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HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

EUROPEAN THEATER OF OPERATIONS



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BY AUTHORITY OF TJAG

BY CARL E. WILLIAMSON, LT. COL.

JAGC, ASST EXEC ON 20 MAY 54

VOLUME 28 B. R. (ETO)

CM ETO 14456 - CM ETO 15216

CONFIDENTIAL

CLASSIFICATION CANCELLED

AUTH: TJAG

AUG 20 1946

BY: ALBERT W. JOHNSON
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JAGC, ASST EXEC ON 20 MAY 54

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON, D. C.

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Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 28 B.R. (ETO)

including

CM ETO 14456 - CM ETO 15216

(1945)

Office of The Judge Advocate General

Washington : 1946

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BY CARL E. WILLIAMSON, LT. COL.

JAGC, ASST EXEC ON 20 MAY 54

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

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BY AUTHORITY OF TJAG
BY CARL E. WILLIAMSON, LT. COL.,

BOARD OF REVIEW NO. 1

22 SEP 1945

CM ETO 14456

JAGC, ASST EXEC ON 20 MAY 54

UNITED STATES)

3RD ARMORED DIVISION

v.)

Trial by GCM, convened at Darmstadt, Germany, 22 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

Private JOHN C. FOWLER
(20420022), Company G, 36th
Armored Infantry Regiment)

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, 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 John C. Fowler, Company G, 36th Armored Infantry Regiment, did, at Sangerhausen, Germany, on or about 21 April 1945, desert the service of the United States by absenting himself from his organization, and did remain absent in desertion until he was apprehended at Liege, Belgium, 1110, 15 May 1945.

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

Specification: In that *** did, at Verviers, Belgium, on or about 14 May 1945, feloniously embezzle by fraudulently converting to his own use one (1) 1/4 ton Lx4, #20600452, of the value of \$1,407.00., the property of the United States intended for the military service thereof.

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

Specification: In that * * * did, at Liege, Belgium, on or about 15 May 1945, willfully and wrongfully impersonate an officer of the Army of the United States by wearing the rank of Captain.

He pleaded not guilty to Charge I and its Specification and guilty to Charges II and III and their specifications and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence of three previous convictions was introduced, one by summary court for absence without leave for two days in violation of Article of War 61, two by special courts-martial, one for absence without leave for 25 days and for larceny in violation of Articles of War 61 and 93, and one for absence without leave for 55 days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the findings of guilty of Charge II and its Specification as involved findings that accused did apply to his own use and benefit one (1) quarter ton ~~4x4~~ [truck], the property of the United States, intended for the military service thereof, in violation of Article of War 96, 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 50 $\frac{1}{2}$.

3. The evidence of the prosecution shows substantially the following: The company clerk of accused's organization testified that accused reported as a replacement to the company at Sangerhausen, Germany, on 21 April 1945, and that he personally saw him present there. He prepared the company morning report, and he identified a duly authenticated extract copy thereof, which was received in evidence without objection (R6-8; Pros. Ex. A). Entries on this extract showed accused from attached unassigned to absent without leave at 2300 21 April 1945.

A military policeman testified that on 15 May 1945, while on motorcycle patrol duty in Liege, Belgium, he saw accused driving a jeep, wearing a leather jacket, insignia of rank of an Army captain, and an officer's garrison cap. He had previously seen him without insignia of rank and so stopped him (R10). He had no indication card and said he was a captain "from some bomber group" (R11). Taken to military police headquarters and later to an air field at St. Trond, he gave his rank as captain to a lieutenant and a colonel, respectively. After questioning him, the colonel retained custody of accused. Pursuant to the colonel's instruction, witness returned the vehicle to Liege where it was impounded (R11). An officer testified that

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after accused had been fully advised of his rights he made a sworn statement (R12-13), which was received in evidence without objection (Pros.Ex.B). In this statement accused stated that he left his outfit about 21 April 1945 "and went absent without leave"; that he took a jeep from an unnamed motor pool, went to Belgium and stayed with various units, wearing captain's bars and telling "everybody" that he was a captain assigned to the 556th Bomber Squadron. One day (15 May 1945 is indicated but not clearly stated) he passed a military policeman who recognized him and took him to the air field at St. Trond and turned him over to the colonel there.

The value of a 1/4 ton 4x4 truck was stipulated to be \$1,407.00 (R6).

4. Having been fully advised of his rights (R13), accused elected to testify in his own behalf. He stated that he was on his way to the hospital at Liege when stopped, that he had never reported to the military police because he was going to turn in (R14), and that he said he was a captain in order to get into the hospital (R15).

5. a. Although the certification on the extract copy of the morning report states it to be "a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report" pertaining to accused, no signatures or initials are set forth on that portion extracted. In CM ETO 12151, Osborne, the Board of Review held that such an extract copy is admissible as having been properly signed, even over the objection of the defense in the absence of evidence to overcome the presumption. Here there was not only no objection, but there is the additional fact that the clerk who prepared the original morning report identified and verified the entries from the witness stand (R7) (See also CM ETO 5437, Rosenberg). The officer authenticating the extract did not state his capacity, but did state that he was the official custodian of the morning reports and failure to object could be deemed a waiver of the irregularity (CM ETO 5593, Jarvis). In any event, the original absence without leave, presumed to continue until shown terminated, was admitted by the accused.

b. The court found accused guilty of fraudulently embezzling a 1/4 ton 4x4 truck in violation of Article of War 94 (Charge II and Specification), but the reviewing authority approved only so much of these findings as involved findings that accused applied this vehicle to his own use in violation of Article of War 96. The offense as approved is a lesser included offense of the offense charged, and such action was proper. In addition to the pleas of guilty, there was sufficient corroborative evidence to warrant consideration of the confession on this Charge. Such corroboration is found in his possession of the vehicle in question at the time of apprehension and in the evidence that he had been seen with the vehicle on other occasions (R10). The record supports the findings of guilty as approved.

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c. There is evidence corroborative of the plea of guilty to Charge III and Specification in the testimony of the military policeman, in that of accused himself and in the confession, to support the findings that accused wrongfully impersonated an officer of the United States army in violation of Article of War 96 (CM ETO 3575, Hart; CM ETO 2901, Childrey and Cuddy; Section 32, U.S. Criminal Code, 18 USCA sec.76; Little v. United States, 169 Fed. 620; United States v. Rush, 196 Fed. 579).

d. The sole remaining question is whether there is sufficient evidence to support the finding that accused, at some time during his unauthorized absence, had the intent to desert (Charge I and Specification). The actual period of absence was 24 days. In determining that such an intent existed, the court had the right to consider his change to the uniform of a commissioned officer as more damning than a change to civilian clothes, as it is well known that a man of military age can more easily avoid detection in military garb than in civilian clothes (CM ETO 1629, O'Donnell; CM ETO 15343, Deason), and it is equally apparent that one in officer's apparel may avoid being checked more easily than a man in enlisted uniform. Accused himself proved this in his confession, where, after telling of his rather extensive operations in officer's uniform, he says "I was never challenged". Other proper considerations on the question of intent were his continued possession of a vehicle which would have facilitated return to military control and his actual repeated presence in military installations where he could have surrendered (CM ETO 15512, Francis Miller). On one occasion when his vehicle had been taken to military police headquarters because left unattended, "as I was well known in Verviers as a flying officer, I had no trouble in talking the MP's into releasing the jeep to me" (confession). His failure to surrender under such circumstances is further evidence of an intent not to return to military control. The absence occurred in a theater of active operations during a critical period of the war, and was terminated by apprehension. The finding that accused had the intent to desert is warranted by the record (Cases cited, supra).

6. The charge sheet shows that accused is 25 years of age and enlisted 15 February 1939 at Jacksonville, Florida, to serve for three years. He had no prior service.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of

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the United States Penitentiary, Lewisburg, Pennsylvania, is proper (Cir.229, WD, 8 June 1944, sec.II, par.1b(4), 3b).

Wm. F. Gurnow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald D. Powell Judge Advocate

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

6 SEP 1945

CM ETO 14486

UNITED STATES

) IX AIR FORCE SERVICE COMMAND

v.

Private JAMES A. MARKS (33619824),
Replacement Pool, 170th Replacement
Company, 128th Replacement Battalion,
AAF, ASC, United States Strategic
Air Forces in Europe (formerly of
2072nd Quartermaster Truck Company
(Aviation), 1577th Quartermaster
Truck Battalion (Mobile Aviation)).

) Trial by GCM, convened at City
of Luxembourg, Luxembourg, 13
June 1945. Sentence: Hard labor
without confinement for three
months, and forfeiture of \$18.00
per month for six months.

OPINION by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, 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 and there found legally insufficient to support the findings and the sentence. The record of trial has now been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General in charge of said Branch Office.

2. One of the grounds for such finding of legal insufficiency was that an officer sat as law member at the trial who was shown to have been detailed as such for the trial of another accused, but a copy of a proper order detailing him for the trial of accused herein, which order was originally omitted from the record through a clerical error, has been received, thus disposing of this jurisdictional ground.

3. Accused was found guilty of a Charge and Specification alleging in substance that he absented himself without proper leave from his organization from 12 November 1944 to 24 December 1944, in violation of Article of War 61. The legal sufficiency of this finding is wholly dependent upon an entry shown in an extract copy of a morning report ("Govt" Ex.1) and a stipulation that accused returned to military control as of 24 December 1944 in a manner unknown (R9). This extract copy is authenticated under date of 31 December 1944 by "George R. Marier WOJG USA", who certified

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that he was "the Adjutant of 170 Rpl Co 128 Repl Bn AAF" and the official custodian of the morning report. The extract shows the following entry from the morning report of that company:

"16 November 1944
33619824 Marks, James A. (w) Pvt.
(Atchd unasgd) Fr Dy to AWOL as
of 1800 hrs 12 Nov 44

(s) GEORGE R. MARIER
(t) GEORGE R. MARIER
WOJG USA"

Since an adjutant of a unit is not as such the duly constituted official custodian of the morning report of that unit, his authentication of an extract copy of such report is improper, but a failure to object to such authentication may be deemed a waiver of the objection (CM ETO 5234, Stubinski, and authorities cited therein). A different question arises with respect to the authentication of the original morning report. In November 1944, during which month the purported event occurred and the original morning report recording was made, the only person authorized by the effective regulations to make morning reports was

"the commanding officer of the reporting unit
or in his absence * * * the officer acting
in command",

as provided by AR 345-400, 1 May 1944, section VI, paragraph 42.

In CM ETO 5414, White, the extract copy indicated that the original morning report was signed by "William F. Fischer, Capt. Inf", who failed to indicate in what capacity he acted in placing his signature on the instrument. The Board of Review held that under the circumstances it could properly be assumed by the court that he acted in his capacity of commanding officer of the company. In the absence of indication to the contrary, it is presumed that entries in a morning report were made by the proper officer (CM ETO 5234, Stubinski).

This assumption, and the presumption upon which it is founded, in the opinion of the Board of Review are not applicable under the circumstances of the instant case. The certificate of the extract copy, which is dated 31 December 1944, shows that Warrant Officer (Junior Grade) George R. Marier was adjutant of the company. In addition, the Army Regulations provided that the duties to be assigned warrant officers "are, in general, for the purpose of relieving commissioned officers of a considerable burden of administrative and technical details" (AR 610-5, 13 September 1941, par.3b). It is well known that warrant officers are only very rarely and under unusual circumstances commanding officers of companies, particularly in this theater. While it is, of

course, conceivable that the warrant officer, shown to be an adjutant on 31 December 1944, was the commanding officer of the replacement company on 12 and 16 November 1944, the Board of Review, in the absence of evidence at least of unusual circumstances, considers this possibility remote and declines to indulge in the assumption in the face of the inherent improbabilities. It is concluded, therefore, that the morning report entry is incompetent and should not have been admitted in evidence. Had the adjutant been a commissioned officer, another question could be presented which is not here decided. Nor will absence without leave be inferred from the stipulation that accused returned to military control on 24 December 1944 (CM ETO 5633, Gibson; CM ETO 11693, Parke).

4. The court was legally constituted and had jurisdiction of the person and offense. For the reasons above stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence as approved.

Wm. F. Barrett Judge Advocate

Edward L. Stearns, Jr. Judge Advocate

Ronald L. Carroll Judge Advocate

(10)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater
General, United States Forces, European Theater (Main), APO 757,
U. S. Army.

6 SEP 1945

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 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private JAMES A. MARKS (33619824), Replacement Pool, 170th Replacement Company, 128th Replacement Battalion, AAF, ASC, United States Strategic Air Forces in Europe (formerly of 2072nd Quartermaster Truck Company (Aviation), 1577th Quartermaster Truck Battalion (Mobile Aviation)).

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



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

(Findings and sentence vacated. GCMO 475, USFET, 28 Sept. 1945)

Incls:

- Incl 1 - Record of Trial
- Incl 2 - Form of Action
- Incl 3 - Draft GCMO

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He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 122, Headquarters 5th Infantry Division, APO 5, U. S. Army, 9 July 1945.

3. Sergeant Russel T. Long, Company C, 11th Infantry, the leader of accused's squad, and the only witness in the case, testified that on 22 March 1945, accused was with his company, which was located in the town of Oppenheim, Germany, waiting to cross the Rhine River. Everyone had been drinking a little that day, and at 1300 hours the entire company was informed that it would cross the Rhine at 2200 hours. In the evening, accused could not be found; a search was made without success; the company moved about a half mile out of Oppenheim, and then received orders that it would cross the river at about 1000 hours the following day (R4). Accused had been informed of the impending crossing of the river, and had been drinking but was not drunk (R5). He was not found before the crossing was made (R4), and was not seen by witness until 2 April when he returned "on his own" (R5).

Accused's absence without leave was established by properly authenticated extract copies of the company morning report, which showed him from duty to AWOL 2200 hours 22 March 1945 and from AWOL to duty 0900 hours 31 March 1945 (R6; Pros.Ex.A).

4. Accused, after his rights as a witness were fully explained to him, elected to remain silent and no evidence was introduced in his behalf (R6).

5. The Board of Review will take judicial notice that on 22 March 1945 the allied armies had no bridgehead across the Rhine River south of that at Remagen, more than 50 miles to the north of Oppenheim, and that on the night of 22 March the Third Army made its historic assault boat crossing of the Rhine, at Oppenheim (CM ETO 12007, Pierce;

CM ETO 8358, Lape and Corderman). The question is therefore squarely presented whether prospective participation in that crossing was hazardous duty reasonably apparent to accused. The proof does not show the location of enemy troops, and that fact is too specific for judicial notice (CM ETO 15223, Skuczas, and cases therein cited). However, the Rhine was the last great barrier before the heart of Germany, a broad river, and one crossed by invasion seldom in history. What perils lay beyond it were not then known, but it must have been evident to accused as it was to the world that the Germans must protect it or abandon any hope of peace without defeat. It could not have been anything but a fearful prospect, a dangerous and hazardous venture, and the court could rightfully infer that accused intended to avoid it (CM ETO 12007, Pierce; CM ETO 8519, Briguglio).

6. Inasmuch as the accused was on trial for his life, the Board of Review may perhaps with propriety, express its concern with the inadequate investigation, and the lack of inquiry by counsel and court into the full facts of the offense charged. That the accused was drinking liquor when alerted was, for example, a circumstance which fully developed might have shown another cause, that of drunkenness, rather than cowardice at the time of the actual offense. The trial was perfunctory. In view of the unsatisfactory state of the record, and in justice to the accused, the Board of Review, although holding the evidence legally and technically sufficient, expresses the opinion that the trial reflects no credit upon the administration of military justice or upon the Army.

7. The charge sheet shows that the accused is 31 years of age and was inducted 28 June 1941 to serve for one year. He had no prior service.

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

9. The penalty for desertion is death or such other punishment as the court-martial may direct (AW 58). The designation of the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France as the place of confinement is proper (Ltr., Hqs. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 Aug. 1945).

Wm. F. Dunson Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald A. Casell Judge Advocate

(15)

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3

5 NOV 1945

CM ETO 14545

UNITED STATES

FIFTEENTH UNITED STATES ARMY

v.

Private HURTLE CHAMPION
(34221377), Company G,
60th Infantry

) Trial by GCM, convened at Bad Neuenahr,
) Germany, 23 June 1945. Sentence:
) Dishonorable discharge, total forfeitures,
) and confinement at hard labor for life.
) United States Penitentiary, Lewisburg,
) Pennsylvania.

HOLDING BY BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN, and DEWEY, 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 Murtle Champion, Company "G", 60th Infantry, 9th Infantry Division, did, at Remagen, Germany, on or about 29 March 1945, forcibly and feloniously and against her will, have carnal knowledge of Frau Lotte Schuster.

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

Specification 1: In that * * * did, at Remagen, Germany, on or about 29 March 1945, unlawfully enter the dwelling of Herr Josef Clemens, a German civilian, with intent to commit a criminal offense, to wit, rape therein.

Specification 2: (Finding of not guilty).

He pleaded not guilty. Three-fourths of the members of the court present at the time the vote was taken concurring, he was found guilty of Charge I and Specification and Charge II and Specification 1 but not guilty of Specification 2. Evidence was introduced of one previous conviction by summary court for

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absence without leave. All members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for 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.

3. Evidence for prosecution:

On the night of 29 March 1945, seven persons were sleeping in the house of Peter Joseph Clemens at Remagen, Germany. In the kitchen were Mrs. Clemens, his wife; Mrs. Margaret Sundheimer, a resident of Remagen; and Marie Laskowski, a Polish girl who worked in the Clemens' home. In the basement were Mr. Clemens, over 70 years of age; the Miller sisters, Adelle and Elizabeth, residents of Remagen; and the prosecutrix, Lotte Schuster, a married woman, 32 years, who had that day returned to, after evacuating, Remagen (R6-7,9,19-20,29,49). About 2300 hours (R20), the women in the kitchen were aroused by a knocking on the door (R9,20). According to Mrs. Sundheimer, "first it was a light knocking and then it was a heavier knocking and the third time, it just opened the door" (R20). Although the door was an emergency door which could not be locked (R6-7), it had been closed for the night (R20) with a bolt from the inside (R7). The women jumped out of the window, ran to the cellar (R9,20) and aroused its occupants (R6,29,49). Clemens went upstairs and discovered a man standing in the hall with his rifle pointed. Being unable to understand the man, Clemens returned to the cellar (R6-8). As he returned to the cellar, a shot or shots fell after him (R7-8,9,20,30,50). Within a few minutes, a colored American soldier descended into the cellar, lit some matches (R8,10), ascended upstairs, and returned to the cellar bearing a lamp (R8,10,24,38,50) which had been lit by Mrs. Sundheimer just before she and the other women fled the kitchen (R14,20). In addition, the soldier was bearing a rifle (R14,21). He approached Clemens and made him get up (R10,21,30), apparently to see whether he had a gun (R30). Next he asked the prosecutrix to go upstairs with him. At first she demurred (R22,31). According to Mrs. Sundheimer, "Mrs. Schuster was very excited and she cried and then the soldier took his ammunition out of his rifle and then Mrs. Schuster went upstairs with him" (R22). However, according to the prosecutrix "he forced me to go up with the rifle" (R42). Upstairs "nothing happened" (R31) except "he tried to pet around but I told him * * * tomorrow and I managed to get downstairs * * * without anything happening" (R42). Mrs. Clemens then had "an attack" and the soldier was sent for medical help (R22,31,51). Asked why they then made no effort to escape or hide the prosecutrix replied, "We were afraid that there were more negroes upstairs and then we were not permitted out on the streets after 7 o'clock in the evening. The streets were patrolled". However, the door was not closed (R44) and the soldier returned alone in a few minutes and indicated they should apply a compress to Mrs. Clemens' head as was done (R11,22,31,51). When she was better, the soldier again sought to have a woman accompany him upstairs. According to

the prosecutrix, he first asked Mrs. Sundheimer but she did not have any shoes on. Next he asked Adelle Miller but she had bad feet. Then he turned to the prosecutrix (R32). When made to understand that she was afraid, the soldier, according to the prosecutrix (R33) and Adelle Miller (R52), unloaded his rifle. When the prosecutrix still refused, he, according to the prosecutrix, reloaded his rifle (R33) and, according to Adelle Miller held it "in a position as if he was ready to fire" (R52). Then prosecutrix' companions urged her to go with him lest he kill someone (R33,52). Elizabeth Miller wanted to accompany them but accused, saying "God-damn" (R52), pulled her back and indicated she should remain below (R33,52). Mrs. Sundheimer was unable to say whether accused was armed at that time (R23) but Marie Laskowski testified "he had his ammunition right here [indicating the vicinity of the upper right chest] all the time" (R12). Upstairs, according to the prosecutrix,

"there was a blanket and he put the blanket down and then he attacked me (R33). He forced me down on the blanket * * * He pulled me on the arm * * * pretty hard * * * It was force enough to pull me down * * * I started crying and asked him to leave me alone but he didn't listen to me (R45). * * * He pulled down my drawers (R34). * * * He spread my legs (R46). * * * I pushed him away and told him I had to go down there in the basement again * * * He made signs that I should keep quiet and he attacked me * * * He used me (R34). * * * His private parts was in my private parts (R46). * * * I moaned loudly and he made signs that I should keep quiet (R34). * * * I tried to get up but I was not successful" (R35).

The prosecutrix further testified that she did not consent to intercourse. Her reason for going through with it was because "I couldn't help myself any other way" (R34). When she did not go upstairs he pointed a loaded rifle at her (R47). However, upstairs he placed it against the stairway (R37). She was dressed in an overcoat, dress, blouse, petticoat and under-drawers. They were not torn nor was she bruised (R34). While the prosecutrix was upstairs with the soldier, Marie Laskowski "heard yelling and Mrs. Schuster call out 'Tomorrow. Tomorrow'" (R12). However, Adelle Miller heard nothing (R52).

After the soldier finished with the prosecutrix she "ran down the basement immediately" (R46). "She was in a bad condition * * * crying and yelling" (R12), "very excited and crying" (R23,52). "And then he came back downstairs and he was pretty friendly" (R53). "He said he'd come back the next day and bring his two buddies and (R35) * * * coffee, orange, bread, meat" (R53). "We all told him to be back at 4 o'clock" (R48). Then "we would have had help" (R47). He left about 0200 hours (R23,35).

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The next afternoon about 1330 hours, when the prosecutrix and Marie Laskowski were doing laundry in the Clemens yard, the same soldier returned and offered each of them tobacco which was refused (R12,15,35). Mrs. Clemens, who was in the kitchen, (R35) went for an interpreter (R15). The soldier remained for about 10 minutes and departed followed by the interpreter (R15). Military police were notified (R15,35). The witnesses lost sight of the soldier (R16) but within a few minutes he was returned to the Clemens home by military police where he was identified by the prosecutrix and Marie Laskowski (R17,35,41) and also by Mrs. Sundheimer and Adelle Miller who had been called (R25,53). However, in a pre-trial statement Adelle Miller said "I did not feel absolute certainty at the first moment that it was the same person" (R56, Def.Exs.A,B). Later the same soldier was picked out in an identification parade by the prosecutrix, Marie Laskowski, Mrs. Sundheimer and Adelle Miller (R17,25,36,53).

At the trial accused was identified as the soldier by Marie Laskowski (R10-11,14-15,17-19), by Mrs. Sundheimer (R21,24-28), and by Adelle Miller (R51,53-57). Each saw him by lamplight and recalled a scar on his face. Marie Laskowski testified she "was sure" the soldier brought to the house the next day by the "MP" was the soldier who had been in the cellar the previous night. She recognized him "immediately * * * on his speech and his face and everything". She also then recognized him by a ring (R17). Later, however, she testified that her only means of identification was a scar on the left side of his face (R18,19). Mrs. Sundheimer, in pointing out accused, said "I think that's the one" (R21). She thought she recognized him "because of the scar under his eye". From the cellar she did not know under which eye the scar was but from the later identification she knew it was under his right eye (R24-25). The scar under accused's right eye was the same scar she saw on the night of 29 March 1945 (R27). Adelle Miller said she was sure as to her identification (R51). "I recognize his face. He has a broad nose and there is something he had on his cheek a kind of scar * * * I remember about his lips when he's laughing" (R54).

The prosecutrix was not asked to point out the soldier in court. However, she testified the soldier was in court (R31). Later, in answer to the question "Is that the same man you picked out today", she replied, "yes" (R36). And upon cross examination, she said, "Now, while looking at him again, I recognize him immediately" (R39).

4. Evidence for the Defense:

After his rights as a witness were explained to him, accused elected to testify (R59-60). He enlisted in 1941 at Fort Benning, Georgia (R60). Prior to coming to Company G, 60th Infantry, he had been with "a quartermaster bakery" (R68). When he learned he could volunteer for the front, he did so. "They gave us six weeks training and * * * brought us up to Remagen" where he had been for about a week prior to 29 March 1945 (R61). On the night in question,

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"I went to the headquarters and we was playing the piano and dancing around — me and some white boy, Cope. I asked Cope where Brown was so he said that Brown was around to the back and we went around there * * * and he wasn't there so we came on back. We danced around there and then we got through, I came on back to the barracks [with Settle who lived in a different room - R65]. I went to sleep (R63) I didn't pay much attention [as to who was in the room]. The floor was full" (R65).

"The next day I got up, sat around a little while and I wrote a couple of letters. Then I went * * * in this building * * * [and] played the piano (R64). When I came out * * * This MP * * * said, 'You been shooting that gun?' * * * The MP put me in a jeep and * * * carries me to Frau Schuster's place * * *. I looked around at the women there * * * They stood about 10 or 15 minutes looking at me and then one of them said 'Yes'. Then all of them started to holler 'Yes!' * * * A couple of days later, they got 16 boys * * * and lined me up with them * * * This woman and all of them, they came out and picked me out" (R61).

He did not have carnal knowledge of the prosecutrix and had never seen her prior to 30 March 1945 (R62), did not fire his rifle at any time during the night of the alleged offense, but did have three scars, one of which was on his right cheek (R67).

5. a. The defense was alibi. Three witnesses identified the accused in court as the soldier who had been in the Clemens home on the night in question. They also testified, and properly so, to identifying accused on two other occasions (cf: CM ETO 7209, Williams). While the prosecutrix did not point out accused in court as did the other three witnesses, she did say the soldier was in court (R31) and subsequently testified as if she had pointed him out (R36,39). Substantial evidence supports the court's finding as to accused's identify (CM ETO 5009, Sledge et al; CM ETO 13568, Nelums et al).

b. Charge I and Specification:

Accused's uninvited entry into the Clemens home was accompanied by a display of and discharge of his rifle. Twice he sought to have a woman accompany him upstairs alone. Each time he did so to no avail until after he had made threats with his rifle. The first time upstairs he "tried to pet around" but the prosecutrix "managed to get downstairs * * * without anything

happening". The next time she was not so successful for accused, despite her pushing, crying, and moaning, forced her on a blanket, pulled down her drawers, opened her legs and inserted his private parts in her private parts. Feeble though her resistance was she may well have believed she "couldn't help myself any other way". Accused had twice threatened her with a rifle to force her to accompany him upstairs. "Where a woman ceases resistance under fear of death or other great harm * * * the consummated act is rape * * *" (1 Wharton's Criminal Law (12 Ed., 1932) sec. 701, p. 942).

While accused's promise to return and his return the next day bearing gifts suggest, at first blush, that accused thought the prosecutrix had voluntarily consented to sexual intercourse, suffice it to say that the circumstances preceding and attending his carnal knowledge of her belie that he could have so thought. The invitation to return following upon his offer to bring gifts may have lead him to conclude he would be welcome. It appeared that the reason he was told to come back was "because we would have had help the next day" (R47).

Substantial evidence supports the findings.

c. Charge II and Specification 1

"Burglary is completed when the house or building is entered with the" requisite intent (2 Wharton's Criminal Law (12th Ed. 1932) sec. 971, p. 1274); a fortiori, as to housebreaking. From the evidence the court could infer that accused's initial entry was with the intent to commit rape. That his second entry may have been lawful, therefore, becomes immaterial.

6. The charge sheet shows that accused is 31 years three months of age and was inducted 6 May 1942. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the offenses and person. 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 rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a United States

Penitentiary is authorized upon conviction of the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567) and also upon conviction of housebreaking by Article of War 42 and section 22-1801 (6:55) District of Columbia Code. The designation of the United States Penitentiary, Lewis-butg, Pennsylvania as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, par. 1b (4), 3b).

(ON LEAVE)

Judge Advocate

Walter C. Sherman

Judge Advocate

B. H. Lewis Jr.

Judge Advocate

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

29 SEP 1945

CM ETO 14547

U N I T E D S T A T E S) THIRD UNITED STATES ARMY
))
) v.) Trial by GCM, convened
)) at Trier, Germany, 1 April
Master Sergeant WILMER B.) 1945. Sentence: Dis-
KEECH (6562676), Headquarters) honorable discharge, total
Detachment, 150th Ordnance) forfeitures and confine-
Battalion) ment at hard labor for
) life. United States
) Penitentiary, Lewisburg,
) Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, 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.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Master Sergeant Wilmer B. Keech, Headquarters Detachment, 150th Ordnance Battalion, did, at or near Bettange, Luxembourg, on or about 25 December 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Alex Bohler, a human being by shooting

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him with a caliber .45 sub-machine gun.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Third United States Army, approved the sentence, but in view of the special circumstances in the case, recommended that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 10 years. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case, 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 of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

3. Prosecution Evidence:

On 25 December 1944 at Bettange (co-ordinates P 7309), Luxembourg, two colored soldiers named Private Henry Reece and Sergeant Thurman Cooper were on duty as a road patrol. Their duties were to apprehend suspicious appearing civilians anywhere in the area, and they were so charged due to the fact that a large amount of ammunition was stored in the area, some of which was of very secret character, and reports of enemy paratroopers in the vicinity had been received (R8,11,25). Bettange is some 30 miles south-south-east of Bastogne and about seven miles west of Luxembourg City. After dark at about 1930 to 2000 hours, they received a report from a woman, who called to them on the road, that there was a German in civilian clothes in her cafe. They proceeded to the cafe and arrested the man in civilian clothes, subsequently identified as the deceased, and escorted him to their nearby company command post (R8-11,33-34).

The company commander and first sergeant questioned the prisoner, examined his photographic identification card of Alex Bohler and his papers, determined that he had been drinking, and reported by telephone to the battalion S-2 that they had apprehended a man who was believed to be a German in civilian clothes (R12-17,19,20). Accused (white) who was at battalion headquarters, was cognizant of the contents of this report (R23). The S-2 ordered the prisoner brought to battalion headquarters, and the company first sergeant detailed Cooper, Reece and a colored soldier named Sergeant Odell English to take a command car and execute the order (R15,20).

At battalion headquarters, the prisoner was delivered to the S-2 by his guards who stated in accused's presence that he was a German soldier in civilian clothes (R23). The S-2 searched him and found only foreign papers which he did not understand (R20,24,25). He did not remember seeing any identification card (R24). (It was found outside the company command post the next morning (R18)). He noted that the prisoner was unkempt, hatless and drunk. He "just wasn't in line", but shouted and "was exceedingly arrogant". He understood neither French nor English, and spoke either German or Luxembourgish (R27-28). The S-2 feared trouble from him (R27). It was his decision to send the prisoner to the XII Corps G-2 at the command post in Luxembourg City, about five miles away, for screening, as was customary in such cases (R20,26,63). Accused volunteered for the assignment, and was ordered to take Sergeant Harold Moss and proceed in a jeep to that destination (R20,22).

Accused borrowed a caliber .45 M3, submachine gun, number 128760, from the battalion supply sergeant, as men in the company were wont to do when on night missions in this sector. The weapon had a clip of cartridges in it and the bore was clean (R29,32). Accused requested Cooper and English to take him, Moss and the prisoner to corps in their command car and the group departed therein (R29,51-52). Cooper drove; accused sat on his right in the front seat; and the prisoner sat in the rear center with English on his left and Moss on his right (R37,54). Accused was armed with the submachine gun; Cooper was unarmed, and Moss and English each carried carbines (R10,37-38,62).

The vehicle proceeded en route for three or four kilometers, during which time accused, half turned to the rear, watched the prisoner who acted suspiciously (R54-55,62). The prisoner would lean forward, and would not obey accused's order to keep his hands behind his head and took them down time and again. Accused and the prisoner exchanged a few words in German or French (R52,54,63-65).

Suddenly, accused order the car stopped and told all occupants to dismount, which was done (R38-39). The prisoner was taken to the front of the vehicle as somebody said "Keep your hands up" (R38). Accused looked "mad * * * sort of out of his mind or something" (R64). The prisoner's guards stood around him, all in front of the car except Moss (R40-41,55,61). Accused said something to the prisoner, who replied but made no effort to run or "tussle" (R34,58). Accused told English to "look up the road". As he looked away he heard shots fired, and he turned back to see the civilian falling (R52-53). Cooper saw accused shoot the prisoner with the submachine gun, saw the fire come out of it and saw the victim fall. He testified accused fired the gun from a swing position (R42-43). Moss did not see the shooting or the civilian fall (R65). English, Cooper, and Moss were positive that they heard only the one gun fired, whose fire was rapid, a burst "almost a concussion", and that no carbine, whose firing sound they knew, was discharged (R43,56-57,64). All testified accused had the .45 caliber submachine gun at the time-(R42,56,62). An estimate was that eight or nine shots were heard (R46). Accused stood six or seven feet from the prisoner when he fired, and he afterwards pushed him over into a little ditch with his foot (R42,49,56). No examination was made to see whether the victim was living or dead (R46). It was a moonlit night (R48). After pushing deceased into the ditch, accused stated: "We carried this man to G-2" and after the group returned to battalion headquarters, repeated this statement (R35,44). English and Cooper, together with Reece who had waited at battalion, returned to the company (R35).

Accused reported to the battalion S-2 that the prisoner had been delivered to the XII Corps (R22), and when questioned on 20 January 1945 by that officer, said the same thing (R21). On the next day, 26 December,

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accused told the battalion supply sergeant he had fired the borrowed weapon, and this sergeant's inspection on 27 December revealed that the gun had in fact been fired (R30-31). Medical testimony, which was stipulated, showed that Alex Bohler died 25 December from gunshot wounds, and described 20 bullet wounds, two of which found in the left lung were fatal. The point of entry of each of the latter was in the back, and generally the orifices in the back were smaller and more precise than those in front. It was difficult to establish the points of entry. The force of the bullets was extreme, and only one bullet was found lodged in the body, in the left forearm, which was not a fatal bullet (R5-6). Stipulated ballistics testimony established that the bullet found in deceased's arm was fired by a caliber .45 M3 submachine gun number 128760 (R7).

4. Defense Evidence:

Stipulated testimony of local gendarmes showed that eight empty shell cases of 12 mm. caliber which came from a machine gun or a large arm pistol and an unstated number of eight mm. cartridges which came from "a little American quick loading gun of 15 shots" were found at the crime scene. The body was found in snow off the road shoulder. The stipulated testimony of the doctor performing the autopsy was: That the body contained 23 bullet wounds; that he could not tell whether they were .30 or .45 caliber wounds although he knew at the time that both these sizes of shell cases had been found near the body; and that he could not tell which wounds were entering shots although he believed they entered from the back (R67-68). On 19 December, accused told two sergeants of his organization that he had learned his brother was seriously wounded in action. Accused was then in a distressed mental condition (R69).

Accused, after his rights as a witness were fully explained to him, elected to remain silent (R69-70).

5. Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par.148a, pp.162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death

(1 Wharton's Criminal Law (12th Ed., 1932), sec.426, pp.654-655), and an intent to kill may be inferred from an act of the accused which manifests a reckless disregard of human life (40 CJS, sec.44, p.905, sec. 79b, pp.943-944). The presumption of malice is not conclusive, however, and the evidence rebutting it may be found in the evidence introduced by prosecution or defense (Winthrop's Military Law and Precedents (Reprint 1920), p.673; 29 C.J. sec.77, p.1103).

There are two problems in this case; that of malice, and that of whether the shots which accused fired may be said to have caused death. As to the first, we on the Board of Review have not legal power to weigh evidence (CM ETO 1631, Pepper). Upon the evidence adduced of accused's anger, the wounding of his brother, the arrogance of the man believed to be a German prisoner or spy, and from the judicially noticed stirring times of the great German breakthrough with all the accompanying nervous tension, the nearby seige of Bastogne, and the then recent German massacre of prisoners at Malmedy, the court-martial as the fact-finding body might well and properly have found that the accused acted in passion, adequately provoked by the individual enemy as the apparent representative of the cruel, inhuman and hated foe. Such a finding would reduce the offense to manslaughter (IV Blackstone; Commentaries, 190,191). Likewise the court-martial had the power to infer malice from the facts, and to determine that the acts sprang from a "wicked and malignant heart", of the same ilk as that of Germans at Malmedy, and that the presumption of malice from the use of a deadly weapon was not rebutted. The court so found and the matter was of fact within its province which we have not legal power to reverse, however harsh it seems to us to convict this man of murder under these circumstances (CM ETO 6682, Frazier; Stevenson v. U.S., 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896); Wallace v. U.S., 162 U.S. 466, 16 S.Ct. 859, 40 L.Ed. 1039 (1896); WD Ltr. To C.G., E.T.O. (AG 321.4 (26 Apr.43) OB-S, 28 Apr. 43: Subj. Op. of BOTJAG).

As to the cause of death, the defense sought to put the matter in doubt by proof of, what may have been, carbine shells at the place of the shooting. Their presence suggests the following hypotheses:

- (a) The shells were on the ground prior to the time of shooting;

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(b) They were fired at the time thereof;

(c) They were fired at the deceased by a subsequent assailant who thereby caused death.

If the first be true, the shells are insignificant; and if the second be true and such shells were those of all the fatal shots, accused is still liable as a principal for having aided and abetted those among Moss, English and Cooper who fired (CM ETO 5156, Clark; CM ETO 5764, Lilly et al.; CM ETO 15787, Parker and Bennerman). That the third occurred is perhaps too remote a possibility for consideration because it is neither reasonable nor probable that a person finding an unidentified civilian wounded and lying in the snow would without motive inflict a fatal wound. Yet even so, if accused shot at deceased with a machine gun from close range, lodged a bullet in his arm, hit him with enough force to leave him prostrate, pushed him off the road with his foot, and left him in the snow, his acts constituted a contributing cause of the death that resulted directly from whatever subsequent cause, and he was therefore guilty of the homicide.

"One who inflicts an injury on another is deemed by the law to be guilty of the homicide if the injury contributes mediately or immediately to the death of such other"
(13 R.C.L., par.53, p.748)".

The leading case of State v. Francis is squarely in point (152 S.C. 17, 149 S.E. 348, 70 A.L.R. 1133 (1929)); see also: 26 Am. Jur., par.48, pp.191-192).

6. The charge sheet shows that the accused is 32 years six months of age and reenlisted in the Army 14 August 1939 at Schofield Barracks, Territory of Hawaii, to serve for three years. His service period is governed by the Service Extension Act of 1941. He had prior service from 14 August 1936 to 13 August 1939 with the Headquarters and Military Police Company, Hawaii Division.

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

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

8. The penalty for murder is death or life imprisonment as a court martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and secs. 275 and 330. Federal Criminal Code (18 USCA 454, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

Wm. F. Surran Judge Advocate

Edward L. Stevens Jr. Judge Advocate

Donald K. Caswell Judge Advocate

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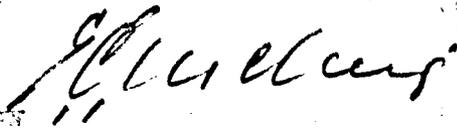
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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater, 29 SEP 1945 Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Master Sergeant WILMER B. KEECH (6562676), Headquarters Detachment, 150th Ordnance 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 commuted, 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 as commuted.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 14547. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14547).



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

(Sentence as commuted ordered executed. GCMO 502, USFET, 23 Oct 1945).

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

14 SEP 1945

CM ETO 14560

UNITED STATES)

3RD INFANTRY DIVISION

v.)

Trial by GCM, convened at Salzburg,
Austria, 8 May 1945. Sentence:
Dishonorable discharge, total for-
feitures and confinement at hard
labor for life. Eastern Branch,
United States Disciplinary Barracks,
Greenhaven, New York

Private LEO J. HADALA
(32764683), Company G,
30th Infantry)

HOLDING by BOARD OF REVIEW NO. 2

VAN BENSCHOTEN, HEPBURN and MILLER, 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 on the following Charge and specifications:

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private LEO J. HADALA, Company "G", 30th Infantry, did at or near Sigolsheim, France, on or about 9 January 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he was apprehended at or near Plombieres, France, on or about 30 January 1945.

Specification 2: In that * * * did, at or near Mellingeroff, France, on or about 15 March 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid

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hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he surrendered himself at Nancy, France on or about 19 March 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and specifications. No evidence was introduced of previous convictions. Three-fourths of the members of the court present at the time the vote was taken concurring, the accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. 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 $\frac{1}{2}$.

3. a. The evidence for the prosecution shows that accused was a member of Company G, 30th Infantry, having been assigned to and joined his company on 7 January 1945 (R13;Pros.Ex.A). On the night of 9 January 1945, that unit was at Sigolsheim, France, in direct contact with the enemy, with small arms and artillery fire occurring (R8-10,12). Accused, who was then at battalion headquarters, was turned over to the mess sergeant to be brought up to the company command post (R8). They went forward to the company area and as far as the vehicle could go, then the accused was left there with the heavy weapons platoon of the unit while the mess sergeant walked forward to report to the company commander (R8,11). When he returned with the first sergeant to the vehicle, accused was gone and could not be found in the area (R8,9). He had not been given permission to depart and was entered in the organization's morning report as "AWOL 9 Jan." (R8,12; Pros.Ex.A). In a pre-trial statement, admitted in evidence without objection, accused admitted that he "just couldn't take it" and left and went to Plombieres, France, where, on 30 January 1945, he was apprehended by military police (Pros.Ex.C).

b. On 15 March 1945 accused and his unit were near the town of Mellingeroff, France, in combat, and "jumping off into the attack" on the Siegfried Line (R13,14). Accused knew of the impending attack and as the company was moving out, he dropped out because he knew that "I couldn't take any more combat". He absented himself without leave as his company was moving forward into the battle (R13-15; Pros.Ex.B,C). He returned to military control on 19 March 1945 (Pros. Ex.C).

4. On being advised of his rights, accused elected to be sworn and testify (R18). He detailed his combat record, that he had joined the Third Division in May 1944 at Anzio, had had many close escapes in combat, been shot through the helmet, and seen many men injured and killed (R19,20). He established the place of his return

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to military control on 19 March 1945 as Nancy, France (R21).

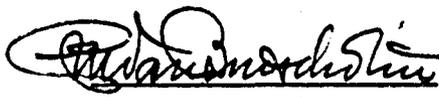
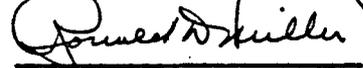
5. "Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service" (MCM, 1928, par.130a,p.142).

Under Article of War 28, "Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter". The undisputed evidence shows that during both periods alleged in the specifications accused was absent from his organization without proper leave. It is further shown that on the occasion of such absence he intended to avoid military duty involving active combat with the enemy. In the first case accused absented himself in the front lines, with enemy activity apparent. In the second case he abandoned his unit as it was moving forward in combat to attack, a fact of which he had been apprised. In each instance he clearly intended to avoid hazardous duty (CM ETO 8083, Cubley).

6. The charge sheet shows accused to be 20 years of age. Without prior service, he was inducted 11 February 1943.

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

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

 Judge Advocate
 Judge Advocate
 Judge Advocate



Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 5

24 AUG 1945

CM ETO 14563

UNITED STATES)

104TH INFANTRY DIVISION

v.)

Trial by GCM, convened at
Halle, Germany, 18 May 1945.

Private RAYMOND COLLINS
(35735790), Company G,
413th Infantry)

Sentence: Dishonorable discharge,
total forfeitures, and confinement
at hard labor for life. United
States Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 5
HILL, EVINS and JULIAN, 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.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Raymond Collins,
Company "G", Four Hundred and Thirteenth Infantry,
did, at Hohenthurm, Germany, on or about 16 April
1945, forcibly and feloniously, against her will,
have carnal knowledge of Brigitte Rummel.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave, for an undisclosed period of time, in violation of Article of War 61. All of the members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 104th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming

authority, the Commanding General, United States Forces European Theater, confirmed, but owing to special circumstances in the case, commuted the sentence 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 of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence, pursuant to Article of War 50½.

3. Evidence for the prosecution shows that on 16 April 1945, accused was a member of Company G, 413th Infantry, which organization captured and on the afternoon of this date moved into the town of Hohenthurm, Germany (R11,19). At approximately 8:30 pm, accused and another colored soldier entered the house of Herr Ernst Rummel, 16 Bahnhofstrasse and found Frau Maria Rummel and her two daughters, Helena and Brigitte, in the kitchen (R7-9). Accused singled out the latter girl, aged 16, and took her to show him the rooms in the house. As a white soldier had been there previously looking for quarters for troops, she went with him and showed him the rooms both downstairs and upstairs (R8). She preceded him upstairs after he pushed her, and when her parents started to accompany their daughter, accused and his companion prevented them from going along and forced them back into the kitchen (R11). Once upstairs accused drew the girl into a room, laid his rifle on a table and tried to lock the door. He had a small pistol in his hand and pointed this weapon at her chest, pulled at her clothes and asked her if she understood what he wanted. He then took off her panties, continued pointing his pistol at her, saying "Forstay, forstay", drew her onto the bed and engaged in sexual intercourse with her, accomplishing penetration (R7,8). Fraulein Brigitte testified that accused held the pistol at her breast during the entire time that he engaged in the act of intercourse with her. She had never seen a negro before and did not cry out or resist his advances because she was afraid (R9,11). About the time he completed the act of sexual intercourse another soldier called to accused from downstairs and he left hurriedly (R10,16). Immediately thereafter the girl left the room, ran downstairs and told her mother that she had been raped. She was crying and sobbing and appeared nervous and excited at this time (R9,11,15,16). A medical examination held within six hours after the incident occurred disclosed that the girl's hymen had been ruptured recently. It was the opinion of the American medical officer, who made the examination, that this was the first time the girl's organs had been penetrated (R12,13).

4. Accused, after his rights as a witness were explained to him, elected to remain silent and no evidence was introduced in his behalf (R22).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.148b, p.165). The extent and character of resistance required to establish lack of consent depends upon the physical and mental condition of the parties, the relations existing between them and the surrounding circumstances (1 Wharton's Criminal Law, (12th Ed., 1932) sec. 734, p.995). The fact that accused engaged in an act of sexual intercourse with Fraulein Brigitte Rummel is established by

competent substantial evidence. Corroboration of the evidence of carnal knowledge of the German girl was shown by the testimony of the medical officer. The only question for consideration is whether the prosecutrix consented to the act of sexual intercourse or was subjected thereto by force and without her consent. The evidence shows that she failed to make any outcries or to forcibly resist accused. However, she testified that she did not consent to his advances and that she would not have engaged in sexual intercourse with him except for the fact that he frightened her by continually pointing his pistol at her breast. Acquiescence gained through fear engendered in the woman ravished negative consent, and "where she ceases resistance under fear of death or great bodily harm, (such fear being gaged by her own capacity) the consummated act is rape" (2 Wharton's Criminal Law, (12th Ed., 1932), sec.701, p.942). In addition to the reasons assigned by the prosecutrix for her failure to make an outcry or more strenuous resistance, there exists the uncontradicted evidence that she was less than 17 years of age and, in the opinion of the medical officer, had never engaged in sexual intercourse previous to this time, plus the fact that she had never before seen a negro and that accused's relation to her was that of a hostile conquering soldier. All of these facts when viewed in the light of human experience, refute any reasonable probability that she consented to the act of sexual intercourse. The crime of rape, under the circumstances herein alleged, is completely established (CM ETO 6224, Kinney and Smith; CM ETO 9611, Prairiechief; CM ETO 12650 Combs and Shimmel).

6. The charge sheet shows that accused is 19 years and 11 months of age and was inducted 8 November 1943. He had no prior service.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 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 proper (Cir.229, MD, 8 June 1944, sec.II, pars.1b(4), 3b).

John Tommhill Judge Advocate

Joe L. Weiss Judge Advocate

Anthony J. Julian Judge Advocate

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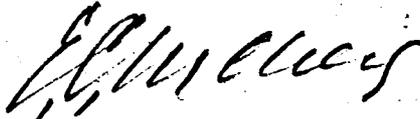
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1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater. **24 AUG 1945** TO: Commanding
General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Private RAYMOND COLLINS (35735790), Company G, 413th 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 commuted, which holding is hereby approved. Under the provisions of Article of War 50¹/₂, 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 CM ETO 14563. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO.14563).



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

(Sentence as commuted ordered executed. GCMO 392, USFET, 7 Sept 1945).

CONFIDENTIAL

14563

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

29 AUG 1945

CM ETO 14564

UNITED STATES)

4TH ARMORED DIVISION

v.)

Trial by GCM, convened at Jugesheim, Germany, 3 April 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

Privates SPATE ANTHONY (38305497) and E. J. ARNOLD (38603417), both of Company B, 704th Tank Destroyer Battalion

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, Judge Advocates

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

2. Accused were tried together with their consent upon the following charges and specifications:

ANTHONY

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Spate Anthony, Company "B", 704th Tank Destroyer Battalion, did, at Langenlonsheim, Germany on or about 17 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Seckler, a female person sixteen years of age.

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Specification 2: In that * * * did, at Langenlonsheim, Germany on or about 17 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Eva Kunkel, a female person twenty-three years of age.

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

Specification: In that * * * did, at Langenlonsheim, Germany on or about 17 March 1945, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Maria Seckler, a female person sixteen years of age.

ARNOLD

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private E. J. Arnold, Company "B", 704th Tank Destroyer Battalion, did, at Langenlonsheim, Germany on or about 17 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Eva Kunkel, a female person twenty-three years of age.

Specification 2: In that * * * did, at Langenlonsheim, Germany on or about 17 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Hedwig Glaser, a female person twenty-eight years of age.

Specification 3: (Finding of guilty disapproved by confirming authority).

Each accused pleaded not guilty and, all of the members of the court present at the times the votes were taken concurring, was found guilty of all charges and specifications preferred against him. No evidence of previous convictions of accused Anthony was introduced. Evidence was introduced of three previous convictions of accused Arnold, two by special courts-martial for absence without leave for eight days and for larceny of clothing in violation of Articles of War 61 and 93, and one by summary court for leaving properly appointed places of duty in violation of Article of War 61. All of the members of the court

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present at the times the votes were taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, 4th Armored Division, approved each of the sentences and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, as to accused Anthony, approved only so much of the finding of guilty of the Specification of Charge II as involved a finding that accused did, at the time and place alleged, attempt to commit the crime of sodomy by feloniously and against the order of nature attempting to have carnal connection per os with Maria Seckler, in violation of Article of War 96; as to accused Arnold, disapproved the finding of guilty of Specification 3 of the Charge; and, as to each accused, confirmed the sentence, but owing to special circumstances in the case 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 of his natural, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

3. The undisputed evidence, consisting of the credible testimony of the alleged victims and materially corroborated in part by that of a member of accuseds' organization, established that on the evening of the date and (by inference) at the place alleged, accused Anthony, who was armed, twice obtained sexual intercourse with Fraulein Maria Seckler by forcibly overcoming her resistance, after which he committed, or at least attempted to commit, sodomy per os with her, also over her resistance (Specification 1, Charge I; Specification, Charge II); that accused Arnold, at the point of his gun and over her resistance, twice forced Fraulein Eva Kunkel to submit to carnal connection with him (Specification 1, Charge), after which Anthony overcame her weakening struggles to resist and copulated with her (Specification 2, Charge I); and that Arnold, after threatening Frau Hedwig Glaser, who was with her eight year old son, with a gun and against her protests, had carnal knowledge of her, during which act she became unconscious (Specification 2, Charge). The findings of guilty of rape as alleged are supported by competent, substantial evidence, in each case where more than one act of intercourse was shown, relating to the first of said acts (Cf: CM ETO 7078, Arthur L. Jones, and authorities therein cited; CM ETO 14040, McCreary; CM ETO 14256, Barkley, and authorities therein cited). The evidence also supports the findings of guilty, as modified by the confirming authority, of an attempt to commit sodomy per os, in violation of Article of War 96 (CM ETO 991, Gugliotta, et al).

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The question of accused Anthony's drunkenness and the effect thereof upon the criminal intents involved in his offenses constituted an issue of fact for the sole determination of the court, whose findings of guilty will not be disturbed in view of the substantial evidence that he was in control of his faculties (CM ETO 14256, Barkley, supra, and authorities therein cited).

4. a. The record shows (R2) that the charges were served on each accused only two days before the trial. The staff judge advocate of the reviewing authority stated military necessity required trial at that time. In the absence of objection or motion for continuance and of indication that any of the substantial rights of either accused were prejudiced, the irregularity, if any, may be regarded as waived (CM ETO 8083, Cubley; CM ETO 7869, Adams and Harris).

b. Lieutenant Colonel R. M. Connolly, Adjutant General of the 4th Armored Division, by command of the division commander, referred the charges to the trial judge advocate for trial. Colonel Connolly was appointed and sat as a member of the court herein. His act in referring the charges was purely administrative and the irregularity may be regarded as harmless (CM ETO 3948, Paulerico).

5. The charge sheets show that accused Anthony is 25 years two months of age and was inducted 16 December 1942 at Tyler, Texas, no prior service being shown, and that accused Arnold is 19 years four months of age and was inducted 22 January 1944 at Little Rock, Arkansas, without prior service.

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

7. The penalty for rape is death or life imprisonment, as the court-martial may direct (AW 92'). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 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 proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

Wm. F. Burrow Judge Advocate

Edwin H. Stevens, Jr. Judge Advocate

Donald F. Carroll Judge Advocate

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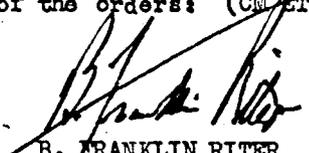
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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. **29 AUG 1945** TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Privates SPATE ANTHONY (38305497) and E. J. ARNOLD (38603417), both of Company B, 704th Tank Destroyer Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty, as approved, and the sentence, as commuted, 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 sentences.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 14564. For convenience of reference, please place that number in brackets at the end of the orders: (CM ETO 14564).


B. FRANKLIN RITTER,
Colonel, JAGD

Acting Assistant Judge Advocate General

-
- (As to accused Arnold, sentence as commuted ordered executed. GCMO 425, USFET, 20 Sept 1945).
 - (As to accused Anthony, sentence as commuted ordered executed. GCMO 426, USFET, 20 Sept 1945).

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

(45)

BOARD OF REVIEW NO. 1

29 SEP 1945

CM ETO 14573

UNITED STATES)

v.)

Private RICHARD J. MORTON)
(32617634), 306th Replacement)
Company, 40th Replacement)
Battalion, 19th Replacement)
Depot)

SEINE SECTION, COMMUNICATIONS)
ZONE, EUROPEAN THEATER OF)
OPERATIONS)

Trial by GCM, convened at Paris,)
France, 26,27 January 1945.)
Sentence: Dishonorable discharge,)
total forfeitures and confinement)
at hard labor for life. United)
States Penitentiary, Lewisburg,)
Pennsylvania.)

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, 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.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Richard J. Morton, 306th Replacement Company, 40th Replacement Battalion, 19th Replacement Depot, did, at Itterville, France, on or about 19 November 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Pete (NMI) Terezakis, a human being, by shooting him with a rifle.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The

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reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but, owing to special circumstances in the case, 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 of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Accused, who was billeted in a chateau near Itteville, France, was present in the cafe of Maria Jacquet, known as "Mom's" Cafe, on 19 November 1944. He was armed with a loaded carbine which he pointed at several people, and he had in his possession a clip containing 15 live rounds. He drank some wine there, and left at about 1900 hours (R11-12,14). About 2100 hours he came into a cafe owned by Jean Henneguet, known as "Pop's". He was still carrying the carbine. When a soldier asked him what he was doing with a carbine in town, accused pointed it at his stomach. Deceased, who was standing nearby, took the carbine from accused, removed a live round from the chamber and returned the carbine to him (R15,20-21). A short while later, accused left the cafe and walked across the street with a soldier who had observed the incident. The soldier advised accused to return to his billet and accused said that he would and started in that direction. When this soldier returned to the cafe, deceased had left (R28). It was then about 2130 hours (R15). The incident between accused and deceased had not given rise to any argument between the two, accused had not resisted when the carbine was taken from him, and just before he left, he did not seem to be excited (R25,29,30). About 10 or 15 minutes after accused had left, two or three shots were heard. It was estimated that they were fired about 125 or 130 yards down the street from "Pop's", across from "Mom's" Cafe and in its vicinity (R24-25). Accused had headed in this direction when he had started back to camp (R31). The shots were also heard by the occupant of the house opposite "Mom's" Cafe. In his opinion, they were fired from his side of the street. A couple of minutes later he saw a soldier with a weapon slung over his right shoulder run from the courtyard of "Mom's" Cafe toward the victim. This soldier was of approximately the same stature as accused (R44-45,49). Maria Jacquet, proprietress of "Mom's" Cafe, heard someone enter and leave the courtyard just after the shots were fired (R70).

Sergeant Terezakis was found in the street near "Mom's" Cafe. His face was covered with blood and blood was on the ground. A discharged carbine cartridge shell was found near the body (R39-43). Sergeant Pete Terezakis died about 2245 hours (R7) as the result of a bullet entering his left eyeball, penetrating the brain, and coming out through the right parietal region behind the right ear. There was no evidence of powder burns around the wound (R9). The wound was

caused by a bullet about the size of a .30 caliber bullet (R11).

About 2145 hours, accused sought directions as to how to return to his camp at the home of Daniel Maisse, located about 150 meters from "Mom's" Cafe. Accused was armed with a carbine and there was blood on his hands (R51-53). About 2200 hours he stopped at the Hotel du Parc and again requested directions to camp. Three lieutenants happened to be there and one of them told him to wait and they would take him back with them. When they came out of the hotel, accused picked up a carbine. Questioned as to what he was doing carrying arms away from camp, accused stated that he had just come from Belgium where he had been under orders to carry weapons. When asked by one of the lieutenants for the weapon, he hesitated a moment and then surrendered it. There was one live round in the chamber and blood "practically all over it" (R55). When asked to explain the presence of blood on the weapon, he stated he had been fighting "Jerries". He stated that someone had "mugged" him and added "I shot at someone but I didn't kill him" (R55,58). There was also blood on accused's hands, cheek, field jacket and trousers (R56).

Various opinions were expressed as to accused's sobriety. In the opinion of one witness, he was "sober" (R21); in the opinion of another, "pretty high" (R41). According to one of the lieutenants of whom he asked directions at the hotel, accused "seemed on the verged (sic) of intoxication, but more confused than anything" (R59). One of the other lieutenants stated that accused did not stagger, although he had a befuddled appearance and expression (R64,66). A soldier who arrested accused said he was "more dazed than drunk" (R67).

4. Accused, after an explanation of his rights, elected to remain silent and no evidence was introduced in his behalf (R68-69).

5. There are two questions presented by this record. Did accused fire the fatal shot and, if so, is he guilty of murder? The court by its findings has answered both of these affirmatively and, in reviewing their findings, we are limited to ascertaining whether there is competent, substantial evidence in the record to support them (CM ETO 895, Davis et al).

There can be little doubt that the record sustains the court's finding that accused fired the fatal shot. He was armed with a loaded carbine and had been pointing it at various people. He left the cafe approximately the same time deceased did and he started in the direction where the shooting afterwards occurred. A spent carbine cartridge was found near the body. The fatal wound was probably inflicted by a round from a carbine. A soldier who resembled accused ran away from the scene of the shooting almost immediately after the shots were fired. A few minutes after shots were heard, accused was discovered with his hands and his carbine covered with blood. He admitted shooting someone. This chain of circumstantial evidence points to but one reasonable hypothesis, that accused fired the fatal shot (CM ETO 3200, Pice; CM ETO 2686, Brinson and Smith; CM ETO 7867, Westfield).

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Is accused guilty of murder? Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par.148a, pp.162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (1 Wharton's Criminal Law (12th Ed., 1932), sec.426, pp.654-655).

Manslaughter, on the other hand, is distinguished from murder by the absence of deliberation and malice aforethought (Wharton, supra, sec.423, p.640). It is voluntary manslaughter when the act causing death is committed in the heat of sudden passion caused by adequate provocation (Stevenson v. United States 162 U.S. 313, 40 L.Ed.980; 16 S.Ct.839 (1896); CM ETO 10338, Lamb; MCM, 1928, par.149a, p.165).

In the view we take of this case, accused can be guilty only of either murder or voluntary manslaughter. The other possibilities are that the killing was a pure accident, that it was the result of culpable negligence, involuntary manslaughter, or that it was done in self-defense. As to the latter it is sufficient to state that the burden of proving self-defense is on the accused and there is no evidence in the record tending to establish that defense except possibly accused's statement that he was "mugged", a vague statement the court was at liberty to disbelieve. (1 Wharton, supra, sec.614, p.829). In rejecting the other two possibilities, the court could take into consideration accused's efforts to escape detection, even though it meant leaving his victim lying in the middle of the street unattended, a course of conduct which is indicative of a deliberate, intentional killing, rather than one resulting from carelessness, however culpable (cf: CM ETO 12224, Ciullo). Moreover, they could reasonably conclude that it was something more than a coincidence that shortly before the killing deceased had exercised his authority to disarm accused. To be sure, there is no evidence that accused was angered by that at the time, but it is well known that some people are slow to anger and some are crafty enough to conceal it while they wait for a more opportune time to take revenge.

There remain then, only two alternatives - accused was guilty of murder or manslaughter. As we have said, to reduce murder to manslaughter in this case, the killing must have occurred in the heat of a sudden passion occasioned by adequate provocation. All of the evidence indicates that accused was not laboring under a violent passion. There may have been suppressed anger, but no more. So far as this record shows, there was not that violent emotion which "might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment" (People v. Poole, 159 Mich.350,354, 123 N.W.1093, 134 A.S.R.722). Moreover, the passion must be produced by "due and adequate provocation" (1 Wharton, supra, sec.426, p.648). It would be curious, indeed, if accused could reduce a homicide from murder to manslaughter on the grounds that he was enraged because deceased had, in the legitimate exercise of his

authority, acted to prevent him from possibly killing another.

It is our opinion, then, that the court was warranted in finding accused guilty of murder. They could properly find a motive in accused's resentment at deceased's disarming him. They could find consciousness of guilt in accused's efforts to escape detection. They could find that the malice presumed from the use of a deadly weapon was un rebutted. They could accept accused's statement that he had been "mugged" and that he had been fighting "Jerries" as an admission that the shooting was intentional, although they were, of course, at liberty to discount his version of the intentional shooting as a self-serving declaration. On all the evidence we think the record is legally sufficient to sustain the findings of guilty of murder (CM ETO 1901, Miranda; CM ETO 1922, Forester et al; CM ETO 1941, Battles; CM ETO 4292, Hendricks; CM ETO 4497, DeKeyser).

6. In his closing argument the trial judge advocate stated (R79):

"I leave to your consideration, also: If I were on trial for my life, and evidence against me was that I was covered with blood, I would ask my defense counsel to produce any evidence that he could to explain why I was covered with blood".

Since accused himself was obviously the best witness to explain why he was covered with blood, this cannot be construed as other than a comment on accused's failure to take the stand and testify. Obviously, this was improper (AW 24; MCM, 1928, par.77, p.62). However, reviewing the record as a whole and in view of the fact that the law member, when he instructed the accused as to his right to testify or remain silent, specifically mentioned that the trial judge advocate would not be permitted to comment on accused's failure to testify, the error was not prejudicial to accused's substantial rights. The case in this respect is similar to United States v. DiCarlo (CCA 2nd, 1933) 64 F(2nd) 15.

7. The charge sheet shows that accused is 31 years six months of age and was inducted on 4 November 1942 to serve for the duration of the war plus six months. He had no prior service.

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

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9. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir. 229, WD, 8 June 1944, sec. II, par. 1b(4), 3b).

Wm. F. Binn Judge Advocate

Edward L. Thomas Judge Advocate

Donald X. Carroll Judge Advocate

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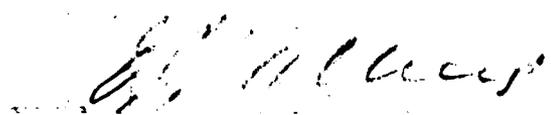
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1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater. **29 SEP 1945** TO: Commanding
General, United States Forces, European Theater (Main), APO 757,
U. S. Army.

1. In the case of Private RICHARD J. MORTON (32617634), 306th Replacement Company, 40th Replacement Battalion, 19th 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 commuted, 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 as commuted.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 14573. For convenience of reference, please place that number in brackets at the end of the order (CM ETO 14573).


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

(Sentence as commuted ordered executed. GCMO 487, USFET, 13 Oct 1945).

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RESTRICTED

14573

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

1 SEP 1945

CM-ETO 14574

UNITED STATES)
))
 v.)
))
Private CECIL C. WOOD)
(20752421), Battery C,)
203rd Anti-Aircraft)
Artillery Automatic)
Weapon Battalion)

SEINE SECTION, COMMUNICATIONS
ZONE, EUROPEAN THEATER OF OPER-
ATIONS

Trial by GCM, convened at Paris,
France, 10 April 1945. Sentence:
Dishonorable discharge, total
forfeitures and confinement at
hard labor for life. United
States Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
VAN BESNCHOTEN, HEPBURN and MILLER, 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.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Cecil C. Wood, 203rd Anti Aircraft Artillery Automatic Weapon Battalion, European Theater of Operations, United States Army, did, at his organization on or about 2 January 1945, desert the service of the United States and did remain absent in desertion until he came under military control at Paris, France on or about 10 March 1945.

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He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions, one by special court-martial for absence without leave for five days and one by summary court for absence without leave for nine days, both in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence with the recommendation that it be commuted, 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 owing to special circumstances in this case and the recommendation of the convening authority, 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 of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

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

A duly authenticated extract copy of the morning report of accused's organization was received in evidence showing accused from duty to absent without leave on 2 January 1945 (R5; Pros.Ex.A). About 8 January 1945, accused began living at the home of Madame Marie Massard in Paris. He continued to live there for the next two months and during this time he wore civilian clothing belonging to her husband, except for some days when he went to Belgium or to other places. On these latter occasions he wore his uniform (R12,13). On 7 March 1945, accused, while dressed in uniform, rented a room in a hotel in Courbevois, France, and on the second day while there he went out and returned wearing civilian clothes (R15). On 10 March 1945, accused was apprehended in a cafe in the St. Cloud area of Paris by military policemen. At this time he was wearing civilian trousers, coat and shoes and "regular G.I. sweater" and he was carrying a loaded German Luger pistol (R5-8,10; Pros.Exs.B,C; Def.Ex.1). Accused did not offer any resistance to the military policemen (R10), and voluntarily surrendered his "dog tags" to them (R11).

After an agent of the Criminal Investigation Division testified as to its voluntary nature (R18-20), a sworn statement signed by the accused was received in evidence (R20; Pros.Ex.D). In this statement accused relates that on 2 January 1945 while in a town in Belgium he and others went in a truck to another town to take a shower. When they arrived there, the showers were not open as yet so he went into a house to keep warm. While in the house he "had quite a few drinks"

and when he went out to look for the truck it was gone. Knowing his unit was near Liege, Belgium, he hitch-hiked there and not finding it in the next few days, he went to Paris. He immediately went to Madame Massard's home and began to live there. Although he had about twelve thousand francs, he did not let her know this and she supported him. About ten days after he began to live there, she showed him a suit of civilian clothes and asked him to wear them, knowing he was absent without leave. The German Luger pistol he was carrying when apprehended was souvenir he had with him since he left his organization. He never used the gun at any time and it was always in his mind to return to his organization. He was never involved in any robberies or black market activities and he never did anything to discredit the Army.

4. Accused, after his rights as a witness were fully explained to him (R21), made an unsworn statement in which he repeated substantially the same matter contained in his pretrial statement.

5. Accused's unauthorized and unexplained absence from his organization for 67 days, his apprehension in the Paris area, while wearing civilian clothing and carrying a loaded weapon, were established by competent, substantial evidence. The court could take judicial notice that the absence occurred in a country where was being actively waged and which was dotted with military establishments where accused could have surrendered had he so desired. Under these circumstances the court was warranted in inferring that he intended to remain permanently absent from his organization (CM ETO 9595, De Laurier; CM ETO 10185, Polander; CM ETO 10211, Stoner). There is substantial evidence to sustain the findings of guilty of the Charge and Specification (MCM, 1928, par. 130a, pp. 143, 144).

6. The charge sheet shows that accused is 23 years one month of age and enlisted 1 September 1940 at Winona, Minnesota. No prior service is shown.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the

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place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Walter Bunscher Judge Advocate

Charles Stephum Judge Advocate

Paul Miller Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater. **1 SEP 1945** TO: Commanding General,
United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private CECIL C. WOOD (20752421), 203rd Anti-Aircraft Artillery Automatic Weapon 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 commuted, 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 CM ETO 14574. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14574).



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

(Sentence as commuted ordered executed, OCMD-427, USFET, 20 Sept 1945).

14574

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

8 SEP 1945

CM ETO 14575

UNITED STATES)

SEINE SECTION, COMMUNICATIONS ZONE,
EUROPEAN THEATER OF OPERATIONS

v.)

Private First Class JAMES E.)
DUGGER (39083211), 390th)
Fighter Squadron, 366th)
Fighter Group)

Trial by GCM, convened at Paris, France,
22 February 1945. Sentence: Dishonorable
discharge, total forfeitures and confine-
ment at hard labor for life. United
States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, 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.

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

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

Specification: In that Private First Class James E. Dugger, 366th Fighter Group, 390th Squadron, European Theater of Operations, United States Army, did, at APO 595, United States Army, on or about 11 September 1944, desert the service of the United States and remain absent in desertion until he was apprehended at Paris, France, on or about 12 October 1944.

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

Specification 1: In that * * * did, at Paris, France, on or about 3 October 1944, wrongfully dispose of eight (8) gasoline cans and thirty-six (36) gallons of gasoline, property of the United States furnished and intended for the military service thereof, by selling the same to Madame Louise Bouvier and to unknown civilians, thereby impeding the war effort.

Specification 2: (Finding of guilty disapproved by reviewing authority)

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and all specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, disapproved the findings of guilty of Specification 2 of Charge II, approved the sentence but recommended that pursuant to Article of War 50, it be commuted, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, approved only so much of the findings of guilty of Specification 1 of Charge II and of Charge II as involved a finding that accused wrongfully sold to Madame Louise Bouvier property of the United States as alleged, furnished and intended for the military service thereof, in violation of Article of War 94. He confirmed the sentence but owing to the special circumstances in the case and the recommendation of the reviewing authority, 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 of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

3. Competent and substantial evidence establishes that accused absented himself without leave on 11 September 1944 and remained absent without leave until he was apprehended in Paris, France in civilian clothes on 12 October 1944. Accused in his extrajudicial confession, which was properly admitted in evidence after the corpus delicti was established, admitted that he was absent without leave and that during his absence he was engaged in black market activities. Accused's

absence without leave for one month in a foreign theater of operations, in wartime, his wearing of civilian clothes, and his participation in criminal activities furnish a sufficient basis for inferring an intent to desert. The record is legally sufficient to support the findings of guilty of the Specification of Charge I (CM ETO 952, Mosser; CM ETO 1036, Harris; CM ETO 1629, O'Donnell).

4. The evidence sufficiently establishes that accused sold eight cans containing gasoline to Madame Bouvier. The only question presented by the record is whether the gasoline was property of the United States furnished and intended for the military service thereof, and the testimony of Madame Bouvier sufficiently establishes that fact. The record is legally sufficient to support the findings of guilty of Specification I of Charge II as approved.

5. The charge sheet shows that accused is 24 years and six months of age and enlisted 8 October 1944 at Monterey, California. No prior service is shown.

6. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of 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 as approved and the sentence, as commuted.

7. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized upon conviction of desertion by Article of War 42 and upon conviction of unlawful disposition of property of the United States furnished and intended for the military service thereof by Article of War 42 and section 36, Federal Criminal Code (18 USCA 87) (See CM ETO 1764, Jones and Mundy). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Caswell Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. **8 SEP 1945** TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private First Class JAMES E. DUGGER (3908321), 390th Fighter Squadron, 366th Fighter 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 as approved and the sentence as commuted. 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 CM ETO 14575. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14575).



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

(Sentence as commuted ordered executed. GCMO 432. USFET, 22 Sept 1945)*

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 5

25 AUG 1945

CM ETO 14576

UNITED STATES)

SEINE SECTION, COMMUNICATIONS ZONE,
EUROPEAN THEATER OF OPERATIONS

v.)

Private HARRY W. HARGETT)
(6905405), 23rd Depot Repair)
Squadron, 2nd Air Depot Group,)
European Theater of Operations)

Trial by GCM, convened at Paris, France,
13 March 1945. Sentence: Dishonorable
discharge, total forfeitures, and con-
finement at hard labor for life. United
States Penitentiary, Lewisburg, Pennsylvania

HOLDING by BOARD OF REVIEW NO. 5
HILL, EVINS and JULIAN, 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.

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

CHARGE I: Violation of the 58th Article of War

Specification: In that Private Harry W. HARGETT, 23rd Depot Repair Squadron, European Theater of Operations, United States Army, did, at his organization on or about 18 October 1944 desert the service of the United States and did remain absent in desertion until he came under military control at Paris, France on or about 15 February 1945.

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He pleaded not guilty of desertion but guilty of absence without leave in violation of Article of War 61 and, all 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. All of the members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48, recommending that the sentence be commuted. The confirming authority, the Theater Commander, United States Forces, European Theater, confirmed the sentence, but commuted it to dishonorable discharge from the service, total forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

3. Evidence introduced by the prosecution showed that accused, a private attached to the 23rd Depot Repair Squadron, 2nd Air Depot Group, was absent without leave from his organization on 18 October 1944. Two days later an entry to that effect was entered on the morning report of his organization by its commanding officer. A duly authenticated copy of this extract was received in evidence without objection (R6,7; Pros.Ex.a). Accused was arrested in Paris, France, on or about 15 February 1945. This arrest was effected when accused presented alleged travel orders (admitted in evidence) to a military policeman on duty in the Post Exchange in order to have these orders checked so that he could purchase rations. This policeman testified, in effect, that he became suspicious of accused's travel orders and checked the continental AWOL book and found the accused's name in there listed as 60 days AWOL (R7, 8; Pros.Ex.B).

4. Fully advised of his rights as a witness, accused elected to take the stand and testified under oath. He said that he had been stationed at Ville-coublet, France, and had absented himself from his command without leave on or about 16 October; that he went to Paris and remained there about two and a half weeks, after which he returned to his former station and found his organization had left, where, he did not know nor could he find out. He returned to Paris and remained there hoping some person from his organization would come in to the Red Cross. He wanted to go to Belgium or Germany to look for his outfit. A week before he was picked up he met a soldier who offered to sell him "some papers" (evidently Prosecution's Exhibit B) which would enable him to get to Belgium, in his search, "without being picked up". He accepted these "papers". He never intended to desert, he said. He has been in the service eight years and would like to go back. He has a "family home" (R9,10).

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5. Accused is charged with desertion in violation of Article of War 58 which offense is defined as "absence without leave accompanied by the intention not to return" (MCM, 1928, par.130a, p.142). Accused's absence continued for almost four months. Also proved were the facts that this absence was terminated by arrest and that at that time accused was possessed of and using orders which were admittedly forged. During the major portion of his absence, accused was in Paris where he had abundant opportunity to surrender himself to military authorities to be returned to his organization had he honestly desired such return. The sole issue was whether accused, during this absence, intended not to return. On these facts, the court was justified in believing accused did not intend to return to military control if he could help it. As pointed out, this was desertion (CM ETO 952, Mosser; CM ETO 1577, Le Van).

6. The testimony of the military policeman as to his thoughts regarding the validity of the travel orders carried by accused and as to the fact that he found accused AWOL in a book kept in Paris was incompetent and improper. The error in its admission was not prejudicial in view of accused's plea of guilty to absence without leave and his judicial confession in court that the orders in question were not valid.

7. The charge sheet shows that accused is 25 years and nine months of age and that he enlisted 14 June 1937. No prior service is shown.

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

9. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229,WD, 8 June 1944, sec.II, pars.1b(4),3b).

Alvin W. Hammett Judge Advocate
Joe L. Miller Judge Advocate
Anthony J. Julia Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater. **25 AUG 1945** TO: Commanding
General, United States Forces, European Theater (Main), APO 757, U. S.
Army.

1. In the case of Private HARRY W. HARCETT (6905405), 23rd Depot
Repair Squadron, 2nd Air Depot Group, European Theater of Operations,
attention is invited to the foregoing holding by the Board of Review
that the record of trial is legally sufficient to support the findings
of guilty and the sentence as commuted, which holding is hereby approved.
Under the provisions of Article of War 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 indorse-
ment. The file number of the record in this office is CM ETO 14576.
For convenience of reference, please place that number in brackets at
the end of the order: (CM ETO 14576).



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

(Sentence as commuted ordered executed, GCMO 395, USFET, 7 Sept 1945).

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3

14 SEP 1945

CM ETO 14583

UNITED STATES	)	1ST INFANTRY DIVISION
)	
v.	)	Trial by GCM, convened at Kynzvalt,
	)	Marienbad, Sudetenland, Czechoslovakia,
Private First Class WALTER R.	)	15 May 1945. Sentence: Dishonorable
LAJOIE (36853086), Company B,	)	discharge, total forfeitures and con-
18th Infantry	)	finement at hard labor for life.
	)	United States Penitentiary, Lewisburg,
	)	Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, 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.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Walter R. Lajoie, Company B, 18th Infantry, did, at his assembly area in the vicinity of Aachen, Rheinprovinz, Germany, on or about 5 October 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he surrendered himself at Haaren, Aachen, Rheinprovinz, Germany, on or about 16 October 1944.

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

Specification: In that * * * did, in the vicinity of 14583,

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Haaren, Aachen, Rheinprovinz, Germany, on or about 3 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, and did remain absent in desertion until he was apprehended at Brussels, Brabant, Belgium, on or about 14 December 1944.

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

Specification: In that * * *, having been duly placed in arrest on or about 1 November 1944, did, at Haaren, Aachen, Rheinprovinz, Germany, on or about 3 November 1944, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death by musketry. 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 with the recommendation that, if confirmed, the sentence be commuted to dishonorable discharge, total forfeiture and confinement for life. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case and the recommendation of the reviewing authority, 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 of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

3. An authenticated extract copy of the morning report of Company B, 18th Infantry, dated 6 October 1944 was received in evidence, without objection by the defense, showing accused absent without leave on 5 October 1944 (R12; Pros.Ex.B). On 5 October 1944 the accused was one of 27 members of the Ranger Platoon of the First Battalion, 18th Infantry, then in position in vicinity of Crucifix Hill (R14) near Aachen, Germany (R20). On this date the platoon was 500 to 1000 yards from the enemy lines and was being subjected to artillery, small arms and mortar fire (R15). Members of the platoon, including accused, had been informed by their platoon leader, now deceased, that the platoon had been assigned the mission of attacking and taking Crucifix Hill (R15,16). Accused was subsequently discovered to be missing and a search was made by platoon leader and platoon sergeant, but accused could not be found (R14). The attack was made and Crucifix Hill taken by the platoon during absence of accused, five members of the platoon being killed (R17). It was stipulated that accused surrendered himself at Haaren, Aachen, Rheinprovinz, Germany on 16 October 1944 (R21; Pros.Ex.C). First Sergeant Donald J. Endres, Headquarters Company, First Battalion, 18th Infantry, testified that accused, on 1 November 1944, was placed under arrest and was properly advised of his arrest status (R11); that on 3 November 1944,

while still in arrest status, he absented himself from his organization without permission and could not be found, when, upon discovery of his absence, a search of the area was made for him (R10). He was absent from the organization from 3 November 1944 until 14 December 1944 (R11). An authenticated extract copy of the morning report of Company B, 18th Infantry, was received in evidence, without objection by the defense, showing accused absent without leave on 3 November 1944 (R9; Pros.Ex.A). It was stipulated, accused expressly consenting thereto, that Sergeant William Mings, Military Police, if present, would testify that while on duty in Brussels, Brabant, Belgium on 14 December 1944, he apprehended the accused and returned him to military control (R21; Pros.Ex.C).

4. The accused after his rights as a witness were fully explained to him, elected to remain silent and no evidence was introduced in his behalf (R22-23).

5. With reference to the Specification and original Charge, the evidence shows that while accused's platoon was in contact with the enemy, receiving artillery, mortar and small arms fire, pending an imminent scheduled attack of which accused had been notified, he went absent without leave from his organization and did not return until nine days later - after the attack mission had been accomplished. The record thus sustains the findings of guilty of desertion to avoid hazardous duty (MCM, 1928, par. 130a, p.143).

With reference to the specifications and additional charges, the proof shows unauthorized absence from 3 November to 14 December 1944, initiated by breach of arrest near Aachen, Germany, less than three weeks after his return from his previous desertion, terminated by apprehension at Brussels, Belgium, thus supporting the inference of intent not to return (CM ETO 7379, Keiser), and sustaining the findings of guilty of desertion (MCM, 1928, par.130a, pp.143-144) and breach of arrest (*ibid.*, par.139a, pp.153-154).

6. The charge sheet shows that accused is 20 years of age and that, with no prior service, he was inducted at Detroit, Michigan 14 May 1945.

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 as commuted.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229,WD,8 June 1944, sec.II, pars.1b(4), 3b).

B.R. Sleeper Judge Advocate
Malcolm C. Sherman Judge Advocate
B.H. Lewis, Jr. Judge Advocate

RESTRICTED

(70)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater. **14 SEP 1945** TO: Commanding
General, United States Forces, European Theater (Main), APO 757,
U. S. Army.

1. In the case of Private First Class WALTER R. LAJOIE (36853086),
Company B, 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 commuted, which hold-
ing 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 CM ETO 14583. For con-
venience of reference, please place that number in brackets at the end of
the order: ~~(CM ETO 14583)~~



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

(Sentence as commuted ordered executed. GCMD 450, USFET, 3 Oct 1945)•

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3

11 SEP 1945

CM ETO 14584

UNITED STATES)

1ST INFANTRY DIVISION

v.)

Private First Class LAWRENCE
D. McNAMARA (36073548),
Company D, 18th Infantry)

Trial by GCM, convened at Kynzsvart,
Marienbad, Sudetenland, Czecho-
slovakia, 15 May 1945. Sentence:
Dishonorable discharge, total
forfeitures and confinement at
hard labor for life, United States
Penitentiary, Lewisburg, Penn-
sylvania.

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, 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.

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

CHARGE: Violation of the 58th Article of War.

Specifications: In that Private First Class Lawrence D. McNamara, Company D, 18th Infantry, did, at Zweifall, Aachen, Rheinprovinz, Germany, on or about 15 November 1944, desert the service of the United States by absentsing himself without proper leave from his organization and did remain absent in desertion until he surrendered himself at Liege, Liege, Belgium, on or about 11 April 1945.

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He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 115 days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death by musketry. 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, with the recommendation that, if confirmed, the sentence be commuted to dishonorable discharge, total forfeiture and confinement for life. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all allowances due or to become due and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

3. An authenticated extract copy of the morning report of Company D, 18th Infantry for 16 November 1944 was received in evidence, without objection by the defense, showing accused absent without leave on 16 November 1944 (R7,8; Pros.Ex.A). An authenticated extract copy of the morning report of same organization dated 6 January 1945 was received in evidence, without objection by the defense, consisting of a correction entry showing accused absent without leave on 15 November 1944 (R9; Pros.Ex.B).

Corporal Gottlieb C. Graumann testified that on 14 November 1944, he, the accused and one other soldier, all members of Company D, 18th Infantry, then stationed in a woods near Zweifall, Germany, were given a 24-hour pass to go to the 1st Infantry rest camp in the city of Herve (R10-11). The soldiers, including accused, were instructed prior to leaving the rest camp that they should report back by 4:00 o'clock on 15 November 1944 (R11). Accused did not return as instructed and search for him was made in the City of Herve on 15 November 1944 without success (R12). It was stipulated between counsel for the prosecution and the defense, the accused expressly consenting thereto, that he surrendered himself to military control on 11 April 1945 at Liege, Liege, Belgium (R13; Pros.Ex.C).

4. Accused, after his rights as a witness were explained to him, elected to remain silent and no evidence was introduced in his behalf (R14).

5. Accused was charged with desertion, initiated on or about 15 November 1944, terminated by voluntary surrender on or about 11 April 1945. Competent uncontradicted evidence establishes his unauthorized absence for the period involved. No explanation was attempted by or on behalf of accused.

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

"The absence of accused without leave for a period of more than four months in an active theater of operations was evidence from which the court was fully warranted in finding him guilty of desertion" (CM ETO 5406, Aldinger. See also CM ETO 7663, Williams).

6. The charge sheet shows that accused is 33 years of age and that, with no prior service, he was inducted at Peoria, Illinois, 5 May 1942.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 5b).

B. R. Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. H. Newey Jr. Judge Advocate

(74)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater. **11 SEP 1945** TO: Commanding General,
United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private First Class LAWRENCE D. McNAMARA (36073548), Company D, 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 commuted, which holding is hereby approved. Under the provisions of Article of War 50¹/₂, 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 CM ETO 14584. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14584).

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



(Sentence as commuted ordered executed. GCMO 446, USFET, 2 Oct 1945).

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

11 AUG 1945

CM ETO 14587

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

) 35TH INFANTRY DIVISION

v.

) Trial by GCM, convened at
) Hannover, Germany, 16 May 1945.

Technician Fifth Grade

) Sentence: To be shot to death
) with musketry.

ARNOLD W. TEACHEY (34865960),

2705th Engineer Dump Truck
Company.)

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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 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.

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

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

Specification: In that Technician Fifth Grade Arnold W. Teachey, 2705 Engineer Dump Truck Company, did, at Isernhagen, Germany, on or about 4 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Eva Glashoff.

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

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Specification: In that * * * did, at Isernhagen, Germany, on or about 4 May 1945, with intent to do him bodily harm commit an assault upon Mr. Waldemar Grosse, by striking him on the head with a dangerous weapon, to wit: a carbine.

He pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 35th Infantry Division, approved the findings and sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50 $\frac{1}{2}$.

3. The prosecutrix, Mrs. Eva Glashoff, was a widow of 39 years, living with her five children and several other German civilians in a house in Isernhagen, Germany. She was the widow of a German soldier who died in battle. Other occupants were Mrs. Dora Zimmerman, 71, Mr. Waldemar Grosse, 62, and his wife.

During the evening of 2 May 1945, accused appeared at this house and, finding the door locked, broke the window to secure admission. He demanded young girls, began searching, and locked some of the occupants in a room. They thereafter heard cries (R10).

At about 2230 or 2300 hours on 4 May, Mrs. Zimmerman heard blows on the locked front door and the firing of a shot. She opened the door and admitted accused and another negro soldier. He again demanded young girls, and finding none since they had left through fear, in anger he drove his companion off, locked the front door, and forced Mrs. Zimmerman and Mrs. Grosse into a bedroom (R7-8).

The prosecutrix, who had retired at 2130 hours, was awakened by the noise and walked from her bedroom on the ground floor into the adjacent antechamber. She carried her three months old baby in her arms. There she saw accused, armed and infuriated. Her children cried, and

because of the events of 2 May she was much afraid. He indicated she should be quiet and go into the bedroom. She complied with the demand. Accused accompanied her. (R11-12).

There, accused told her to turn on the light, and when she replied that there was none, he struck her in the back and on her arm. She opened a door to let in light from another room. He looked at the beds and told her to put the children in them and go upstairs with him. She refused and evaded him as he pursued her around a table. Finally, when accused went upstairs for a few minutes, she sent her oldest boy of 16 for American help. Accused returned and told the prosecutrix, who still held her baby in her arms, to lie down. To her pleading he said "Nicht bitte", but struck at her with the butt of his rifle. The blow missed and broke a vase on the table. She cried in terror, and Mrs. Grosse who heard the cry entered and took the baby (R9,13-14).

He aimed his rifle at the prosecutrix, grabbed her as she stood bewildered and dragged her upstairs. She heard her baby cry and said she must get a milk bottle. As he looked around, she escaped downstairs and into the kitchen, with her children again about her. He followed. The bottle which she procured he tore from her grasp and broke. To gain time she sought to turn on the fire in the oven, but he struck her so heavy a blow on the head with his rifle that she fell. The wound bled, but he would not allow her to wash it or place a towel about her head until she screamed again. While she bathed the wound, he emptied a basin of blood and water several times, and then made her stop these ministrations. When she said she must feed the baby, he struck at her again with the rifle, but missed and hit the door against which she stood. He "tore her around" and, as she had little strength left, forced her upstairs. When she did not go fast enough, he grabbed her from behind (R14-16).

She went into Grosse's room. Accused woke Grosse, aimed his rifle at him, and hit him as he lay, because he rose too slowly. Grosse was deaf and an old man. He began to plead, but she told him to get up, for she was half dead already and it was better to let the accused do as he willed with her (R16). Grosse rose, but accused tore his night shirt in front, and felled him with his rifle as he stood

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there ashamed of his nakedness. Accused drove him into the adjacent living room and struck him twice more with the rifle, but allowed him finally to lie on a sofa covered by a tablecloth. He suffered a concussion of the brain from the blows (R17,22-24). She sought to go to the toilet, showed accused her abdomen, told him it was sore; but the accused for answer shot at her. She escaped the bullet by six inches by hitting the barrel. He ripped at her clothes, saying "Auf, auf". When she was too slow undoing her apron, he tore it off. She said she was sore inside from the recent birth, and he aimed the gun again. Somehow, the bullets fell out. She kicked them under the dresser. He tore all her clothes off, and as a result of her struggle, wounds and fright, her bowels moved involuntarily in diarrhea and ran down her legs. She pleaded, "After all we are human beings, and not pigs", but his response was to urinate by the door. She got away into the living room where Grosse lay. Accused followed, pressed his thumbs into Grosse's eyes, and turned him over so that he could not see the subsequent acts (R18). He placed pillows and a featherbed over him (R19).

Accused pushed her onto a bed in the living room, twisted her hands, put her legs over his shoulders, ignored her protests that her womb was still sore, and forced his penis into her vagina. He had an emission. Thereafter, he placed her clothes under his head, told her if she went away it would be "Boom-boom-boom", and went to sleep (R18-19).

The prosecutrix left quietly, secured a morning gown, and went to the houses of three neighbors seeking help (R20). When American soldiers arrived between 0200 and 0300 hours, much delayed although first contacted by prosecutrix' son at 2330 hours, they found the three women in the front yard, frightened and jabbering. The prosecutrix was bleeding, bruised on the face, and had blood stains on her legs. Grosse was bleeding, and accused was asleep in bed. His rifle was near him. Its barrel was bent, the top of the stock missing, and the bottom part split (R25-28). On 6 May, a medical examination of the prosecutrix revealed an inch and a half scalp cut which had bled profusely, and bruises on both forearms. She complained of pain in forearms, neck, jaw, breasts and abdomen. No bruises on breasts and abdomen were observed. Due to her recent child-bearing, it was not possible for the doctor to determine whether rape or penetration had occurred (R23-24).

4. The accused, after his rights as a witness were explained to him, elected to be sworn and testified in substance as follows:

He was a native of North Carolina, where he completed the 7th grade in school. He had been in Germany a little more than a month before the 2nd of May.

On Wednesday, the 2nd of May, accused and a soldier named Jones killed a deer. That night they exchanged the deer with the Russians for drink and drank heavily. Later they visited the house in question and seeing a woman of 27 or 28 years standing by the gate, asked schnapps of her. She offered wine instead and they entered and drank with her. After drinking a bottle and a half, accused had intercourse with this woman and demanded another girl for his friend. She returned with the prosecutrix' daughter, who seemed afraid. The woman, however, pushed her over to where Jones was sitting and the four slept there that night. Accused was awakened the next morning at 5 o'clock by one of these girls. As they were leaving, the women asked him if they would come back and they promised to do so. The sergeant refused to let them leave the area the next night, but permitted them to do so on Friday (4 May) (R34,35).

On that day, accused and Jones killed another deer and again exchanged it with the Russians for liquor. Accused said he drank a lot, and too much. He, Jones and a soldier named Taylor went into the village to the same house. They knocked on the door and an old lady came and opened it. She asked what was wanted and was told that they wanted the girls who were there Wednesday night. She replied that they were not there, but accused went upstairs looking for them. Taylor never entered the house and Jones stayed downstairs. Accused could not find them either upstairs or down. He then saw the prosecutrix.

His version of subsequent events is as follows:

"She was standing by the table when I came back from upstairs. When I came down, Jones was still looking around downstairs. He said he didn't see the young girls. This lady was standing by the table right as you come in, with the baby in her arms, and I walked up to her and told her 'You can come with me'.

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CONFIDENTIAL

(80)

I told her in English. She told me she didn't understand. I told her 'Put the baby to bed'. I motioned for her to put the baby to bed.

* * *

I took her by the hand and told her 'Come up with me'. She refused to come with me up. Jones said 'Let her go'. So I walked back in the kitchen"(R33).

Jones then left the house. Accused did not know why. Accused's testimony continues:

"Then she came back into the kitchen and she came in and got a bottle to give the baby to fix the baby's milk, and I grabbed her by the hand and told her that could wait. I pulled her upstairs and I got her upstairs; she started screaming. She started screaming and I hit her. This old man jumps up out of bed and when he jumped out of bed, he grabbed me first and when he grabbed me, I reached and grabbed him, but I didn't hit him with the butt of the gun, but with the barrel of the gun, on the side of the head, and put him on the floor.

* * *

When me and the old man was tussling, she ran out and I ran and chased her, but I got caught on the door and it slowed me for a little while. This old man came back to attack me again. I reached down for my carbine. He and I tussled on; I dropped my carbine on the floor. I hit him and knocked him out and drug him across the floor on the sofa. I picked up the carbine and stood it up to the corner and I laid down on the bed" (R32,33).

Accused then testified that he never saw the prosecutrix that night after she ran out of the door and that when he laid down on the bed, he was drunk and "passed out".

He admitted: That he hit the prosecutrix with his rifle and his fist (R34); that he took her upstairs with the intent to rape her (R34); that he attempted to rape her (R32,34); that every time he started to rape her the old man "would start for me" (R34); and that he hit Grosse twice with a rifle (R34). He insisted that he never got her in the bedroom and that he had no sexual intercourse with her.

5. The record shows that the trial took place only four days after the charges were served on accused. In the absence of objection or motion for continuance and of indication that any of the substantial rights of accused were prejudiced, the irregularity may be regarded as harmless (CM ETO 8083, Cubley, and authorities therein cited).

6. a. Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration of her genitals is sufficient carnal knowledge whether emission occurs or not. The force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM, 1928, par.148b, p.165). Every consent involves submission, but it does not follow that mere submission involves consent (52 CJ, sec.26, p.1017), which, however reluctant, negatives rape. But where the woman is insensible through fright or ceases resistance under fear, gaged by her own capacity, of death or other great harm, the consummated act is rape (1 Wharton's Criminal Law (12th Ed., 1932), sec.701, p.942).

b. The testimony of the prosecutrix is in part corroborated by the testimony of Grosse who saw her naked, heard the shot fired, and suffered severe injuries himself. It is further overwhelmingly corroborated by the gash in her head, the bruises on her body, the blood stains on her legs, and her physical and mental condition when found by American soldiers. In addition, her own testimony is certain, consistent and unimpeached. The common law rule on the necessity for corroboration of the prosecutrix of a rape case, which is in effect in military law, is succinctly stated in an annotation in 60 A.L.R. 1125:

"The rule in most jurisdictions is that in the absence of statute a conviction for rape may be sustained on the uncorroborated testimony of the prosecutrix."

Although corroboration of a prosecutrix may be required if her testimony is contradictory, uncertain, improbable or impeached (CM ETO 2625, Pridgen), such is not the case here. Even if corroboration were required, there is ample in the evidence (44 Am.Jur., secs.106-110, pp.969-973). Corroboration as to penetration was clearly not necessary under any theory. (CM ETO 14256, Barkley, and authorities therein cited).

The accused's claim that he pursued the prosecutrix with the intent to rape her, that he beat her, that he fought off her rescuer and then beat him into insensibility, and thereafter, having removed all obstacles to his lust, desisted, is improbable in the extreme, and the court was well within its province of determining questions of fact by resolving the issue against him.

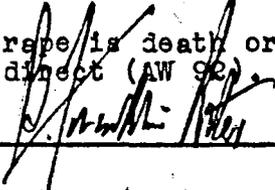
All the necessary elements to sustain a conviction of rape appear in this case. It would be hard to find in the reports a record of more bestial and savage conduct. It would ill behoove our courts to fail to mete just punishment for such an offense at the time we seek to govern the defeated enemy nation upon a civilized basis. The evidence is sufficient to sustain the conviction and the sentence is just (CM ETO 4444, Hudson, et al; CM ETO 7869, Adams and Harris; CM ETO 8542, Myles; CM ETO 12869, DeWar).

7. The severe injuries which Grosse suffered were proof beyond question that the assault upon him to which accused pleaded guilty, was with intent to do him bodily harm (CM ETO 804, Ogletree; CM ETO 4606, Geckler).

8. The charge sheet shows that the accused is 23 years of age and was inducted 1 January 1944 at Fort Bragg, North Carolina. No prior service is shown.

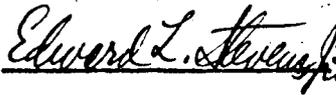
9. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty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

10. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92).



Judge Advocate

(Sick in hospital) Judge Advocate



Judge Advocate

14587

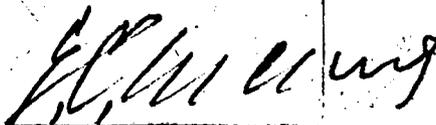
1st Ind.

War Department, Branch Office of The Judge Advocate General
with the European Theater. **11 AUG 1945** TO: Commanding
General, United States Forces, European Theater, APO 887,
U. S. Army

1. In the case of Technician Fifth Grade ARNOID W. TEACHEY (34865960), 2705th Engineer Dump Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial, which is delivered to you herewith. The file number of the record in this office is CM ETO 14587. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14587).

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



E.C. Mc Neil,
Brigadier general, United States Army,
Assistant Judge Advocate General.

(Sentence as commuted ordered executed. GCMO 401, USFET, 29 Aug 1945).

RESTRICTED

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO 3

22 SEP 1945

CM ETO 14595

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

v.)

Private NORVAL S. ARNETT)
(35869613), 4001st Quarter-)
Master Truck Company)

SEINE SECTION, COMMUNICATIONS
ZONE, EUROPEAN THEATER OF
OPERATIONS.

Trial by GCM convened at Paris,
France, 21 March 1945. Sentence:
Dishonorable discharge, total
forfeitures and confinement at
hard labor for life. United States
Penitentiary, Lewisburg, Pennsyl-
vania.

HOLDING by BOARD OF REVIEW NO 3
SLEEPER, SHERMAN and DEWEY, 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.

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Norval S. Arnett, 4001 Quartermaster Truck Company, European Theater of Operations, did, at his organization on or about 8 September 1944 desert the service of the United States, and did remain absent in desertion until he came under military control at Chartres, France, on or about 27 October 1944.

Specification 2: In that * * *, did, at his organization on or about 31 October 1944 desert the service of the United States, and did

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remain absent in desertion until he came under military control at Paris, France, on or about 9 December 1944.

He pleaded not guilty and all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48, recommending that the sentence be commuted. The confirming authority, the Commanding General, United States Forces, European Theater, 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 of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence introduced by the prosecution showed that accused was a private in the 4001st Quartermaster Truck Company (R5,14,Pros.Ex.C). A duly authenticated extract copy of the morning report of his organization was admitted in evidence without objection (R5) showing that accused absented himself without leave on 8 September 1944 (Pros.Ex.A). His company commander testified that accused was brought back to his organization from the 19th Replacement Depot on 27 October 1944 (R56) and was immediately placed in arrest, and confined to the camp area pending investigation of his absence (R5,6).

At 0700 hours 31 October 1944, accused was reported absent again. A search was made for him but he could not be found. He was not seen again by his company commander until the day of the trial (R6). On 9 December 1944, a French police officer/following an investigation of a shooting incident near a cafe in Paris. He arrested accused whom he found hiding in the basement of a nearby apartment building (R8,9) and turned him over to the military police (R10) to whom he admitted that "he was AWOL 3 or 4 days" (R7). He was then in uniform (R7) and had in his possession a forged trip ticket (R19,23,26,27, Pros. Exs. C & D) but the truck for which it was issued could not be found (R7,13).

On 14 December 1944, he was questioned by an agent of the Criminal Investigation Division. After being properly warned of his rights, he voluntarily subscribed and swore

to a statement in which he admitted that he was absent without leave from his organization when arrested in Paris (R11-13, 28, 29; Pros.Ex.C).

4. After being advised of his rights as a witness accused elected to testify in substance as follows (R14): The CID agent did not advise him that he did not have to make the statement which was offered in evidence as Prosecution's Exhibit C. However, he read, swore to, and signed it, and it was substantially true (R15-16, 20-21, 24-25).

His initial absence 8 September 1944 occurred when he stopped his truck for repairs and became separated from his convoy. Thereafter he tried without success to locate his organization which had moved from its former station when he arrived there. During his wanderings his truck was stolen and subsequently recovered by him from the military police in Paris. On his way back to his "outfit" with his truck, he was picked up for questioning by the CID, held by them for one day, and then sent to the 19th stragglers stockade. Four days later he was taken back to his organization (R16-18).

About 1 November after drinking some cognac he went to town planning to return in time for reveille. However, he did not get back until two days later, by which time his "outfit" had moved out. Again he vainly sought to locate it and was eventually arrested in Paris after the shooting incident (R18, 20). He did not forge the trip ticket which was found in his possession at the time of his arrest, but obtained it from a truck which he had "picked up" to use in returning to his outfit. (R19, 23, 26, 27; Pros.Exs.C.D). He had no intention of deserting the service (R20). On cross examination, he admitted that he lied to the CID agent as to the length of his absence (R20). During his second absence he occupied a room in Paris for about three weeks and supported himself by borrowing money (R21, 22).

5. Accused was charged with two desertions; (a) from 8 September to 27 October and (b) from 31 October to 9 December 1944. Competent evidence including his own testimony - with slight immaterial variances - established his absence without leave from his organization during the periods in question, and the termination of each absence by apprehension. Two unauthorized absences for more than six and more than five weeks respectively, separated by an interval of four days with his company, and terminated in each instance by apprehension, support the inference of intent not to return (CM ETO 7379, Keiser).

6. The charge sheet shows that accused is 20 years of age and that he was inducted at Fort Thomas, Kentucky, 21 June 1943. No prior service is shown.

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

substantial rights of 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 commuted.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229,WD, 8 June 1944, sec.II, pars.1b(4),3b).

B. H. Sawyer Judge Advocate

Malcolm C. Sherman Judge Advocate

B. H. Sawyer Judge Advocate

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War Department, Branch Office of The Judge Advocate General with
the European Theater. **22 SEP 1945** TO: Commanding General,
United States Forces, European Theater (Main), APO 757, U S. Army.

1. In the case of Private NORVAL S. ARNETT (35869613), of 4001st 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 commuted, 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.

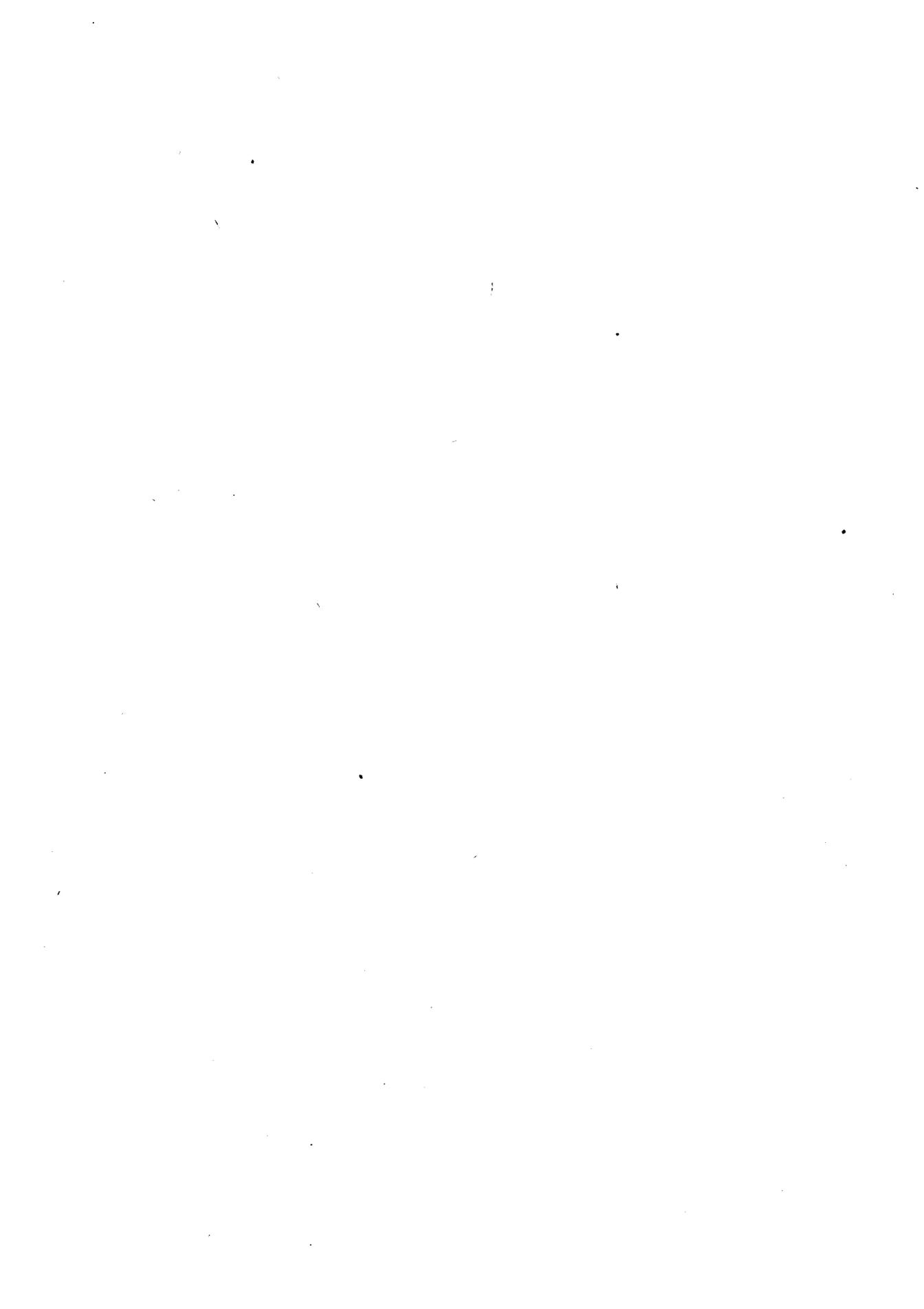
2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 14595. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 14595).


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

(Sentence as commuted ordered executed. GCMO 468, USFET, 8 Oct 1945).

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

5 SEP 1945

CM ETO 14596

UNITED STATES)

99TH INFANTRY DIVISION)

v.)

Trial by GCM, convened at Altmanstein, Germany, 28, 29 April 1945. Sentences: BRADFORD: Dismissal, total forfeitures and confinement at hard labor for life. PETERSON and WELKER: Dishonorable discharge, total forfeitures and confinement at hard labor, PETERSON for life and WELKER for thirty years. United States Penitentiary, Lewisburg, Pennsylvania.)

Second Lieutenant HAROLD W. BRADFORD (O-1314588), Company B, and Privates First Class JACK PETERSON (39592412), Company B, and CHARLES E. WELKER (33258863), Company D, all of 394th Infantry.)

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, Judge Advocates

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

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

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

Specification 1: In that Second Lieutenant Harold W. Bradford, and Private First Class Jack Peterson, both of Company B,

394th Infantry Regiment, and Private First Class Charles E. Welker, Company D, 394th Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Leubsdorf, Germany, on or about 12 March 1945, forcibly and feloniously against her will, have carnal knowledge of Fraulein Felicitas Liesenfeld.

Accused Bradford was also tried upon the following Charge and Specification:

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

Specification 1: In that Second Lieutenant Harold W. Bradford, Company B, 394th Infantry Regiment, was at Leubsdorf, Germany, on or about 12 March 1945 drunk and disorderly while in uniform.

Accused Bradford pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, the Commanding General, 99th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

Accused Peterson and Welker pleaded not guilty and, two-thirds of the members of the court present at the times the votes were taken concurring, were found guilty of Charge I and its Specification. No evidence of previous convictions of either was introduced. Three-fourths of the members of the court present at the times the votes were taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved each of the sentences, but reduced Welker's period of confinement to thirty 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 Article of War 50 $\frac{1}{2}$.

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

At approximately 1900 hours, 12 March 1945, the three accused sought and gained admission to the home of Matthias Shopp in Leubsdorf, Germany, for the purpose of getting some chickens cooked. They had some liquor with them which they drank. The soldiers were "on their way to being drunk", and the Lieutenant "was very drunk". Frau Shopp helped Peterson prepare the meal, for which she was paid, after which Lieutenant Bradford asked Shopp to bring some girls (R24-25,29). When he indicated that he could not, Peterson and Welker left the house at about 2400 and awakened the household of Herr Ludwig Liesenfeld. Liesenfeld, his wife and two daughters were asleep in the kitchen, and Peterson flashed his light around the kitchen but did not otherwise disturb them. The soldiers returned to the Shopp house and then Peterson and the lieutenant went back to Liesenfeld's. Bradford ordered the oldest daughter, Felicitas, aged 17, to get up and go with them, and when she wept and refused, both men threatened her and the family with pistols. She went out with them, weeping, but ran back about ten minutes later. She was crying and tried to go to bed, but the two men followed her back and took her out again (R7-12,25,30). They returned with her to Shopp's and the Shopp's were forced into a bedroom and the door locked by Peterson. The girl removed her coat, combed her hair, drank half a glass of wine, and was shown but refused to accept money (R13-14). The officer indicated that he wanted her to go upstairs and when she refused he took her by the arm, forced her up to a bedroom and threw her on the bed. They were on the bed an hour, during which time she continued to resist, and tried to leave the bed, and once he struck her in the face. He continually threatened her with a pistol. When he removed her pants she screamed, but he held her mouth and then had intercourse with her, forcibly. He then left the room, and as soon as he did so Peterson entered the room, pushed her prostrate from a sitting position on the bed, put a wristwatch on her arm and forcibly had intercourse with her, but she was too weak to resist. When he left Welker came in and forcibly had intercourse with her (R15-18). On the question of penetration, she was sure that Bradford's privates entered hers, and "it hurt" (R16); in the case of Peterson and Welker, she testified that she felt their privates penetrate her (R17,18). She then went downstairs, put on her coat, and left. Peterson walked home with her, removing the wristwatch from her arm on the way. She arrived home around 0400, told her parents of the incident and reported it to the American commander the next morning (R18-19). Two medical officers testified that a detailed examination of the girl showed bruises on the cheek, wrists and vaginal entrance and dilation of the vagina, but

neither was able to state whether she had had intercourse within the preceding twenty-four hours and both were of the opinion she was no virgin at the beginning of that period (R32-39).

4. For the defense Lieutenant Bradford and Peterson, having been advised of their rights, elected to testify in their own behalf (R39-62). Their testimony was in substantial accord with that of the prosecution on all points except concerning the willingness of the girl to accompany them from her home to the Shopp house, to go upstairs, and to submit to love-making. Bradford and Peterson both denied that they had intercourse with her. All described her as entirely acquiescent in these matters, the lieutenant testifying that their love-making so excited him that he had a premature emission which he caught in his handkerchief. He then left the room, and characterized her to Peterson whom he passed on the stairs as "hotter than a pistol but a little golddigger" (R42). Peterson testified that she accepted the watch but he had to put it on for her as she had difficulty with the catch on the band, and that he did not have intercourse because, after lying on the bed with her for a few minutes, he had to leave to urinate, not seeing her again until she came downstairs some 15 minutes later, put her coat on and left. He accompanied her home. She held his arm and kissed him on the way, until she discovered that the watch was missing - "Apparently the band had unhooked and she dropped it" (R50-51).

Welker elected to remain silent, and no other evidence was offered by the defense.

5. a. Neither element of the crime of rape ((a) that the accused had carnal knowledge of a certain female and (b) that the act was done by force and without her consent (MCM, 1928, par. 148b, p. 165)) is admitted by any accused, and the first and perforce the second are specifically denied by Bradford and Peterson. The prosecution's case included precise testimony of penetration on the part of each of the accused which the court had the right to, and did, accept. On the second element the prosecution's testimony evinced active resistance to the alleged acts of Bradford and Welker. Although the prosecution admitted that there was no such resistance in the case of Peterson, there were sufficient grounds in the surrounding facts to support a finding that there was a lack of consent to the act by him; the court was justified in its finding, in effect, that at the time of this act her physical condition (she was "hardly conscious"), coupled with the mental state induced by her recent experiences and the array of force against her, rendered her incapable of active resistance and that Peterson was well aware of these facts and of her lack of consent. The evidence also shows that each accused aided and abetted the other two in the commission of their rapes, thereby sustaining the allegation "jointly and in pursuance of a common intent" (cf: CM ETO 10857, Welch and Dollar; CM ETO 10871, Stevenson and Stuart).

There being substantial evidence of the elements of the offense against each accused the findings of the court will not be disturbed by the Board on appellate review, notwithstanding the conflict in the evidence created by the testimony of two of the accused (CM ETO 11376, Longie, and cases therein cited).

b. There is very little evidence that Lieutenant Bradford was drunk in uniform, but such testimony as was offered stands entirely unrefuted. Frau Shopp testified that he was "very drunk", and even without further explanation, in the absence of evidence to the contrary that justified a finding that he was drunk (MCM, 1928, par. 112b, p. 111). The general requisite to cause drunkenness to be a sufficient ground for conviction under Article of War 95 is that it be of a gross character (of which there is no evidence here). Winthrop, however, deems it a sufficient alternative when the drunkenness is "characterized by some peculiarly shameful conduct" (Winthrop's Military Law and Precedents (Reprint, 1920), p. 717). It is difficult to picture more shameful conduct than that of the accused, who stands convicted of rape, and most of whose disorderly conduct took place in the presence of military inferiors. It is prescribed that a specification must allege all of the elements of an offense (MCM 1928, par. 29a, p. 18), and the Specification to Charge II may be considered deficient in this respect. However, findings of guilty to the same charge have been upheld on similar specifications (CM ETO 12480, Buck; CM ETO 11271, O'Hara), and in the absence of a showing that accused has been misled by a defect in a specification or his substantial rights otherwise prejudiced thereby, no finding or sentence need be disapproved on this grounds (MCM 1928, par. 87b, p. 74). There is no evidence as to his clothing, but the wearing of a uniform is a legitimate inference from the presence of gold bars on his shoulders [referred to by one witness (R8)] and the fact that he was recognized as an American officer (CM ETO 580, Gorman). His conduct was disorderly to a high degree and was clearly unbecoming an officer and a gentleman.

6. The charge sheet shows the following: Bradford is 35 years, seven months of age and was commissioned a second lieutenant 17 March 1943. Peterson is 23 years, seven months of age and was inducted 6 July 1944, at Los Angeles, California. Welker is 26 years, three months of age and was inducted 21 November 1942 at Altoona, Pennsylvania. The service period of each accused is the duration of the war plus six months. No prior service is shown for any of the accused.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of any of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification as to each accused, and legally sufficient to support the

findings of guilty of Charge II and its Specification as to Lieutenant Bradford in violation of Article of War 95, and legally sufficient to support the sentences.

8. Dismissal is mandatory upon conviction of an officer of violation of Article of War 95. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and Section 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 proper (Cir.229,WD,8 June 1944, sec.II,pars.1b(4),3b).

Wm. F. Gurnea Judge Advocate

Edward L. Stearns Judge Advocate

Ronald H. Caswell Judge Advocate

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War Department, Branch Office of The Judge Advocate
General with the European Theater. 5 SEP 1945
TO: Commanding General, 99th Infantry Division, APO 449,
U. S. Army.

1. In the case of Privates First Class JACK PETERSON (39592412), Company B, and CHARLES E. WELKER (33258863), Company D, both of 394th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 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 CM ETO 14596. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14596).



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

(As to accused Bradford, sentence ordered executed. GCMO 414, USFET, 17 Sept 1945).
(As to accused Peterson & Welker, sentence ordered executed. GCMO 68, USFET, 8 March 1946).

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Branch Office of The Judge Advocate General
with the
European Theater
APO 837

BOARD OF REVIEW NO. 2

14 SEP 1945

CM BTO 14604

UNITED STATES

v.

Privates First Class DAVID
MCARTHUR (31466230), and
WILLIE J. LEE (39138876),
both of 3119th Quartermaster
Service Company

SEVENTH UNITED STATES ARMY

Trial by GCM, convened at Darmstadt,
Germany, 27 April 1945. Sentence as
to each accused: Dishonorable dis-
charge, total forfeitures and confine-
ment at hard labor, McArthur for life;
Lee for 20 years. United States Peni-
tentiary, Lewisburg, Pennsylvania, as
to both.

HOLDING by BOARD OF REVIEW NO. 2
VAN BEECKHOVEN, HEPBURN and MILLER, 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 arraigned separately and with their consent were tried together upon the following charges and specifications:

MCARTHUR

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Pfc David McArthur, 3119
Quartermaster Service Company, did at Leider,
Germany, on or about 6 April 1945, forcibly
and feloniously, against her will, have carnal
knowledge of Agatha Bils.

Specification 2: (Finding of not guilty).

LEE

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Pfc Willie J. Lee, 3119 QM Service Company, did, at Leider, Germany, on or about 6 April 1945, with intent to commit a felony, viz, rape, commit an assault upon Helga Henken, by willfully and feloniously pushing the said Helga Henken to the floor and cutting off her underdrawers with a knife.

Specification 2: (Finding of not guilty)

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, ^{was} found guilty of the Charge and Specification 1 and not guilty of Specification 2 preferred against him. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be dishonorable discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct: McArthur for the term of his natural life, and Lee for 20 years. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for each accused, and forwarded the record of trial for action pursuant to Article of War 50g.

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

Accused are members of the 3119th Quartermaster Service Company (R6,7,27). On the afternoon of 6 April 1945, in Leider, Germany, accompanied by a third soldier, they entered the home of Agatha Bils (R6,7). They had been drinking (R9,10). McArthur went into the kitchen where Mrs. Bils was working (R7). He first "threw" her on the table, then unbuttoned his trousers (R8). She "protected" herself, and he threw her on the floor (R8). Thereafter, though she further "protected" herself, he forcibly had intercourse with her, inserting his penis into her female organ (R8). She did not consent, and tried to get away, but he held on to her (R8,10). She tried to cry out, but he put his hand over her mouth. Her brother-in-law, Johann Haas who was repairing the roof of her house, testified that he heard screaming (R8,11). While the act of intercourse was taking place, another of the three soldiers was watching through the door into the kitchen (R10).

When Haas heard screaming, he came down from the roof and saw accused McArthur at one of the doors of the house; then the third soldier of the group pointed his weapon at him and compelled him to get back up on the roof (R11-13). He was able to

get down off the roof by another way, however, and reported the episode to the local American commander, who sent him back accompanied by other military personnel (R11-13). Accused were taken into custody immediately after they left the Henke house, which is about 500 feet from the Hils residence (R40,41).

Accused Lee and two other colored soldiers appeared at the Henke residence on the same day (R17,18). Mrs. Hilda Henke heard a knock and upon looking out of her living room window, saw one of the men standing there "with his gun in front of him" (R18). She was compelled to open the door, and "they just stormed into the door like wild", two of them going into the living room where her daughter, Helga, was (R15,18). Accused Lee threw Helga onto the couch, then pulled her up, then pushed her "down towards the floor" (R15). He reached into his pocket, pulled out a dagger or knife, and with it cut her underdrawers (R15,17). After that, he opened his pants and took out his penis (R16). He said the word "kill" to her several times, but eventually left the room after the other soldier with him had also departed (R16,17). Immediately after the episode, Helga Henke had scratches on her face, and one of her cheeks was swollen (R18,19).

On the day in question, Lieutenant Daly was informed of a disturbance in the town of Leider and visited it to investigate, accompanied by the German civilian who had reported the incident (R19-21,41). Except for the two accused and the third soldier, he saw no other soldiers in the town at that time (R20). The accused had been drinking, and he took them out of town and back to his command post, where he deprived them of their carbines (R20,21,43). The accused told him that they had come to town to get water; however, they were not then wearing canteens (R44,45).

4. On being advised of his rights as a witness, each accused elected to be sworn and to testify (R32). They stated that they had been detailed to guard a warehouse near the town of Leider and had gone off guard on the day in question (R32,33,36,37). They were running short of water and decided to go into town to find a water point (R33,36). They had gone only about two or two and a half blocks into the town when they were stopped by a lieutenant in an army truck, who asked them what they were doing there (R33,36). He had them get into the truck and took them to his command post (R33,36). They did not enter any of the houses in the town and had had nothing to drink on that day (R33,34,36). Accused Lee also testified that there were other soldiers in the town when they entered it, though no colored

soldiers, that they, the accused, had canteens, and that he was not carrying a knife of any kind (R33-35). Private Reed, a soldier in the same unit as the accused, corroborated the testimony of accused and stated that he was with them when they entered the town in search of water (R29-31).

Accused's platoon leader and first sergeant testified that Lee's character rating was "excellent" and McArthur's was "good" (R27-29).

5. a. As to the accused, McArthur:

Rape is defined as the "unlawful carnal knowledge of a woman by force and without her consent" (MCM 1928, par.148, p.165). The record contains substantial evidence to show that accused McArthur committed this crime and the testimony of the complaining witness was corroborated in many particulars. The contention of the defense that accused had only just arrived in the town of Leider when he was arrested, and had entered no residences there, is opposed by the testimony of both victims and two other civilian witnesses. The court evidently resolved the conflict in the evidence against accused and gave full credence to the prosecutrix' testimony, and its conclusion may not be disturbed by the Board of Review (CM BTO 5869, Williams; CM BTO 895, Davis).

b. As to the accused, Lee:

Assault with intent to commit rape is "an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished" (MCM 1928, par.149, p.179). Here there is substantial evidence of the accused's assault upon Helga Henke, and his purpose to commit the act of rape is clear from the circumstances. The court could properly find that accused pushed the complaining witness onto the floor, cut her underdrawers with a knife, opened his pants, and took out his penis, and from these facts conclude that he assaulted her in an attempt to commit rape (CM BTO 5765, Hack; CM BTO 4386, Green). The fact that thereafter he voluntarily desisted is no defense (MCM, 1928, par.149, p.179; CM BTO 3309, Lanz).

The fact that the name of the person assaulted is alleged in the specification to be Helga Henken, but shown in the record as Helga Henke, is not error, as the names are idem sonans.

6. The charge sheets show that accused McArthur is 25 years and five months of age and was inducted 2 May 1944 at Fort Devens, Massachusetts; Lee is 20 years and ten months of age and was inducted 20 August 1943 at San Francisco, California. Neither of the accused had any prior service.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AF 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457, 567). Confinement in a penitentiary is authorized upon conviction of assault with intent to commit rape by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

CHARLES VAN BENSCHOTEN Judge Advocate

EARLE HERBIEB Judge Advocate

RONALD D. MILLER Judge Advocate

A TRUE COPY:

Clarence W. Hall
Major JAGD



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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

14 SEP 1945

CM ETO 14609

UNITED STATES	)	3RD INFANTRY DIVISION
)	
v.	)	Trial by GCM, convened at Salzburg,
	)	Austria, 10 May 1945. Sentence:
Private HARRY G. PANAGOS	)	Dishonorable discharge, total forfeitures
(37555801), Company E,	)	and confinement at hard labor for life.
7th Infantry	)	Eastern Branch, United States Disciplinary
	)	Barracks, Greenhaven, New York.

HOLDING BY BOARD OF REVIEW NO. 2
VAN EENSCHOTEN, HEPBURN, and MILLER, 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 on the following charges and specifications:

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

Specification 1: In that Private Harry G. Panagos, Company "E" 7th Infantry did, near Wirh en Plaine, France, on or about 30 January 1945, desert the service of the United States by absents himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was returned to his organization on or about 6 February 1945.

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

Specification: In that * * * did, without proper leave, absent himself from his organization at Pozzuoli, Italy from about 10 July 1944, to about 5 December 1944.

He pleaded not guilty and, all of the members of the court present at the time

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the vote was taken concurring, was found guilty of all charges and specifications with words "about 5 December 1944" excepted and words "a time unknown" substituted in the Specification of Charge II. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. 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 $\frac{1}{2}$.

3. The accused's platoon commander testified for the prosecution substantially as follows:

Accused, a member of Company E, 7th Infantry, was present when his platoon was moving up in battalion reserve in the attack on the town of Wihr en Plaine, France on 29 January 1945. The unit was receiving artillery and mortar fire and later, when about five hundred yards from the town, the platoon came under tank and machine gun fire. About an hour later, a check was made of personnel when the platoon was taking a position of defense and accused could not be found (R-8). He was absent until 6 February 1945 and without permission (R.8-9,12).

Extracts of the morning reports of Company E, 7th Infantry showing the following entries pertaining to accused were admitted: Entry of 31 January 1945, without objection, reading "dy to AWOL 30 Jan 45" (R7, Ex.A); entry of 17 February 1945, over objection by defense, reading "AWOL (30 Jan 1945) to arr in Regtl Work Plat 6 Feb 1945 (pres status: arrest)" (R7, Ex.B); and entries of 10 July 1944, without objection, reading "3 $\frac{1}{2}$ miles north of Pozzuoli, Italy" and "dy to AWOL 0600 10 July 44" (R10, Ex.C).

4. The accused, after his rights as a witness were explained to him, elected to remain silent (R12). Defense introduced a stipulation that the officer who signed the morning report entry shown in Exhibit A, had no personal knowledge of the facts contained therein (R10). Prosecution agreed to this stipulation subject to judicial knowledge being taken of an order of higher headquarters which permitted a personnel adjutant to sign copies of morning reports (R11).

5. As to Charge I and Specification, the prosecution's evidence established an unauthorized absence by accused beginning at the time and place alleged while his platoon was actually under fire and advancing toward an enemy position. In absence of evidence to the contrary, the court was justified in concluding that he deliberately and wilfully absented himself to avoid the hazards and perils of combat operations then in progress against the enemy (CM ETO 7413, Gogel). All of the elements of the offense were fully established. Section IV, Circular 119, ETO, 12 December 1944, authorized personnel officers to sign morning reports.

As to Charge II and Specification, a prima facie case of absence without leave at the time and place alleged is established (MCM, 1928, par. 117, p.121). The offense was committed when accused absented himself and a

finding of a specific date of termination was unnecessary (CM NATO 1087 III Bull JAG 9).

6. The charge sheet shows that accused is 20 years and eleven months of age, was inducted on 19 March 1943 at Ft. Snelling, Minnesota, and had no prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

14 SEP 1945

CM ETO 14614

UNITED STATES

XII CORPS

v.

Technician Fifth Grade JERRY
GAINES (34341170), 443rd Quarter-
master Truck Company

Trial by GCM, convened at Regens-
burg, Germany, 18 June 1945.
Sentence: Dishonorable discharge,
total forfeitures and confinement
at hard labor for life. United
States Penitentiary, Leaven-
worth, Kansas.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HEPBURN and MILLER, 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 92nd Article of War.

Specification: In that Technician Fifth Grade Jerry Gaines, 443rd Quartermaster Truck Company, did near Kirchdorf, Germany, on or about 10 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Rosa Binder, a German civilian.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for "speeding" in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably

discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. Evidence for the prosecution: About 8:30 pm on 10 May 1945, the accused, a soldier in the 443rd Quartermaster Truck Company (R8) together with Sergeant W. R. Williams left camp in a truck to "police the area". The truck slipped off into a ditch, so they turned around to return to camp when accused asked Williams if he wanted a "piece of ass" and lead him to a house into which the accused entered (R9). It proved to be the house occupied by Eta Schwenifier and her child and her mother, and the Binder family, including Rosa Binder, one of the daughters--altogether ten people. It was located in Kirchdorf, Bavaria, Germany (R11). Mrs. Schwenifier testified that about 1:30 am, she heard an automobile drive up, then a knock on the door followed by some noise downstairs. Shortly thereafter, the accused (R15) entered her room with a flashlight in hand and "threatened" her and her mother with a rifle. She ran out of the house about 2:00 o'clock to a window from where she heard some shots fired in the house (R11-13). Rosa Binder, 26 years of age and unmarried, was asleep on the first floor of the house (R18) and was awakened by noises at 1:30 am. Her brother went downstairs. Shortly thereafter, the accused entered her bedroom armed with a rifle (R19). She and her sister pulled the bed covers over their heads (R20). The accused struck her mother who was also in the room and discharged his rifle about five times (R23). One shot went over her head into a mirror. He then pulled off the bed covers, shoved her into the next room and struck her in the face with his fist (R20). He backed her up against the wall with the gun against her, took her back to the first room and threw her into a bed (R21), undressed himself "up to his shirt" (R22), after laying the gun on the night table beside the bed (R23), got into the bed with her and against her will penetrated her private parts with his penis (R23). She resisted him only by pushing him away (R27). She tried to get away from him several times but desisted when he reached for his rifle (R27). Accused then fell asleep and she lay there in his arms (R31) awake until 7:00 or 8:00 o'clock in the morning, when an American officer entered the room and arrested the accused. She tried to get away once when he was asleep but he awakened and pulled her back (R23-24, 29-30). She identified the accused as the offender (R24).

It was stipulated that if First Lieutenant G. H. Goff were present in court he would testify that about 7:00 am on 10 May 1945, he was summoned by two German civilians to a house in Kirchdorf and there found the accused in bed with Rosa Binder. Accused was clad in drawers, Rosa in a nightgown. Accused was not drunk. He placed him under arrest. He observed three carbine cartridge cases and a broken mirror with a bullet imbedded in the wall behind it (R32). Three days later a slight

discoloration, a blue mark, was observed above Rosa's left eye (R34).

4. Sergeant Williams was recalled as a witness for the defense and related that after accused entered the house he remained in the truck for 15 minutes (R36). Accused did not return, so he entered the house to find out if the accused had "got any". He found accused upstairs talking to a girl, so he suggested that they leave as it was late, returned to the truck and fell asleep (R37). He heard no shots fired. In the morning, he awakened but the house was empty, so he drove the truck back to camp (R37). Accused's duty in the unit was that of the driver of the kitchen truck (R36). He was unable to say whether accused had his carbine with him or not (R40).

The accused, after being fully advised as to his rights as a witness, elected to testify in his own behalf (R42). He met Rosa Binder on the road before 10 May 1945. She waved to him and they talked a little together. He saw her again about five days later and stopped and talked and he asked her about sleeping with her. She told him yes (R45). So on the night of 9-10 May, he stopped at Rosa's house. Her brother let him in and called her. She came downstairs and after a few words led him upstairs and showed him the bed. He got in bed after undressing to his underwear and fell asleep and did not awaken until the next morning about 8:00 o'clock (R43). He denied that he had intercourse with her (R50). He was drunk at the time and sleepy (R51) and immediately fell asleep and did not awaken all night (R53). He denied that he had a carbine with him or that he fired any shots (R44).

5. The court recalled Eta Schwenflier as a witness and she again related she heard a car approach, a knock on the door, the window in the door was smashed, the accused entered her room with a carbine. He was drunk. He would say "come, come". She could not understand what he wanted her to do. He punched her mother on her breast. She managed to escape and ran down the stairs and outside where she was when she heard the shots fired. The mirror in Rosa's room was broken the next day. It was not broken before (R54-56).

6. Rape is the unlawful carnal knowledge of a woman by force and without her consent. The prosecution introduced competent substantial evidence that during the night of 9-10 May 1945, the accused, a stranger to Rosa Binder, came uninvited into her bedroom and by firing his gun, striking her, and pulling her about from bed to bed so intimidated her that she could only feebly resist his advances because of her fear of death or great bodily harm from the weapon, culminating in sexual intercourse. Under such circumstances, the court may properly and legally find the accused guilty of rape as charged. In defense, the accused claimed that he did not have any sexual relations with Rosa Binder.

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but merely got into her bed at her invitation and fell asleep. This conflict of evidence created an issue of fact which was within the court's exclusive province to determine. Rosa Binder's contention of rape was corroborated in many of its details by another witness. As it is sustained by the evidence, the findings of guilt will not be disturbed by the Board upon review (CM ETO 10742, Byrd).

7. The charge sheet shows the accused to be 25 years of age. Without prior service, he was inducted 3 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.

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AN 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA , 457,567). The designation of the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.lb(4), Sb).

William J. ... Judge Advocate
Earle ... Judge Advocate
Paul D. Miller Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3

28 SEP 1945

CM ETO 14615

UNITED STATES)
) v.)
Private First Class LEROY)
D. LEWIS (42060506) and)
Private JOHNNIE JERRO)
(38198496), both of 3459th)
Quartermaster Truck Company)

XII CORPS

Trial by GCM, convened at Regensburg, Germany, 19 June 1945. Sentence as to each: Lewis: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. Jerro: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Leavenworth, Kansas

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, 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, by direction of the appointing authority (R3), were tried together upon the following charges and specifications:

LEWIS

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Leroy D. Lewis, 3459th Quartermaster Truck Company, did at Rosenau, Germany, on or about 5 May 1945, aid and abet one Private Johnnie Jerro, 3459th Quartermaster Truck Company, in forcibly and feloniously against her will having carnal knowledge of Maria Graf.

JERRO

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

Specification: In that Private Johnnie Jerro, 3459th Quartermaster Truck Company, did, at Rosenau, Germany, on or about 5 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Graf.

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

Specification: In that * * * did, at Rosenau, Germany, on or about 5 May 1945, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Maria Graf.

Each accused pleaded not guilty. Two-thirds of the members of the court present at the time the vote was taken concurring, Lewis was found of the Specification, guilty, and of the Charge, not guilty, but guilty of violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, Jerro was found guilty of Charge I and Specification and, two-thirds of the members of the court present at the time the vote was taken concurring, guilty of Charge II and Specification. As to Lewis, no evidence of previous convictions was introduced. As to Jerro, evidence was introduced of two previous convictions for absence without leave in violation of Article of War 81, one by summary court and one by special court-martial for one day and six days respectively. As to Lewis, two-thirds of the members of the court present at the time the vote was taken concurring, and as to Jerro, three-fourths of the members of the court present at the time the vote was taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such places as the reviewing authority may direct, Lewis for ten years and Jerro for the term of his natural life. The reviewing authority approved the sentence, designated, as the places of confinement, the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as to Lewis, and the United States Penitentiary, Leavenworth, Kansas, as to Jerro, and forwarded the record of trial for action pursuant to Article of War 50g.

3. Prosecution's evidence:

Herr Xaver Graf and his wife, Maria, who live in Rosenau, Germany, were awakened about midnight on 5 May 1945 by two negro soldiers who came to their home, smashed the gate in the yard, entered the house and searched it throughout (R36,49-50,57-58,66). They demanded billets for 65 soldiers (R38,66). The taller of the two negroes

armed with a pistol pushed their daughter, aged 17, also named Maria, into her bedroom and forced her at the point of his gun to go to bed (R39,40). She did not want to take off her panties so he pulled them off. He then "put his private part, his penis, into my private parts". She had to comply with his wishes because "he hurt me with his knife and he threatened me with his pistol". He "put his penis twice into my mouth" (R41-42). Although she cried for help, her father was prevented from going to her aid by the smaller negro who threatened him with a pistol and guarded the door (R50-51). The smaller soldier then led him downstairs and told him to stay there "or I will shoot you" (R52).

Margarete Ulbrich and her two children also lived at the Graf home. She and her daughter were threatened by the smaller soldier with his pistol when they refused to come to him. She managed to escape from the dwelling (R56-59) and at an identification parade the following morning identified accused Lewis as the smaller of the two soldiers. She also identified him in court (R13,21,61).

Soon after the two soldiers entered her home, Frau Graf left and returned with two officers and an enlisted man from accused's organization, which had its command post a few hundred yards away. They at once entered Maria's room. She was lying on her back in bed with accused Jerro between her legs, his penis in his right hand and a knife in his left. He demanded that they "shut the mother fucking door", got off the bed and pulled out a revolver (R17-18,23,27-28). Blood spots were observed on the sheet in the center of the bed (R34-35). He was disarmed by one of the officers, returned to his organization and placed in arrest (R11-12,29; Pros.Exs. 1 and 2).

About 1000 hours 6 May 1945 Fraulein Maria Graf was examined by Captain Albion J. Kuzzier, MC, 613th Clearing Company, who found she "had been entered" within a 24 hour period previous to his examination. He found she had a hymeneal tear with a small contusion beneath it, which bled as a result of the examination (R47).

4. After their rights were explained (R74), both accused testified admitting their presence at the Graf home about midnight on 5 May 1945. According to Lewis, they knocked at the door and "the man came and he opened the door and he started to show everybody the rooms or something" (R76). He saw Jerro go into a room and say something "to the girl". While Lewis' testimony is not clear as to the sequence of events, it indicates that he then "went and hid back of the laundry" (R78) and later, as everybody seemed to be downstairs, he descended to find that

"They were all excited and everything. The man came running up to me and he said something about my comrade, he was trying to tell me my comrade was upstairs with his daughter or something, so I went back upstairs and I looked in the doorway and I told him to 'Come on, let's go', because the people were beginning to get all excited downstairs * * *" (R79).

He again tried to get Jerro to leave and when he would not do so, returned to his bivouac area (R50). He never pointed his pistol nor threatened anyone with it in this house (R89). He went with Jerro to the Graf home having "intentions of going out with a girl or something that night, that's all" (R82).

Jerro testified that earlier in the evening of 5 May two girls, one named Maria, came and stood near the motor pool. He talked with them and Maria asked for chocolate. He volunteered to get her some if she would let him come to see her. She agreed and pointed out her house to him. About midnight he and Lewis went to the Graf home where they knocked and were admitted by Mr. Graf. Asked about "any frauleins", Mr. Graf replied in the affirmative and led them all over the house. Seeing Maria Graf, Jerro took her to a room and described in detail the manner in which she voluntarily joined him in the act of sexual intercourse after he gave her the chocolate, kissing him, embracing him with her arms and legs and saying the act was "good, good". He denied forcing sexual relations upon her without her consent, denied inserting his penis in her mouth, denied seeing Lewis again after entering her bedroom and denied seeing any blood on the bed sheets (R92-102).

5. In view of the positive identification of both accused as the two colored soldiers at the Graf home on the night of 5-6 May 1945, it is clear that the evidence relating to the pre-trial identification of accused Lewis by Margarete Ulrich at the identification formation at his organization did not prejudice accused's substantial rights (CM ETO 6554, Hill; CM ETO 7209, Williams).

6. As regards Jerro, substantial evidence demonstrates that he committed the crimes of rape, as alleged under Charge I and Specification (CM ETO 4661, Ducote; CM ETO 12954, Burgess, et al), and sodomy as alleged under Charge II and Specification (CM ETO 1743, Penson) (MCM, 1928, par.149k, p.177).

7. The position of accused Lewis is somewhat different. He too was charged under Article of War 92, but as an aider and abettor rather than as an actual rapist. The Specification alleges that he "did * * * aid and abet" his fellow accused "in forcibly and feloniously against her will having carnal knowledge of Maria Graf". A similarly worded specification under Article of War 92 was upheld in CM ETO 5068, Rape and Holthus and again in CM ETO 4234, Lasker and Harrell. In both cases the Board of Review, citing many authorities, discussed fully the abolition of the distinction between principals and aiders and abettors by Federal Statute (sec.332, Federal Criminal Code, 18 USCA 550; 35 Stat.1152) and its non-recognition likewise in the administration of military justice. In the instant case, Lewis might properly have been charged with rape as a principal (CM ETO 3740, Sanders, et al, pp.23-24). However, as clearly shown in the cases above cited, it was not improper to charge him with the substantive offense of aiding and abetting the actual rape. The evidence clearly was sufficient to sustain the court's finding of guilty that he aided and abetted Jerro in the commission of rape. When the victim cried for help, Lewis prevented her father from going to her aid, threatened him with a pistol and guarded the door of the room where the crime was being committed. He could properly have been found guilty as an aider and abettor under Article of War 92 (CM ETO 5068, Rape and Holthus, and authorities therein cited). However, the court's action in finding him guilty as an aider and abettor under Article of War 96 was not improper under all the circumstances. The sentence is legal for the following reasons: The Table of Maximum Punishments does not prescribe any limit of punishment for the substantive crime of aiding and abetting the commission of the crime of rape. The nearest related offense is the crime of rape itself, for which a life sentence or a death sentence are alternative mandatory punishments (AW 92). While death is a legal punishment for rape it is not legal punishment for the separate substantive offense of "aiding and abetting" the commission thereof because Congress has not specifically authorized it (AW 43; MCM 1928, par.103a, p.92). The sentence however may include confinement for life or any period less than life. Confinement for ten years, therefore, is legal (CM ETO 3740, Sanders, pp.24-25).

8. The charge sheets show the following concerning the service of accused:

Lewis is 21 years two months of age and was inducted 17 December 1943 at Afis, New York City, New York.

Jerro is 35 years eight months of age and was inducted 28 July 1942 at Tyler, Texas.

No prior service is shown as to either accused.

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

10. As to Jerro, the penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). As to Lewis, the penalty for aiding and abetting the commission of the crime of rape "may include confinement for life or any period less than life" (CM ETO 3740, Sanders, et al). As to Jerro, confinement in a United States Penitentiary is authorized upon conviction of the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457, 567) and of sodomy by Article of War 42 and section 22-107 District of Columbia Code (CM ETO 3717, Farrington, and authorities therein cited). The United States Penitentiary, Lewisburg, Pennsylvania, should be designated as the place of confinement (Cir. 229, WD, 8 June 1944, sec.II, pars.1b(4), 3b). As to Lewis, the designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

B. R. Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. A. Conway Jr Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 5

23 AUG 1945

CM ETO 14625

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

v.

Private ROBERT L. FASSNACHT,
(35892316), Company A,
157th Infantry

) 45TH INFANTRY DIVISION

) Trial by GCM, convened at APO 45,
) U. S. Army, 16 June 1945. Sentence:
) Dishonorable discharge, total for-
) feitures, and confinement at hard
) labor for life. Eastern Branch,
) United States Disciplinary Barracks,
) Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 5
HILL, EVINS and JULIAN, 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 58th Article of War.

Specification 1: In that Private Robert L. Fassnacht, Company A, 157th Infantry, did, at or near Ramber-villers, France, on or about 28 October 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself at or near Luneville, France, on or about 14 January 1945.

Specification 2: In that * * * did, at or near Offwiller, France, on or about 19 January 1945, desert the service of the United States by absenting himself from his organization without proper leave with intent to avoid hazardous duty to wit: combat operations against elements of the German armed forces, and did remain absent in desertion until he was apprehended at or near Vesoul, France, on or about 2 February, 1945.

Specification 3: In that * * * did at or near Glonville, France, on or about 8 March 1945 desert the service of the United States and did remain absent in desertion until he surrendered himself at or near Toulon, France, on or about 7 May 1945.

He pleaded not guilty and, all of the members of the court present when the vote was taken concurring, was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. Seven-ninths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. Evidence introduced by the prosecution shows that at all times mentioned in the specifications accused was a private in Company A, 157th Infantry (R4,5,6).

An extract copy of the morning report of accused's company for 31 October 1944, signed by the personnel office, received in evidence over objection by the defense for the stated reason that the pertinent entry was not signed by the organization commander, showed accused "Duty to AWOL" as of 28 October (R4; Pros.Ex.A). On that date accused was due back from Rambervillers, France, a rest center nearby, where he had gone on a pass. Staff Sergeant Lane of accused's company was familiar with this pass situation because it was his turn for a similar leave as soon as accused returned. Lane testified that, except for four days early in November when he - Lane - was in a hospital (and could not know), accused was not with his organization between 28 October 1944 and the following 14 January (R4-6).

On 19 January 1945, accused's company was in a defensive position, under rifle and artillery fire, in some foot hills, near the town of Zinswiller and a couple of miles from Offwiller (France) (R8,9). Morning report entries, each dated 7 February 1945, signed by the personnel officer, and received in evidence over objection, showed accused "Duty to AWOL" as of 19 January 1945; and "AWOL to Pres Conf" as of 2 February 1945 (R4; Pros.Ex.A).

On 8 March 1945, accused absented himself from his company at Glonville, France, an amphibious training center. He was missing at morning roll call. The area was then checked to locate accused but he could not be found. The morning accused left, his company started in on amphibious training. Sergeant Makowski, of accused's company, who knew of

accused's initial absence on 8 March, went to the hospital, and did not know anything of accused's actual absence or presence during the subsequent four or five days. But this witness did know that accused was absent from his company during the period between the 14 or 15 March 1945 and 7 May (R6-8). Morning report entries, signed by the personnel officer, received in evidence over objection, showed accused "Duty to AWOL" on 9 March 1945 and "AWOL to Pres Conf" on 19 May 1945 (R4; Pros.Ex.B).

Sometime, the last of May, accused voluntarily made a statement to the officer investigating the charges against him. He said that on or about 31 October 1944 he went to the rest area at Rambervillers and that he "took off" from there, that he ^{was} picked up by the military police after three or four days and returned to his company kitchen and that from that place, within a couple of hours, he again "took off", going to different towns until he surrendered himself about 12 January 1945. After his return to the company and while in the kitchen about 19 January, some shells started coming in and he again left; that he went around to quite a few more towns and was apprehended on 26 January. When he was returned to his company, he said he found it "in a holding position"; that after volunteering to go up on the line with his company and after serving with it there, the company was pulled back to a rest area for two and a half or three weeks and that when the company was preparing to return to the line again "he took off before they did". His only known reason was "he guessed because he couldn't take it". The company was in Glonville at that time. He was finally "picked up by the MP's 7 May 1945" (R9-12).

4. Sergeant Lane, recalled as a defense witness, said that "had the accused come back to the company kitchen, say four or five days after he was reported to have left the company" he probably would not have known it since the company kitchen was in Rambervillers and not in their position area (R12,13).

5. Accused advised fully as to his rights as a witness, testified under oath. He joined his present organization at the Anzio Beachhead on 8 March 1944 when it had just come off the line and was in reserve. He took part "in the push out to Rome", was with his unit when it made the invasion of Southern France and later when it crossed the Moselle River near Epinal.

6. The several absences of accused were shown by entries in the morning report of his company. These entries were authenticated by the personnel officer rather than by accused's company commander. The first entry was made 31 October 1944, at or near Ramberviller, France. The remaining entries were made subsequent to 3 January 1945. The defense objected to these entries on the ground that they were not legally authenticated. All were received in evidence over this objection.

A change was made in Army Regulation 345-400, under date of 1 May 1944, whereby the signing of morning reports was confined to the commanding officer of the reporting unit, or "the officer acting in command" (par.42, AR 345-400, 1 May 44). This change was in effect when the first morning report entry (Pros.Ex.A) was signed by the personnel officer on 31 October 1944 and remained in effect until 3 January 1945, when Army Regulation 345-400 was again revised, with the following provision:

"Morning reports will be signed by the commanding officer of the reporting unit, or by the officer designated by the commanding officer (AR 345-400, 3 January 1945, par.43a).

By virtue of this change of 3 January 1945 and under the authority of Circular 119, European Theater of Operations, 12 December 1944, Section IV, morning reports were authorized to be signed by the unit personnel officer (CM ETO 7686, Maggie; CM ETO 14357, Keller).

From the foregoing, it appears that the morning report entry for 28 October 1944, Prosecution's Exhibit A, signed by the personnel officer was not competent to establish the date of accused's initial absence under Specification 1. The remaining entries, made subsequent to 3 January 1945, were properly received in evidence (CM ETO 6951, Rogers).

Specification 1 alleges that accused deserted the service on or about 28 October 1944 and remained absent in desertion until he surrendered himself about 14 January. The date of initial absence was properly established by the testimony of Sergeant Lane, who by his testimony showed that accused, theretofore absent on pass, was due to return that day but failed to return and was not with his company until 14 January. This evidence was sufficient to support accused's admission that he absented himself without leave about that time. Accused's words were that he "took off". This expression has achieved in this war the definite connotation of departing without leave that was found in the phrase "over the hill" as used in the last war. This initial absence alleged in Specification 1, and its unauthorized character was thus established independently of the incompetent morning report entry. Accused told the investigating officer that he was returned to his organization by the military police three or four days after his initial absence, 28 October, and remained there about two hours before he left again. However, accused did not repeat this when he testified under oath, and the court had a right to disregard this statement to the investigating officer as self-serving. The court was justified in finding that accused was absent without leave from his organization for a period of two and one-half months, and from this protracted absence, occurring in an active zone of military operations, it had the right to infer intent to desert and to find him guilty as charged (CM ETO 1629, O'Donnell).

Specification 2 alleges absence with intent to avoid hazardous duty. This specification was proved. On the date of accused's initial absence his company was in a defensive position, under rifle and artillery fire. Accused's place of duty, his duty with his company, involved hazard. The morning report entry for that date, properly received, shows that accused left his company. Accused himself admitted this unauthorized absence. The period which elapsed before accused was returned to duty, as shown by pertinent morning report entry, varies somewhat from the period of absence as established by accused's admission. This variance is immaterial in a charge of desertion which involves Article of War 28. The day of initial absence and the intent at that time may sustain the charge. There was sufficient, competent evidence to warrant the court's findings of guilty of this specification under the charge (CM ETO 7230, Magnanti; CM ETO 7339, Conklin; CM ETO 5958, Perry and Allen).

Specification 3 alleges that accused did desert the service on or about 8 March 1945 and remained absent in desertion until he surrendered himself on or about 7 May. The absence without leave and its termination was properly proved as alleged. The prosecution, in proving this specification, proceeded upon the theory that accused absented himself from his organization without leave with intent to avoid hazardous duty. This intent was proved by the prosecution and admitted by accused.

7. The charge sheet shows that accused is 20 years of age. He was inducted 5 August 1943 at Indianapolis, Indiana, without 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, except as noted herein, were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence.

9. The penalty for desertion in time of war is death or such punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec. VI, as amended).

John Hamilton Judge Advocate

Joe L. Willis Judge Advocate

Anthony Julian Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO.1

CM ETO 14632

UNITED STATES

v.

ARTHUR H. LANG II (O-825844),
Civilian Technician serving
with Army Exchange Service,
outside or the continental limits
of the United States

SEINE SECTION, COMMUNICATIONS ZONE,
EUROPEAN THEATER OF OPERATIONS

Trial by GCM, convened at Paris,
France, 1, 2 March 1945. Sentence:
Dismissal from service of United
States Government, total forfeit-
ures, and confinement at hard
labor for five years, United
States Penitentiary, Lewisburg,
Pennsylvania.

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

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

CHARGE: Violation of the 96th Article of War,
Specification 1: In that Arthur H. Lang II,
civilian Technician serving with Army Ex-
change Service, Army of the United States
outside the continental limits of the
United States of America, did, at Paris,
France, on or about 28 November 1944, with
intent to defraud willfully, unlawfully
and wrongfully make and utter as true and
genuine a certain written instrument in
words and figures as follows:

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HEADQUARTERS
COMMUNICATIONS ZONE
EUROPEAN THEATER OF OPERATIONS
U.S. ARMY
ARMY EXCHANGE SERVICE
APO 887

shl/wt 28-11-44

TO WHOM IT MAY CONCERN:

This is to certify that the bearer Monsieur Di Rosa Dominique of 7 Rue Moel Liquillon, Epinay/Seine is an authorized agent working directly for me as a procurement specialist in the merchandise field. He had been authorized to locate and purchase all merchandise which may be used for the benefit and interest of the United States Army.

Whatever is sold to him is for the ultimate use and benefit for any and all branches of the United States Army and is not to be used for resale to any French dealers.

He is properly registered and equipped with the necessary travel permit and car registration cards so as to enable him to travel anywhere.

s/ A.H. Lang II
A.H. LANG II
Captain (Assim. rank)
A.E.S. Com Z.
A.P.O. 887.

a writing of a public nature which might operate to the prejudice of another, which said instrument was, as he the said Arthur H. Lang II then well knew, falsely made and signed.

Specification 2: In that * * * did, at Paris, France, on or about -- November 1944, wrongfully and in violation of Letter AG 121 Op GA, Headquarters European Theater of Operations, dated 23 September 1944, Subject: "Prohibition Against Circulating, Importing, or Exporting United States and British Currencies in Liberated and Occupied Areas and Certain Transactions Involving French Currency Except Through Official Channels," participate in a transaction involving the purchase of French francs against other currencies except through official channels, by then and there purchasing francs by use of British Currency in amount of £ 41, outside official channels and at a rate in excess of the official rate of exchange of two hundred francs per British pound.

Specification 3: In that * * * did, at Paris, France on or about 30 November 1944, wrongfully, willfully and feloniously, with intent to defraud falsely make in its entirety a certain Informal Routing Slip in words and figures as follows:

<u>INFORMAL ROUTING SLIP</u>				
ARMY TECHNICAL LIASON Hq Cx ETO -- APO 887 U.S. Army File: AR:5611 T/L-o-221145 Subject: PURCHASE OF COGNAC FOR AMERICANS				
No.	From	To		Initial & date
	J.C. Hendy Deputy T/L	Col. Mills Chief Div.	Please read the following and state your view. Request authority to purchase cognac for American soldiers. Have source of supply available. Can set up necessary mechanism to procure.	s/Joshua C. Hendy 11.30.44
	Col/Mills Chief Div.	Capt. Hendy Deputy	READ AND GRANT AUTHORITY	s/Approved Col.Mills 1-2-44.
SEAL	s/ O.K. Copy Col. Mills			

which said Informal Routing Slip was a writing of a public nature, which might operate to the prejudice of another, and was then known by the said Arthur H. Lang II to be false, fraudulent and forged.

Specification 4: In that * * * did, at Paris, France, on or about 1 December 1944, with intent to defraud willfully, unlawfully and wrongfully make and utter as true and genuine a certain shipping ticket in words and figures as follows:

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SHIPPING TICKET

War Department
Q.M.C. Form No. 434
Revised June 30, 1942

CONSIGNOR:
DATE SHIPPED OR DELIVERED 12.44 MONTH OF DECEMBER

Ship To--- AUTHORITY or Reg. No.
ARP 11156567 JKL.-99 AR-7831
SPECIFIED PURCHASERS Transportation Cost of: \$ None Chargeable To
P/A No. _____

Quantity Ordered	Quantity Shipped	Stock No.	Article	Unit	Unit cost	Total Cost
2000 bttls.		cases	XXX-*** Assorted Brands		1	

Articles listed in column "ordered" have been received unless otherwise noted in Column "shipped"
Consignor's Vou. No. Resliq
Consignee's Vou. No. -
Number of Sheets ---

s/ J.C. Hendy Deputy Chief AIF
Name Rank Organization

which said shipping ticket was a writing of a public nature, which might operate to the prejudice of another, and was then known by the said Arthur H. Lang II, to be false, fraudulent and forged.

Specification 5: In that * * * did, at Paris, France, on or about 1 December 1944, with intent to defraud willfully, unlawfully and wrongfully make and utter as true and genuine a certain Informal Routing Slip in words and figures as follows:

INFORMAL ROUTING SLIP - HQ CQM Z ETOUSA

To	From	Date	Subject:	File Classification: AG
12	Depositor	12.1.44		To deliver and procure 20000bttls Assorted XXX Cognac at once.
	Please Deliver at once.			Approved s/J.C. Hendy Deputy 11.1.44
			-Checked-	O.K. s/J. Spacer

which said Informal Routing Slip was a writing of a public nature, which might operate to the prejudice of another, and was then known by the said Arthur H. Lang II, to be false, fraudulent and forged.

Specification 6: In that * * * did, at Paris, France, on or about 2 December 1944, willfully, unlawfully and feloniously with intent to defraud, falsely make in its entirety a certain Requisition in words and figures as follows:

REQUISITION

SOC. USA. ETO

Form No. 500

En Commander

TO

No. of sheets 1 sheet No. 1

Requisition No. ANE 122211 Date 2-12-44 Period December

Ship to Joshua C. Hendy T/1 #9898765

A.T.F. A.P.O. 887

Requisitioned by: Deputy chief lia, div. Approved by Chief Lia. Div.

ZONE	ZONE	ARTICLE	SIZE	UNIT	REQUIRED	ON HAND	BAL REQUIRED
1	11	Cognac	1/5th	—	5000	—	20000
thy.	676				bttls		bttls.

Approved

s/ J.C. Hendy.

Cognac Purchaser 5000

O.K. s/ W.L. Stacher

Chief

SEAL.

Specification 7: In that * * * did, at Paris, France, on or about 17 December with intent to defraud willfully, unlawfully and wrongfully make, forge and utter as true and genuine a certain written instrument in words and figures as follows:

TIND DIV. SECT 11
HEADQUARTERS
COMMUNICATION ZONE
U. S. ARMY

To Whom it may concern:

17-12-44 kej/ast

This is to certify that the bearer Monsieur Daniel Corral of 147n fg. Passionniere is a duly authorized agent working directly for me. He is empowered to locate and purchase any and all quantities of COGNAC which we may require.

Any courtesies extended him will be greatly appreciated.

s/ Joshua C. Hendy
JOSHUA C. HENDY
Deputy Chief ADMIN. DIV.
P.S. SALTHOUSE
CHIEF ADMIN. DIV.

a writing of a public nature which might operate to the prejudice of another, which said instrument was, as he the said Arthur H. Lang II, then will knew falsely made and forged.

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 of the "United States Government", to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence but reduced the period of confinement to five years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50.

3. a. Evidence for the prosecution establishing the status of accused was substantially as follows:

On 18 September 1944 at New York City, accused entered into a contract of employment as an accountant with the Army Exchange Service, European Theater of Operations (R5-6; Pros.Ex.1). The contract provided in material part: that it should endure for one year from the date of accused's departure from the United States; a salary of \$350 per month; a normal work of 48 hours with overtime compensation at established rates; furnishing of living quarters and subsistence, or monetary allowances therefor; contract contingent upon its final clearance by the War Department and approved by competent authority. Paragraph 12 of the contract provided:

"As a person accompanying or serving with the armies of the United States in the field in time of war, either within or without the territorial jurisdiction of the United States of America, Employee is, and shall be subject to the provisions of the Articles of War".

The contract was signed for the employer by R. P. Kuhn, Colonel, AUS, Fiscal Officer (Pros.Ex.1). It was admitted in evidence without objection by the defense (R8).

About 15 October 1944, accused reported for duty with the Army Exchange Service, 21 Avenue Kleber, Paris, France (R6), a special staff section under the control of G-1, Communications Zone, European Theater of Operations, and was assigned as an accountant with the Fiscal Division. The function of that division was to audit the accounts of each Army Exchange unit operating in the theater (R7). The punitive articles of war were read and explained to accused and other civilian technicians on 20 October (R8; Pros.Ex.2).

B. Article of War 2 reads in pertinent part as follows:

"The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: ***.

(a) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles".

Army Regulations 210-65, WD, 1 June 1944, in effect at material times, provides in pertinent part as follows:

"The Army Exchange Service has jurisdiction over and provides staff supervision of the operation of all Army exchanges, and consists of such officers, enlisted men, and civilian personnel as are necessary.

(b) This service will have jurisdiction over, and will be extended to, all exchanges of the Army through appropriate personnel on the staffs of commanding generals of service commands and commanding officers of posts, camps, stations, and installations, at whose directions exchanges have been established"(par. 11a, b).

The Army Exchange Service is an instrumentality of the United States, an integral part of the War Department, and is in all respects subject to military control and direction (Of; Standard Oil Company of California v. Johnson: (1942) 316 U.S. 481, 483, 485, 36 L.Ed. 1611, 1615-1616). General Orders No. 16, 21 March 1943, Headquarters European Theater of Operations, designated the Services of Supply (now Communications Zone), ** European Theater of Operations, as the Commanding General's agency for administrative service and supply of the theater and placed the Army Exchange Service under the Commanding General, Services of Supply, European Theater of Operations, for coordination, supervision, operational control and direction (see CM ETO 1538, Rhodes).

* Redesignated Theater Service Forces.

The court was authorized, as is also the Board of Review, to take judicial notice of Army Regulations and directives of Headquarters European Theater of Operations (Ibid., and authorities therein cited). Judicial notice may also be taken of the facts that at all relevant times the United States was at war with the Axis powers (Act Dec. 8, 1941, Public Law 328, 77th Cong. 1st Sess.; Act Dec. 11, 1941, Public Law 331, 77th Cong. 1st Sess.; Act Dec. 11, 1941, Public Law 332, 77th Cong. 1st Sess.; 55 Stat 795-797); that the United States maintained military establishments at Paris, France; that the office of the Army Exchange Service, 21 Avenue Elber, was one of those establishments; that military personnel were on duty at said office; and that at such office was a detachment of civilian employees of which accused was a member, which was engaged in work directly connected with the furnishing of various types of supplies to United States Army forces.

It is thus manifest that jurisdiction over the person of accused by military courts existed under the clause of Article of War 2(d) declaring that

"all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States"

are subject to military law irrespective of whether or not a state of war subsists. As further evidence by the provisions of his employment contract above summarized, he was also within the subsequent clause of the article which specifies that

"in time of war all * * * persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States".

are so subject.

The Board of Review (sitting in Washington) has held that a civilian employee of a post exchange in the continental United States was "in time of war serving with an Army of the United States in the field" and therefore subject to trial by court-martial under Article of War 2(d) (CM 120406 (1918), Dig. Op. JAG, 1912-1940, sec. 359 (13), p. 167). Accused was beyond doubt "serving with the armies of the United States in the field" and therefore subject to the jurisdiction of courts-martial and to the Articles of War. The Board of Review is of the opinion that the record of trial established the court's jurisdiction over the person of accused and his amenability to and responsibility under the Articles of War (In re Di Bartolo, (SDNY 1943) 50 F. Supp. 929; Ex Parte Gerlach, (SDNY 1917) 247 Fed. 616; Ex Parte

Falls, (HJ 1918) 251 Fed. 415, CM ETO 1191, Acosta, and authorities therein cited). In view of the foregoing, the defense objection to the admission in evidence of the contract of employment on the ground that it failed to mention specifically the United States Army as the employer was not well taken and the contract was properly admitted in evidence by the law member (R6,8). The failure to object to the document on the ground that its genuineness was not shown might properly be regarded by the court as a waiver of that objection (MCM, 1928, par. 116b, p.120). It must be observed, however, that although the execution and existence of the employment contract between accused and the Army Exchange Service are relevant to his status as accompanying or serving with the Army notwithstanding the failure of the contract to mention the Army, nevertheless military jurisdiction over accused would exist independent of such contract if such status were established without reference thereto. Jurisdiction over civilians under Article of War 2(d) is not dependent upon their agreement, as the test is solely an objective one, independent of their knowledge or intent (McCune v. Kilpatrick, (Ed Va. 1943) 53 F. Supp. 80,85,89). The contract was evidence of, rather than the basis of, the court's jurisdiction. That basis was accused's assumption of duties with the Army, occasioned by and under the contract.

4. Prosecution's evidence with respect to the merits of the case was substantially as follows:

Specification 1 of the Charge:

In October 1944, accused met Madame Maria Javelle, who had been fined for dealing in the black market, and lived with her in Paris for about two months until the time of his arrest (R9-10,14) on 19 December (R30). About the end of November he was in need of cognac for his friends (R10,14) and was informed by Monsieur Domenico Di Rosa, an acquaintance of Madame Javelle in Paris, that he could obtain the same for accused at the official Government price, if accused furnished him with the necessary papers (R15,16). Thereafter accused gave the woman the document set forth in Specification 1, dated "2211-44" bearing the letterhead "Headquarters Communications Zone, European Theater of Operations, U.S. Army, Army Exchange Service, A.P.O. 887", signed by accused in his own name and title, and certifying that "Di Rosa Dominique" was his authorized agent to purchase merchandise to be used solely for the benefit of the United States Army (R10; Pros.Ex.3). She in turn handed the document to Di Rosa early in December (R10,15-17) and the letter stated he would "present himself at a firm" in order to endeavor to obtain 300-500 bottles of cognac for accused's friends. It was arranged that accused would pay the

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official price of 230 francs per bottle at delivery. About eight days later De Rosa informed accused that with the document given to him he could not obtain cognac and returned it to Madame Javelle or accused. Di Rosa never endeavored to obtain cognac by means of the letter, which was valuable only for introductory purposes (R10,18). On 20 December, the day following accused's arrest, the document was found in accused's room in Madame Javelle's home (R33).

Specification 7 of the Charge:

When Madame Javelle learned that Di Rosa was unable to procure cognac, she asked one Daniel Corral if he could do so. He stated that he could provided he was furnished with the necessary papers. Sometime before 18 December accused gave her the document set forth in Specification 7, dated "7-12-44", bearing the letterhead "TIND Div, Sect 11 Headquarters Communications Zone U.S. Army", signed "Joshua C. Hendy Deputy Chief Admin. Div.", and certifying that Corral was his duly authorized agent empowered to purchase all cognac "which we require" (R13,18; Pros. Ex. 8). The day after delivery of this document to Madame Javelle, Di Rosa advised her he could probably obtain the cognac so she kept the document, which was never delivered to Corral (R 13). It was turned over to an American military police officer by a commissioner of the French Economic Police after accused was arrested (R34).

Specification 3, 4, 5 and 6 of the Charge:

About two weeks after Di Rosa returned Pros. Ex. 3 (see Supra with reference to Specification 1) (near the middle of December), he advised Madame Javelle that "a friend had cognac" and he could give satisfaction to accused if furnished with papers to release the same. Accused agreed to deliver to her the necessary documents on condition that they would be returned to him (R 11,19). On 18 December a meeting was held at the home of a Madame Malinowsky, attended by her, Di Rosa, Madame Javelle, accused, and one Basil Socoloff (R12,19,24). At that meeting cognac was offered to accused at a price of from 113 to 230 francs per bottle. He desired delivery of from 250 to 500 bottles (R13,24). It was agreed that Madame Javelle would produce the papers the next morning and that the cognac would be delivered thereafter on the same day (R12). Accordingly, on the morning of 19 December, accused handed to her the following papers (R10-11):

Pros. Ex.4, mimeographed Requisition, "Ben Command", dated 2-12-44, directing shipment to "Joshua C. Hendy, A.T.F.A.P.O. 887"; of 5000 bottles (1/5 quart) of cognac, balance required 20000 bottles, stated

to be requisitioned by "Deputy chief lia, Div." and approved by "Chief Lia. Div.", signed "Approved J.C. Hendy Cognac Purchaser 5000 O.K. W.L. Stacher Chief", and bearing a red ink seal "U.S. Army Allied Expeditionary Forces, SHAEF" (set forth in Specification 6);

Pros. Ex.5, mimeographed Informal Routing Slip, "Army Technical Liason Hq. CZ ETO - APO 887, Subject: Purchase of Cognac for Americans" from "J.C. Hendy Deputy T/L" to "Col. Mills Chief Div" stating "Please read the following and state your views. Request Authority to purchase cognac for American soldiers. Have source of supply available. Can set up necessary mechanism to procure," signed "Joshua C. Hendy 11-30-44", and from "Col/Mills" to "Capt. Hendy" stating "Read and grant authority", signed "Approved Col. Mills 1-12-44", bearing the same inked seal as Pros.Ex.4, and further signed "Checked thru -18-12-44 JC" and "OK Copy Col Mills" (set forth in Specification 3);

Pros. Ex.6, printed Shipping ticket, on War Department QMC Form No. 434, dated "12-1-44" covering 20000 btls(ordered) ASSORTED BRANDS", have been received unless otherwise noted in column 'Shipped'", signed "J.C. Hendy, Deputy Chief of A.T.F." (set forth in Specification 4; and

Pros. Ex.7 printed Informal Routing Slip - Hq FE COM Z ETOUSA dated "12-1-44" to "T/L" from "Depositor", "To deliver and procure 20000 bottle. Assorted *** Cognac at once. Please deliver at once", signed "Approved J.C. Hendy Deputy 12-1-44" and "checked O.K. J. Spacer" (set forth in Specification 5).

The foregoing exhibits were received in evidence, the defense stating there was no objection, as was Pros. Ex.9, certificate dated 18 January 1945 by Robert H. Garretson, Lt.Col, A.G.D., Asst. Adjutant General, European Theater of Operations, to the effect that no officers

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with the following names appear in the locator file of Central Machine Records Unit, Headquarters European Theater of Operations:

Joshua C. Hendy
J.C. Hendy
J.C. Hardy
Joshua C. Hendy (R 35).

At about 0945 hours on that date (19 December), Madame Javelle, accompanied by Scooloff and Di Rosa, brought Pros. Exs.4-7 to the office of one Michael Botcharoff, to whom she presented them, and asked for 500 bottles of cognac (R11,14,19,25,26,28). He saw that they were forged and proceeded with them to the Majestic Hotel and thence to the Criminal Investigation Division, which referred him to the French Economic Control, a governmental agency charged with the duties of controlling prices and suppressing black market activities (R26,27-28). At 1210 hours Botcharoff returned to his office with the representatives of the French Economic Control (R26). At about 1230 hours accused arrived at Botcharoff's office and when he discovered that Madame Javelle had been arrested by the Economic Control, proceeded with him to that office in order to liberate her. He was then apprehended, evidently by First Lieutenant Gerald Cantor, Corps of Military Police, of the 5th Criminal Investigation Detachment (R30, 32), to whom the Economic Control had telephoned in order to have him determine whether or not the documents (Pros.Exs.4-7) were genuine, and to whom they were delivered (R33). Botcharoff testified that at the 0945 meeting they discussed with Madame Malinowsky and Scooloff the possibility of procuring 6000,000 bottles of cognac in lots of 10,000 or 20,000 bottles, at a commission of five francs per bottle, to be split among them, but evidently neither Madame Javelle nor accused was included in the deal (R28-29). No cognac or liquor was ever obtained by any of the documents(R13):

Specification 2 of the Charge:

Sometime in November 1944 at Paris, accused requested Nicholas Oglou to perform a favor either for him or for his friends by exchanging pounds Sterling for French francs. In exchange for £41, he gave accused 20,500 francs (R20-23). Oglou at one time made a loan of 8,000 francs to accused "for cognac to be paid to a lieutenant" (R22). The court took judicial notice that the authorized rate of exchange was approximately 200 francs per pound(R23).

With respect to all specifications:

On the day after accused's apprehension, Lieutenant Cantor warned him of his rights under Article of War 24, and accused, who understood his rights, made a written statement substantially as follows:

Dominique (Di Rosa) stated he could obtain any amount of liquor if accused could give him a statement saying he was speaking for an American. He wished a "bon de commande", but accused states he had no authority to issue that. Di Rosa said he needed it to show the quantity desired and requested accused to put down 5000 bottles, on which he could draw any time. Accused wrote fictitious names on the documents to avoid identity. He wished the documents to be returned, as was done because no cognac was received (R 31). On 18 December a flight lieutenant told accused he wished cognac for a new officer's club for Christmas. The Russian woman (Madame Malinowsky) stated she needed something to show Americans were the buyers. Accused insisted that the documents be used only for identification purposes and that they should be returned to him, as was agreed. He gave the documents to Madame Javelle on 19 December for such purposes. The exchange of 42 francs was made for two friends (R31-32).

In a supplemental written statement dated 22 December, still understanding his rights, he said the only activities from which he derived a profit were his share in the 441, which amounted to about 4300 francs, and sales of champagne and cognac amounting to 1900 francs (R33).

5. After his rights were explained to him, the accused elected to be sworn as a witness in his own behalf and testified in material substance as follows:

Before his present position he worked in a war plant and organized a scout pack for boys in New York City. He left in his senior year at New York University night school to come overseas under the contract in question to do his part in essential war work. Life in the Army, which it virtually was, was a vast change for him. He was impressed by the haphazard manner of handling accounts in the Army. He also learned, from contacts, of "the French way of doing business" (R37-38).

An Air Corps lieutenant told him his group was planning to open an officers' club at Christmastime. The officer said they had to pay 700 francs per bottle. Accused told him he would endeavor to obtain cognac for him at 250-300 francs, the price he heard Americans were paying. He accordingly asked his landlady, Madame Javelle, where he could procure about 500 bottles, the desired amount, and through her met Di Rosa, who stated he needed a letter of representation to present to police or FFI if necessary. Accused gave him this and later, realizing his indiscretion, asked the woman to get it back for him. On 18 December the lieutenant arrived and stated he had collected money and had a truck, so accused told the woman it was an urgent matter to obtain the cognac (R39). At Madame Malinowsky's apartment she told him "requisitions" were needed to obtain cognac and he agreed to furnish them, but later told Madame Javelle his intent was not to do so. Di Rosa and she subsequently told him the amount should be 20,000 bottles, which made him suspect black market operations were involved,

in which he wanted no implication. The following day he made up five instruments. He knew how to issue a bona fide requisition, but as he had no desire to pass any, he devised a form which he thought would convince the seller that Madame Javelle was not buying for herself. He especially instructed her not to release the documents. He gave them to her because he could not that morning contact the seller who needed the morning hours to get the cognac ready for the lieutenant. About noon the officer arrived and a cused proceeded with him to Botcharoff, whom accused informed that the man was ready to take delivery of the cognac. Botcharoff then accompanied them to Lieutenant Cantor.

"It was absolutely stupid of me to try to help anyone when I should have been minding my own business" (R40).

He had nothing to do with the arrangement to procure 600,000 bottles of cognac or the five per cent commission. He felt that if he worked eight hours a day he could do as he wished.

Because of general disregard for theater directives, he wondered if any was at all operative. He and a friend decided they would buy francs on a per with the French and accused sold ~~141~~ for two friends, each of whom gave him one-half the profit, later confiscated by the CID. "I was aware then of violating a Theater directive or the implication behind it". All his life he attempted to do more than his share and his reputation was excellent (R41). He would like to donate any profit made to any needy person or organization.

He prepared Pros. Ex. 3, which was returned and never used, on or before 28 November 1944, and Pros. Exs. 4-7 on 18 December. He drew the stamp seal with pen and ink, and used fictitious names so as not to be connected with the black market. He personally was to get no cognac or profit at all. He did not become suspicious until the meeting with Madame Malinowsky. The transaction was intended merely as a favor to the lieutenant.

His testimony as to the Corral paper (Pros. Ex. 8) accorded with that of Madame Javelle. It was prepared about 18 December (R42-43).

6. Specifications 1,3,4,5,6,7, of the Charges:

a. Accused was charged in Specifications 1,4,5 and 7 with willfully, unlawfully and wrongfully, with intent to defraud, making (also forging in Specification 7) and uttering as true and genuine the

instruments set forth, writings of a public nature, which might operate to the prejudice of another, then well known by accused to have been falsely made and signed (Specification 1), to be false, fraudulent and forged (Specifications 4,5), to be falsely (sic) made and forged (Specification 7). He was charged in Specifications 3 and 6 with willfully, unlawfully (wrongfully in Specification 3) and feloniously, with intent to defraud, falsely making in their entirety the instruments set forth. Specification 3 further alleged that the instrument was a writing of a public nature, which might operate to the prejudice of another, then known by accused to be false, fraudulent and forged. Specification 6 omits such allegation.

Although the Charge is designated a violation of the 96th Article of War, Specifications 3 and 6 and substance follow the form of specification of common law forgery in violation of Article of War 93 (MCM, 1928, App.4, Form 97m p.250). This irregularity, however, is immaterial, as offenses in violation of the latter article were stated (*Ibid.*, par.28, p.18; CM ETO 2005, Wilkins and Williams, and authorities therein cited). Each of Specifications 1,4,5, and 7, however, combines with the statement of such offense the allegation of uttering the forged instrument, which manifestly states an offense in violation of District of Columbia Code, sec.22-1401 (6:86), and thus of Article of War 96 and follows as to that allegation the form of specification prescribed therefor (MCM, 1928, App.4, Form 161, pp.256-257). At common law, forgery and uttering were different substantive crimes (Reid v. Aderhold, (CCA 5th 1933) 65F. (2d) 110,112). Technically, therefore, each of the last mentioned specifications alleges two offenses: viz., forgery and uttering a forged instrument in violation respectively of Articles of War 93 and 96. While this is not strictly good pleading (MCM, 1928, par.29b, p.19), the failure of the defense to object or move with respect thereto may be regarded as a waiver of any defect (*Ibid.*, par.64a, p.51), particularly where the criminal acts alleged in the same specification form part of the same transaction (Winthrop's Military Law and Precedents (Reprint, 1920), p.143; CE ETO 13707, Housel). In any event, duplicity in an indictment is cured by verdict and is not thereafter subject to attack (Greater N.Y. Live Poultry Chamber of Commerce v. United States (CCA 2nd, 1931), 47 F.(2d) 158, cert.den. (1931) 285 U.S. 837, 75 L.Ed. 1448).

b. Forgery as denounced by Article of War 93 is thus defined:

"Forgery, at the common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability" (2 Bishop's Criminal Law, se.523;

37 CJS, sec.1, p.31: I Bouvier's Law Dictionary (Rawle's 3rd Revision) 1283; Ex Parte Hibbs, (D.C. Ore. 1896) 26 Fed. 421,432; Milton v. United States, (App.D.C. 1940) 110 F. (2d) 556,560).

It is thus defined in the Manual for Courts-Martial, U.S. Army, 1928:

"Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice" (par.149j., p.175).

The evidence established accused's guilt of forgery of the instruments set forth in Specifications 3-7, inclusive, which were received in evidence (Pros.Exs.4-7, incl.). He admitted both in his pre-trial statement, of whose voluntary nature there was adequate evidence, and in his sworn testimony that he composed the forms himself and placed fictitious names thereon to conceal his own identity. There was also other sufficient evidence of the fictitiousness of the name "Joshua C. Hendy" (CM ETO 2273, Sherman). The signing of a fictitious name may constitute forgery (37CJS, sec.10, p.39). The instruments were clearly falsely made.

That they were made with intent to defraud, and essential element of the offense (37 CJS, sec.4, pp.34-35), might properly be inferred from the proven facts that accused knew the documents were spurious and delivered them to Madame Javelle with the intent that they should be used as if genuine in order to obtain cognac. A general intent to defraud is sufficient; it is not necessary to show that the intent was directed at any particular person (2 Wharton's Criminal Law (12th Ed. 1932), sec. 924, pp.1228-1229), and the general intent may be inferred from an act in relation to the spurious instrument having capacity to defraud (Ibid.), viz., delivery to Madame Javelle.

The instruments were such that they might apparently, if genuine, be of legal efficacy or the foundation of a new or altered legal liability. Orders, demands, warrants and requests for goods are all subjects of forgery provided they possess some efficacy to defraud or prejudice another (37 CJS, sec.26, p.49). Various types of tickets, powers of attorney and sales slips are in the same category (Ibid., secs.35,36, pp.55-56). Genuine documents, of the nature of which these purported to be, were required to be furnished by accused in order to obtain cognac at a certain price. Of necessity the seller of the cognac at that price and others would rely, as accused was well aware, upon the genuineness of the documents. Their falsity of ne-

cessity, therefore, was calculated to defraud or prejudice those persons. Moreover, the documents, taken all together, were such as to create an apparent liability on the part of accused's principal, the Army Exchange Service, to pay for the cognac.

Neither the fact that accused intended no harm by the delivery of the documents (2 Wharton's Criminal Law (12th Ed. 1932), sec.925, pp.1229-1230) nor the fact that the letter of authorization set forth in Specification 7 (Pros.Ex.8) was never actually used (37 CJS, sec.16, p.43) constitutes a defense.

Accused also admitted making the instrument set forth in Specification 1, which was received in evidence (Pros.Ex.3). The document shows that he signed his own name thereto, followed in typewriting by his name, assimilated rank, organization and APO number. The letter bears the heading of the Army Exchange Service. It is fairly inferable from the testimony of prosecution witnesses, and that of accused that he realized by making the letter and delivering the same to DiRosa he had left himself open to criticism and requested its return, that the letter was prepared and signed without authority and that the statement therein as to DiRosa's authority to purchase merchandise solely for the benefit of the United States Army may have been false. The letter was clearly what it purported to be, viz: a letter of authority to DiRosa on the letterhead of the Army Exchange Service signed by accused as an employee or agent of that entity. Although it was prepared and executed without authority from that entity and may have contained a false statement, it was not in any sense a fake, fabrication or counterfeit. The serious question is presented whether the making and signing of the document constituted the offense of common law forgery.

There is an irreconcilable conflict in the authorities on the question whether the genuine making of an instrument for the purpose of defrauding constitutes forgery (see annotation 41 AIR 229-253). The majority view answers the question in the negation (Ibid). The minority view, represented by Ex Parte Hibbs, supra, and Quick Service Box Co. Ins. v. St. Paul Mercury Indemnity Co. (CCA 7th 1938), 95 F. (2d), 15,17 and other federal cases, cases in at least two state courts, and certain English and Canadian cases, rests in the thesis that the essence of forgery is not so much counterfeiting as endeavoring to give the appearance of truth to a more deceit and falsity and by force thereof to give the document in question an operation which in truth and justice it ought not to have. Thus, under this view, an agent may commit forgery by making or signing an instrument in his own name in disobedience of his instructions or in the improper exercise of his authority (see authorities in case last cited and in 37 CJS, sec.8, p.38). Whether, if this view be adopted, accused herein was guilty of forgery as charged because he exceeded his authority and made a false representation thereof in making the document in question, need not be here decided as the Board of Review is of the

opinion that the better view is that the genuine making of a false document for the purpose of defrauding, whatever other crime it may be, is not common law forgery.

A succinct and helpful statement of the majority view appears in People v. Bendit (1896), 111 Cal. 274, 43 Pac.901:

"When the crime is charged to be the false making of a writing, there must be the making of a writing which falsely purports to be the writing of another. The falsity must be in the writing itself--in the manuscript. A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what is not".

As stated in State v. Young (1865), 46 NK 266,

"The paper is just what it purports to be; it is the statement of the man that made it; it is a true writing or paper, though the statement it contains may be false. The truth may be forged as well as falsehood".

The case of Mann v. People (1878), 15 Hun (NY) 155, affirmed 75 N.Y. 484, is significant. There a county treasurer without authority, made a pretended county obligation in his name as agent of the county board of supervisors. The court held that the statement, though unauthorized and false, was not a forgery. To the contention that the prisoner's act did not purport to be his own, but rather that of the county, his pretended principal, the court responded:

"Now it is true that, so far as civil obligations and rights are concerned, we are accustomed, in order to express the binding effect of an agent's acts, to say that the act of the agent is the act of the principal. This is a convenient way of stating, in brief language, that when an agent is authorized, his act binds, not himself, but his principal, just as if it were the act of the principal. But we do not mean that the act is literally

that of the principal. The instrument in question purported to be the act of Henry A. Mann. It may be that it purported to be legally binding on the county of Saratoga. But the act—that is, the doing the physical act, as distinct from the legal effect—was the act of the prisoner. There is undoubtedly a sense, as urged by the counsel for the people, in which such an instrument may be said to purport to be the act of the county. But that is a statement of the legal effect. As a matter of fact, the instrument purports to be the act of Mann. He signed it in his own name, adding the title of his office—an office which he legally held".

The court distinguished specifically between forgery and a false assumption of authority, saying:

"One who makes an instrument signed with his own name, but purporting to bind another, does not make an instrument purporting to be the act of another. The instrument shows upon its face that it is made by himself, and is in point of fact his own act. It is not false as to the person who made it".

The essence of the distinction is thus expressed in Barron v. State (1913), 12 Ca.App.342, 77 S.E. 214:

"The mere fact that a paper is issued with fraudulent intent is not, of itself, sufficient to constitute the crime of forgery, if the paper purports to be issued by an agent, although, in truth and in fact, there may have been no agency at all, since in the latter case the fraud is effected by inducing confidence in the validity of the agency alleged to exist, whereas in the case of forgery the fraud is committed by inducing the belief that the paper was executed or signed by him who purports to have signed it, when, in truth and in fact, such was not the case."

So where there was a complete usurpation of authority by one who falsely represented himself to be a collector for a business house, receipted in his own handwriting in the name of the firm by himself as agent one of its bills sent to a debtor and appropriated the money paid to him to his own use, it was held that whatever other crime he committed,

(144)

it was not forgery (People v. Bendit, supra).

Manual for Courts-Martial, 1928, tends toward the majority view:

"But where, after the false signature of such person is added the word "by" with the signature of the person making the check thus indicating the authority to sign, the offense is not forgery, even if no such authority exists, as the check on its face is what it purports to be" (par. 149j, p.176).

The case of Fitzgibbons Boiler Co., Inc. v. Employers' Liability Assur. Corp. Ltd. (CCA 2d. 1939) 105 F (2d) 893, deserves consideration. In that case the insured's assistant treasurer had authority to issue and sign checks of the insured on which the latter's name appeared, in connection with valid transactions. He induced other officials of the insured to sign certain of its checks under the false representation that they were issued for a legitimate transaction, and himself signed them as assistant treasurer, for the purpose of converting the proceeds to his own use. Judge Augustus Hand held that the general power to execute orders and other documents in behalf of the insured corporation prevented the assistant treasurer's acts in signing the checks from constituting forgery within the meaning of its policy under which the insurer agreed in effect to indemnify insured against loss through payment upon any check upon which the signature of insured as maker was forged. The opinion concludes:

"Where, as here, the agent had a general authority to sign for the principal, the rule in the commercial cases is that the principal is bound, and hence that there is no forgery" (105 F (2d), p.896).

Judge Hand expressly disapproved the minority view, represented in Quick Service Box Co. v. St Paul Mercury Indemnity Co (supra) and Ex parte Hibbs (supra), and cited numerous authorities supporting the majority view. In view of the application of this rule to the situation where there is a total usurpation of authority (e.g. People v. Bendit, supra), it is not believed that under the majority rule, Judge Hand's language to the contrary notwithstanding, the false assumption of authority is forgery perforce when the principal is not bound. Numerous instances may be supposed in which one represents himself in a document, which he signs in his own name, to be the duly authorized agent of another, thereby completely fabricating the agency (not the document) and yet where that other is not bound upon the document by virtue of either real or apparent authority. Under the majority rule this legal result, which occurs quite apart from

the application of the principles of the criminal law, would not make the signer guilty of forgery. In other words, with due deference to Judge Hand's language, it is felt that whether or not a forgery has been committed is not necessarily dependent upon whether the putative forger has, under principles of agency law, bound the person whose authority he has assumed. His guilt of forgery depends upon whether he "has falsely and with purpose to defraud made a writing which purports to be the act of another" (Judge Lehman in International Union Bank v. Nat. Surety Co., 245 NY 368, 372, 157 NE 269, 271, quoted in Fitzgibbons Boiler Co., Inc. case, *supra*). But even assuming arguendo that lack of real or apparent authority in the signer is a sine qua non to his guilt of forgery, the prosecution failed to prove forgery because it offered no evidence as to such lack of authority. For all the record shows, accused had actual or apparent authority to execute documents of the general nature of the letter in question.

Application of the majority and better rule to accused leads to the conclusion that the letter was not falsely made and signed as alleged and that he was not guilty of forgery when he prepared and signed the same or of uttering or attempting to utter a forged instrument when he delivered it to Madame Javalle. The finding of guilty of Specification 1 is therefore not supported by the record.

c. The offense of uttering a forged instrument is complete when the same is offered by one knowing it to be forged with a representation by words or actions that it is genuine and with an intent to defraud. It need not be actually passed or accepted as genuine, nor need anyone be actually prejudiced by it (II Bouvier's Law Dictionary (Rawle's 3rd Revision) 3383; 37 CJS, sec. 37, pp.57-56; LCM, 1928, par. 152c, p. 189; CM ETO 12228, Boggs and Caveda, and authorities therein cited).

"As the acceptance is immaterial, and constitutes no part of the offense, the crime is committed, even though the person, to whom the forged instrument is offered, discovers the forgery from the clumsiness of its execution or the behavior of the one offering it, and, for such reason or any other, refuses to be defrauded. It is therefore patent that whether or not the forgery was such as likely

to deceive is wholly immaterial, so far as the utterance is concerned" (Commonwealth v. Fenwick 177 Ky, 685, 198 S.W. 32,34, L.R.A. 1918 B, 1189; Johnson v. Commonwealth, 90 Ky, 488, 14 S.W. 492; 43 words and Phrases (Penn. Ed.) 588-589) (Quoted with approval in CM-ETO 12228, supra. See also CM ETO 12822, Marrone).

The offense is specifically denounced by the District of Columbia Code (1940 Ed.) as follows:

"Whoever, with intent to defraud or injure another, falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another, or passes, utters, or publishes, or attempts to pass, utter, or publish as true and genuine, any paper so falsely made or altered, knowing the same to be false or forged, with the intent to defraud or prejudice the right of another, shall be imprisoned for not less than one year or more than ten years. (War. 3, 1901, 31 Stat. 1326, ch.854, S 843.)" (Sec. 22-1401, (6:86), p. 512).

That accused uttered the shipping ticket (Specification 4) and the informal routing slip (Specification 5), he admitted in his pre-trial statement and in his sworn testimony. The delivery of the documents to Madame Javelle with knowledge that they were ultimately to be used as genuine, even though with the reservation expressed to her that they were spurious and were to be returned, followed by her presentation of the documents to Botcheroff, constituted a sufficient uttering within the quoted statute and hence within Article of War 96. The fact that Botcheroff recognized them to be forgeries is immaterial. Uttering may be effected by means of an agent, where the instrument is delivered to the agent with intent to have it passed as genuine, and the agent offers the same as such (37 CJS, sec. 42b, pp. 63-64). Accused's intent in delivering these two documents to her was precisely the same as it was in making them: to induce reliance, by whoever might be required to rely, upon the documents as genuine, for the purpose of selling cognac at a certain price. The discussion with respect to the forgeries, supra,

is relevant as to the falsity of the instruments, the fraudulent intent, and the character and use of the instruments. With respect to the letter purporting to authorize Corral to purchase cognac for the Army, the proof fails to show that the document was ever presented to anyone as genuine. It is fairly to be inferred from all the evidence that Madame Javelle was made aware of the falsity of the letter. As agent of accused for the procurement of cognac, she never offered the letter to anyone as genuine or otherwise. Mere delivery of a forged instrument to an agent, whether the agent be innocent or not, with intent that he pass the same as genuine, is not uttering so long, at least, as the agent has not offered it (37 CJS, sec. 42b, pp.63-64). Likewise the delivery of counterfeit money to a person, to be passed off generally for the benefit of the prisoner, is not a passing "in payment" within the Act of December, 19, 1792 (United States v. Venable, Fed. Cas. No. 16,615, 1 Crouch, C.C. 416, 1 D.C. 416. This situation is to be distinguished from that wherein the question is whether a spurious note has been "passed" in violation of a statute which does not require the instrument to be uttered as true or genuine, which the Board is not here called upon to consider (Of: United States v. Nelson, Fed. Cas. No. 15,861, 1Abb. 139). Accused's overt act in delivering the letter to her with fraudulent intent, however, went far enough to constitute an attempt to utter, which is a lesser included offense within that of uttering and is denounced by the same District of Columbia statute, supra (MCM, 1928, par. 152g, p.190).

d. The variance between the allegations and proof with respect to the dates of the offenses charged in Specifications 3-6, inclusive, were immaterial as accused was adequately apprized of the offenses with which, he was charged and is protected from further trial for these offenses (AW 37; Cf: CM ETO 10418, Blacker, and authorities therein cited). The same may be said with respect to the variances between the Shipping Ticket as set forth in Specification 4, showing 2,000 bottles, and that introduced in evidence as Pros. Ex. 6, showing 20,000 bottles, as well as various typographical discrepancies between the documents set forth in Specifications 3-7 and those introduced in evidence. This conclusion, however, does not absolve the pleador of the inexcusable carelessness which made it necessary.

e. The omission from Specification 6 of the allegations that the requisition was a writing of a public nature which might operate to the prejudice of another, and was then known by accused

to be false, fraudulent and forged, was immaterial, although again indicative of inexcusable carelessness on the part of the pleader. The elements of such allegations are sufficiently included in the qualifying words of the Specification, "did * * * willfully, unlawfully and feloniously, with intent to defraud, falsely make in its entirety a certain requisition", which as set forth was clearly a writing of a public nature calculated to operate to the prejudice of another.

7. Specification 2 of the Charge:

The evidence established, as charged, that accused, in November, in violation of a Theater directive, exchanged 141 for 20,500 francs outside official channels and at a rate of exchange in excess of the official rate, which was judicially noticed as 200 francs per pound, 300 francs less than the rate accused received.

Letter AG 121 OpGA, Headquarters European Theater of Operations, dated 23 September 1944, Subject: Prohibition Against Circulating, Importing, or Exporting United States and British Currencies in Liberated and Occupied Areas and Certain Transactions Involving French Currency Except Through Official Channels, provides in pertinent part as follows:

"2. Except as authorized, all personnel subject to the jurisdiction of this headquarters, (including officers and men of United States controlled merchant vessels and civilians accompanying or serving with the United States Army) are prohibited from:

* * *
b. Participating in transactions involving the purchase or sale of francs against other currencies except through official channels".

Accused was aware, according to his own testimony, that he was violating the directive, Such violation was proved beyond question and the findings of guilty are amply supported by the evidence (CM ETO 7553, Beedins and Schnurr; CM ETO 10418, Blacker). The allegation and proof that he received an excessive rate, while matter in aggravation, was not essential to his guilt (Cf: Ibid., with respect to non-necessity of showing of profit).

8. The charge sheet shows that accused is 26 years six months of age and that he was employed under contract by the Army Exchange Service on 18 September 1944, New York, New York, "for one year".

9. As accused is not a member of the armed forces of the United States he is not subject to dishonorable discharge or dismissal from the service of those forces (SPJGJ CM 247640, 16 March 1944, III Bull. JAG 97). To the extent that the court in its sentence essayed to adjudge dismissal of accused from the service of the United States Government, as opposed to dismissal from the military service, it of course clearly exceeded its authority (Winthrop's Military Law and Precedents (Reprint, 1920), pp. 405, et seq., and 433). It follows that that portion of the sentence adjudging that accused be dismissed from the service of the United States Government was illegal and void. Although SPJGJ CM 247640, supra and SPJGJ 1945/93, 17 January 1945, IV Bull. JAG 7, indicate that a sentence against a civilian subject to military law may, under some circumstances, include forfeiture of pay, and although fine is an authorized mode of punishment (SPJGJ 1944/4452, 17 July 1944, III Bull. JAG 281), such authorities do not require or justify a holding that accused's right under his contract with the Army Exchange Service, to a salary of \$350.00 per month (Pres. Ex. 1, par. 4) was subject to a sentence of forfeiture by court-martial.

As hereinbefore indicated (par.3b, supra), the Army Exchange Service is an instrumentality of the United States, an integral part of the War Department and in all respects subject to military control and direction. In the European Theater it is the agency of the Theater Commander and as such under the supervision and direction of the Commanding General, Communications Zone, US Forces, European Theater. However, in its ownership of funds and other property and in its contractual relations with respect thereto, it is privately owned and operated. Its property and funds are not the property of the United States but are held in trust for the ultimate benefit of the military personnel, nor are its contracts and debts those of the United States (Cf: CM ETO 1538, Rhodes, and authorities therein cited). It has been held that property of a post exchange (25 Comp. Dec. 960; SPJGC 400.8, August 23, 1942, I Bull. JAG 199; SPJGD 1942/5486, November 20, 1942, I Bull. JAG 351), funds of a post exchange (Kenny v. United States (1926), 62 Ct. Cls. 328,337; 11 Comp. Gen. 161) and Army Exchange Service property (SPJGC 400.8, supra) do not belong to the United States Government. Likewise contracts of the Army Exchange Service are not Government contracts (Cf: SPJGC 1943/2731, February 20, 1943, II Bull. JAG 127) and its debts are not those of the Government nor are they guaranteed by the Government (Cf: Standard Oil Company v. Johnson, supra; SPJGC 1943/9695, 3 July 1943, II Bull. JAG 294; Cf also: State of Alabama v. King and Boozer (1941), 314 U.S. 1,15, 86 L. Ed. 3,8).

The obligation to pay accused his salary was that of the Army Exchange Service and not that of the United States Army or of

the United States Government. It even appears in the record (P 6) that he was paid out of a revolving, nonappropriated fund under Army Regulations 210-65, supra. rather than from the War Department. It follows that the court-martial had no power to direct forfeiture of amounts due or to become due to him under the employment contract and that the portion of the sentence adjudging that he forfeit all pay and allowances due or to become due was also illegal and void.

There is no legal objection, however, to that portion of the sentence adjudging confinement at hard labor and the same is legal. The sentence is separable and the void part may be disregarded (United States v. Pridgeon (1894), 153 u.s. 48,62, 38 L.Ed. 631,636; 16 CJ, sec. 3093, p. 1312; 24 CJS, sec. 1584, p. 112).

10. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 1, legally sufficient to support only so much of the finding of guilty of Specification 7 as finds accused guilty of making, forging and attempting to utter the instrument set forth under the circumstances alleged, legally sufficient to support the remaining findings of guilty and legally sufficient to support only so much of the sentence, as modified by the reviewing authority, as provides for confinement at hard labor for five years.

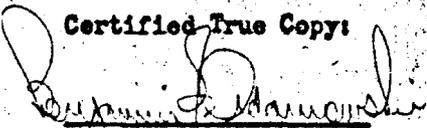
11. Confinement in a penitentiary for five years is authorized punishment for forgery and for uttering and attempting to utter a forged instrument (AW 42, 93, 96; District of Columbia Code, sec. 22-1401 (6;86). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229,WD, 8 June 1944, sec. II, para. 1b (4). 3b).

B. Franklin Riter Judge Advocate

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Certified True Copy:



BENJAMIN S. ADAMOWSKI
Captain, JAGD
Asst. Staff Judge Advocate - 26 -

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

27 JUL 1945

CM ETO 14655

UNITED STATES)

45TH INFANTRY DIVISION

v.)

Trial by GCM, convened at Munich,
Germany, 19 June 1945. Sentence:

Private LESTER R. KNUTSON)
(39214792), Company F,)
180th Infantry)

Dishonorable discharge, total)
forfeitures and confinement at)
hard labor for life. Eastern Branch,)
United States Disciplinary Barracks,)
Greenhaven, New York.)

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, 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 58th Article of War.

Specification: In that Private Lester R. Knutson, Company F, 180th Infantry, did at or near Langensultzbach, France, on or about 11 December 44, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit; combat operations against elements of the German Army, and did remain absent in desertion until he surrendered himself at or near Bobenthal, Germany, on or about 28 December 1944.

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

Specification 1: In that * * * did, at or near Reipertswiller, France, on or about 21 January, 1945, desert the service of the United States and did remain absent in desertion until he returned to military control at or near Bremoncourt, France, on or about 26 February, 1945.

Specification 2: In that * * * did, at or near Bremoncourt, France, on or about 27 February, 1945, desert the service of the United States and did remain absent in desertion until he returned to military control at or near Nurnberg, Germany, on or about 16 April, 1945.

Specification 3: In that * * * did, at or near Lustheim, Germany, on or about 30 April, 1945, desert the service of the United States and did remain absent in desertion until he returned to military control, at or near Dachau, Germany, on or about 26 May, 1945.

He pleaded not guilty, and, all members of the court present when the vote was taken concurring, was found guilty of all charges and specifications. No evidence was introduced of previous convictions. All members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution's evidence was as follows: An extract copy of the morning report of accused's organization (Pros.Ex.A) was admitted in evidence despite objections by the defense on the grounds that it is not prepared or verified by the company commander, the proper custodian of the records. The absences are also otherwise fully shown. It shows the following:

15 December 1944, "Dy to AWOL 1100 Dec. 11, 1944";
 28 December 1944, "AWOL 1100 11 December 1944 to dy
 hour unknown 28 Dec/44";
 23 January 1945, "Dy to AWOL 1500 21 Jan/45";
 26 February 1945, "AWOL to Dy 1630 26 Feb/45";
 1 March 1945, "Dy to AWOL 0930 27 Feb/45".

These entries were signed by "H.G. Wells, Capt., Infantry, Personnel Officer". An additional extract copy of the morning report of accused's organization (Pros.Ex.B) was similarly admitted over similar objection of defense. It shows

16 April 1945,	"AWOL to Dy 2000 hr. 16 Apr/45";
3 May 1945,	"Conf. to AWOL, 1600 hrs. 30 Apr/45";
28 May 1945,	"AWOL to Dy 2130 26 May 45"
30 May 1945,	"correction (3 May 1945) - - - - conf to AWOL 1600 hrs. 30 Apr/45 should be - - - - Dy to AWOL 1600 hrs 30 Apr/45".

This was signed similarly to Exhibit A (R5).

On 11 December 1944, accused was a member of the third platoon of Company F, 180th Infantry, which was attacking Langenscultzbach, France, and he was with his platoon as a rifleman until it ran into a small fire fight about 100 yards from the enemy when he was discovered missing by his platoon leader who then unsuccessfully searched for him (R6). His platoon leader testified that accused was absent from 11 until 28 December 1944; ^{that earlier} on the morning of 11 December accused had told him he was scared and "whenever nobody was looking he was going" (R7).

The first sergeant of accused's organization testified that on 21 January 1945 the company was in contact with the enemy, in a defensive position, that accused with other men held at the kitchen under charges had been sent forward to help dig in the company command post. Accused left the detail and returned to the rear. Search of the area failed to locate him and he was not present nor again seen until he was returned by the military police on 26 February. On 27 February accused was working as a "KP" in the kitchen and was reported missing. A check of the area failed to find him and witness who was present with the organization except from 13 to 17 April and from 19 April to 26 May, did not see him again until 26 May (R8,10). Accused was not present with his organization from 30 April until 26 May 1945 (R12). He had reported back to the company on 16 April but was sent to battalion (R13).

On 11 January 1945 accused gave a sworn statement (Pros.Ex.C) to the officer then investigating the charges against him, which statement was admitted in evidence and read to the court. In this statement he says he does not remember the time or place when he first left, but the company was "in rest". He stayed away three days and returned, stayed four or five days and left again when

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"they were in the lines then. We pushed and were going to dig in for the night. I just could not stand it up there anymore" (R15; Pros.Ex.C).

Thinking it would be better for him if he came back, he later went to Saverne and turned in to the "MBs" who returned him to his organization. He left again the next day and "went back as far as Nancy". After about ten days absence he again turned in to the "MPs" who returned him to his organization where he was sent to the kitchen

"and I have been there ever since. They have not ordered me to go back. I would not go back if they ordered me to. I just go to pieces when I get up there" (R14-15).

Accused also made another sworn statement (Pros.Ex.D) to the same investigating officer on 1 June 1945, when he was again investigating charges against accused. Without objection it was admitted in evidence. In this statement accused says that he was sent to help around the kitchen when he returned 28 December 1944 and kept in restraint there because of the previous charge against him. On the morning of 21 January 1945 a jeep moved him to the company "CP" which was on the lines and with others he was ordered to dig a company "CP". They started

"when some shells came in close. Shrapnel was hitting the trees. Some of the boys got hit. Although I had no permission, I started back to the kitchen. I could not take the shelling" (R17).

But the kitchen had moved and he went to a nearby town and stayed. "I did not want to go back and get any more shelling" (R17).

He went looking for the 180th Infantry "CP" but couldn't find it and turned himself in at Dijon and was returned to his organization on 26 February.

"I left the next day and went to Marseille. I figured the farther back I went, the longer time it would take to get me back on the lines" (R18).

He turned himself in at Marseille and was returned to his unit at Nurnberg, Germany on 16 April 1943. After three or four days he was put in the Pioneer Platoon and was with them about two weeks when they stopped in a town for a couple of hours; he went to sleep and "they went off and left me". He kept looking for the "outfit" and finally found it in Dachau on 26 May (R16-18).

4. No evidence was presented in behalf of defendant who elected to remain silent (R19).

5. "Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty or shirk important service" (MCM, 1928, par.130, p.142).

Under Article of War 28 any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service "shall" be deemed a deserter.

Over a period of 165 days, that is from 11 December 1944 until 26 May 1945, accused was absent from his organization on four occasions for a total period of 131 days. His initial absence occurred while in a small fire fight within 100 yards of the enemy's lines. He said he was scared and was going to run away and he did. His second absence also occurred while in contact with the enemy under fire. The absences of 27 February and of 30 April followed closely upon his being returned to his unit each time. He states "they have not ordered me to go back [to the front lines]. I would not go back if they ordered me to". In his second statement he says "I did not want to go back and get any more shelling. * * * I figured the farther back I went the longer time it would take to get me back on the lines". There is a very plain and continuing intent shown to avoid any hazardous duty. He deliberately and repeatedly absented himself figuring that "the farther back I went the longer time it would take to get me back on the lines". While the last two absences of accused did not appear to have been initiated when combat was imminent and personal danger near, the evidence, including his signed statements, conclusively indicate that each of his charged unlawful absences were made with the obvious intent to avoid any possible hazardous duty. The intent necessary to the offenses here does not rest upon the implications and circumstantial evidence surrounding each running away but is declared by accused in his statements as his purpose in absenting himself. He knew that always somewhere just ahead was a dangerous enemy they must attack and that in so doing, casualties would probably be suffered.

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Only by absenting himself from his organization could he avoid sharing that hazardous duty. The Board of Review is of the opinion that the finding of guilty of each charge and specification is supported by competent substantial evidence (CM ETO 11757, Magoon).

6. The charge sheet shows accused to be 19 years of age. He was inducted 15 October 1943 and assigned to 180th Infantry 22 October 1944.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

Edward ... Judge Advocate

John ... Judge Advocate

Anthony ... Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 5

22 SEP 1945

CM ETO 14683

UNITED STATES

v.

First Lieutenants ROBERT V.
WILSON, JR. (01114809),
LOYD W. COX (01109875),
ROBERT CELAYA (01115209),
and Second Lieutenant
GEORGE KIMMEL (01061994),
all attached unassigned,
Headquarters Special Troops,
Ninth United States Army

) NINTH UNITED STATES ARMY

) Trial by GCM, convened at Maastricht,
) Holland, 23 February to 1 March 1945.
) Sentence as to each accused: Dis-
) missal, total forfeitures and, as to
) Wilson a fine of \$5,000 and confine-
) ment at hard labor for 20 years, as
) to Cox a fine of \$500 and confinement
) at hard labor for 5 years, as to
) Celaya a fine of \$500 and confinement
) at hard labor for 5 years, and as to
) Kimmel a fine of \$3,000 and confinement
) at hard labor for 10 years. Eastern
) Branch, United States Disciplinary
) Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 5
HILL, EVINS and JULIAN, Judge Advocates

1. The record of trial in the case of the officers 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.

2. Accused were tried upon charges and specifications which in substance are as follows:

WILSON

CHARGE I: Violation of Article of War 96

Specification 1: Conspiracy

- Specification 2: Wrongful sale of liquor
- Specification 3: Obtaining liquor under false pretenses
- Specification 4: Obtaining cigarettes under false pretense
- Specification 5: Wrongful sale of cigarettes
- Specification 6: Wrongful sale of whiskey
- Specification 7: Obtaining whiskey by false pretenses
- Specification 8: Wrongful sale of whiskey
- Specification 9: Obtaining whiskey by false pretenses
- Specification 10: (Finding of not guilty)
- Specification 11: (Finding of not guilty)
- Specification 12: Leaving German money for conversion by unauthorized agency
- Specification 13: False swearing during an official I.G. investigation
- Specification 14: (Finding of guilty disapproved by reviewing authority)

CHARGE II: Violation of Article of War 83
(Finding of not guilty)

Specification: (Finding of not guilty)

CHARGE III: Violation of Article of War 61
(Finding of not guilty)

Specification: (Finding of not guilty)

CHARGE IV: Violation of Article of War 93

Specification: Forgery

COX

CHARGE: Violation of Article of War 96

- Specification 1: (Finding of guilty disapproved by reviewing authority)
- Specification 2: Failure to report a fraudulent liquor transaction which he knew was contemplated
- Specification 3: Obtaining liquor by false pretenses
- Specification 4: (Finding of not guilty)
- Specification 5: Wrongful sale of liquor
- Specification 6: False swearing during an official IG Investigation
- Specification 7: (Finding of guilty disapproved by confirming authority)

CELAYA

CHARGE I: Violation of Article of War 96

- Specification 1: (Finding of guilty disapproved by reviewing authority)
- Specification 2: Wrongful taking and use of a government vehicle
- Specification 3: Obtaining liquor by false pretenses
- Specification 4: Wrongful sale of liquor
- Specification 5: False swearing during an official IG investigation
- Specification 6: False swearing during an official IG investigation

CHARGE II: Violation of Article of War 93

Specification: Forgery

KINNEL

CHARGE I: Violation of Article of War 96

- Specification 1: Conspiracy to engage in black market operations
- Specification 2: Obtaining liquor by false pretenses
- Specification 3: Wrongful taking and use of government vehicle
- Specification 4: Wrongful sale of cigarettes
- Specification 5: Obtaining liquor by false pretenses
- Specification 6: Wrongful sale of liquor
- Specification 7: Obtaining liquor by false pretenses
- Specification 8: False official certificate to obtain exchange of currency
- Specification 9: False official certificate to obtain exchange of currency
- Specification 10: False swearing in an official I.G. investigation
- Specification 11:
to
- Specification 16: Same as Specification 10, Charge I

CHARGE II: Violation of Article of War 93

Specification: Forgery

Accused were tried in a common trial. Each was accorded the right of one peremptory challenge. A motion, made on behalf of accused Cox to sever his trial, under Specification 1 of Charge I, was denied. Each pleaded not guilty to all the charges and specifications against him. Two-thirds of the members of the court present when the vote was taken concurring in each finding of guilty: accused Wilson was found not

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guilty of Specifications 10 and 11 of Charge I, and of Charges II and III and their specifications, and guilty of the remaining charges and specifications preferred against him; accused Cox was found not guilty of Specification 4 of the Charge and guilty of the remaining specifications and of the Charge preferred against him; accused Celaya and Kimmel were found guilty of all the charges and specifications preferred against them, respectively. No evidence of previous convictions was introduced against any of the accused. Each accused was sentenced, by separate vote, two-thirds as to Cox and Celaya, and three-fourths as to Wilson and Kimmel, of the members of the court present when each vote was taken concurring, to be dismissed the service, to forfeit all pay and allowances due or to become due and, in the case of Wilson to pay a fine of \$5,000 and to be confined at hard labor for 20 years, in the case of Cox to pay a fine of \$1,000 and to be confined at hard labor for five years, in the case of Celaya to pay a fine of \$2,000 and to be confined at hard labor for ten years, and in the case of Kimmel to pay a fine of \$3,000 and to be confined at hard labor for 15 years. The reviewing authority, the Commanding General, the Ninth United States Army, disapproved the finding of guilty of Specification 14, Charge I, as to Wilson, and approved the sentence; disapproved the finding of guilty of Specification 1 of the Charge as to Cox and approved the sentence, but reduced the fine to the sum of \$500; disapproved the finding of guilty of Specification 1, Charge I, as to Celaya and approved the sentence, but reduced the period of confinement to five years and the fine to the sum of \$500; and as to Kimmel, approved only so much of the finding of guilty of Specification 6, Charge I, as involves a finding of guilty of the wrongful sale of liquor previously unlawfully obtained for the sum of 99,000 French francs, value about \$1,997.32, and approved the sentence but reduced the period of confinement to 10 years; and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Theater Commander, United States Forces, European Theater, disapproved the finding of guilty of Specification 7 of the Charge as to Cox, confirmed the sentence of each accused, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement of all, and withheld the order directing the execution of the sentences pursuant to Article of War 50 $\frac{1}{2}$.

3. The evidence introduced by the prosecution on the trial of this case is adequately and fairly detailed in the review prepared by the Staff Judge Advocate, European Theater, attached to the record of trial. The evidence thus summarized, and as set forth in paragraphs 5 and 6 of that review, is incorporated in this holding by reference. Suffice, therefore, to say that at all times mentioned in the specifications, all the accused were officers of the rank indicated above, and, with the exception of Cox, members of the 172nd Engineer Combat Battalion. Accused Cox was assigned to the 208th Engineer Combat Battalion. These two combat battalions were, from 13 September to 14 December 1944, attached to the 1142nd Engineer Combat Group, which, in turn, was attached to the Ninth United States Army (R29,167, 181-183, 393; Pros.Ex.A-1).

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During the period covered by the charges and specifications, the United Kingdom Ministry of Food made available to the American forces, including the Ninth Army, a quantity of liquor, pursuant to arrangements made with the United States Forces, Quartermaster General's Section, Communication Zone. The liquor was distributed by the Navy, Army and Air Forces Institutes through its several depots. In September 1944, there was such a depot located at Sully, France; and in November and December 1944, there were similar installations at Brussels, Belgium. The drawing of the liquor was effected by having an officer, authorized by the unit, go to a depot and file a certificate certifying to the officer-strength of the unit. On this certificate, one bottle of whiskey and one-half bottle of gin were sold to the unit for each of its officers. The depot collected 76½ francs per bottle for the whiskey and 58½ francs per bottle for the gin. A directive issued by Headquarters Communications Zone, European Theater of Operations, dated 1 September 1944, and indorsed by Headquarters Ninth United States Army on 31 October 1944, announced this issue and provided that units drawing liquor from the depots furnish the latter with "details as to the title of the Unit, APO number, and certified officer strength for whom supplies are requested". It further provided that "all supplies of whiskey and gin must be sold by the purchasing unit to officer personnel of the United States Forces on the following basis: whiskey, 85 francs per bottle; gin, 65 francs per bottle" and that "In view of the fixed quantities of whiskey and gin available, it is necessary that every effort be made by units drawing supplies * * * to effect a maximum and equitable distribution thereof". A directive from the same source, dated 1 December 1944, subsequently repeated these provisions (R34-37; Pros. Ex. B, C).

About 18 September 1944, accused Wilson, being authorized to secure the aforementioned liquor ration for his battalion, went to the depot maintained by the Navy, Army and Air Forces Institutes at Sully for this ration. He presented three of the required certificates in which the withdrawing unit was identified and its officer strength certified. One of these certificates was bona fide and properly executed for his own battalion. However, each of the other two certificates was made out for a unit which at that time had not arrived on the continent. Accused found that all three certificates were honored and he received 96 bottles of whiskey and 48 bottles of gin on the strength of these certificates (R29, 46, 47, 172, 320, 352; Pros. Ex. A-1, F, DD).

On 21 September 1944, accused Kimmel secured 126 bottles of whiskey and 63 bottles of gin from the Institute's depot at Sully, France, by presenting a certificate on which was designated a withdrawing unit, which accused had no authority to represent and which bore a fictitious signature resembling the handwriting of accused (R43-45, 48, 50, 363; Pros. Ex. E, G).

On or about 30 October 1944, accused Wilson entered into an agreement with three enlisted men, Sergeants Halliwill and Rovich and Private

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Saunders, members of his reconnaissance team, that he would supply them with liquor for which they would pay him \$100 a case for scotch and \$90 a case for gin and which they could resell at such price as they might be able, retaining the difference for their own profit (R110,138,143).

Eight transactions of the type outlined above followed this arrangement. Accused Kimmel, without authority, presented a false certificate to this depot at Sully, on or about 30 October and thereby obtained liquor (R38-44,210,211,214,363; Pros.Ex.II). On 31 October, accused Wilson, without authority, obtained on a false certificate 254 bottles of whiskey and 127 bottles of gin, a portion of which was sold by the enlisted men the next day to a civilian at Maastricht, Holland, the profits of this transaction being divided according to agreement (R29,115,116,118,212,213,233,234,324,326; Pros.Ex.A-1,S).

On 10 November, accused Wilson purchased 3600 packs of cigarettes from the Army Exchange Service on a certificate which he presented in the name of a unit he was unauthorized to represent. Accused Kimmel and one of the above named enlisted men sold these cigarettes to a Belgian civilian on or about 20 November. The proceeds were divided as agreed, between Wilson, Kimmel, and the three enlisted men (R29,118,123 & 25,136,140,144,145,148,243,338,339,391,392; Pros.Ex.A-1,DD,JJ,KK,LL). On 20 November at the same time, they also sold to the civilian additional liquor which they had obtained by the same unauthorized method (R96,100,119,122,135,137; Pros.Ex.L,M). On 30 November, more liquor was wrongfully obtained and sold to a Netherlands civilian by accused Calaya and one of the enlisted men. Accused Wilson directed the preparation of the certificates wrongfully used in this withdrawal (R83,84,86,118,126-132,146,147,217,224,236,248,334,335,371; Pros.Ex.H,I,V,W,FF). Additional illegal transactions were consummated by Wilson and one of the enlisted men on 1 and 13 December (R29,88,218,230,309,310,330-333,356,359; Pros.Ex. A-1, K,Y,II). Calaya was involved in one of the above transactions and Cox in a separate transaction. Cox, on or about 2 December, went in Brussels on an authorized mission to draw a liquor ration for his own unit. He was accompanied, in an Army vehicle, by one of the enlisted men who was working under the aforementioned agreement with Wilson. This enlisted man used this mission and the vehicle to draw an unauthorized ration and to sell it. On the way to Brussels he endeavored to make Cox a party to the plan. Cox stated that he wanted nothing to do with the affair. But Cox knew of the consummation of the illegal transaction and the use of the Army vehicle, and the next day asked the enlisted man for a substantial sum of money, 8000 francs, which he received. On his return, Cox failed to make any official report of this incident (R84,86,88,93,223,227,276,281,284,286,300,335,336,377,394; Pros.Ex.4). The evidence, cited above, shows that in their part of the aforementioned transaction, Calaya and Kimmel used government transportation as alleged. The value of each of the vehicles so used was in excess of \$50 (R29, Pros.Ex.A-2,A-3).

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Accused Wilson was also shown to have attempted to convert foreign currency at an unauthorized agency, in violation of Ninth United States Army directive, dated 3 November 1944 (R150,151,153,155,158-163; Pros.Ex.0).

Accused Kimmel, on 29 November and 4 December 1944, made false official certificates with respect to the source of receipt by him of a substantial sum of French francs which he desired to exchange into English currency (R29,79,258-261,263; Pros.Ex.A-2 (pars.8,9)).

The Inspector General of Headquarters Ninth United States Army conducted an investigation into this situation between 11 December 1944 and 15 January 1945 and each of accused made statements. It is charged against each officer that some of the statements made by him were false and constituted false official statements. The evidence is clear that accused made the statements, as alleged, to Colonel Francis B. Linehan, Inspector General Section, during an official investigation conducted by him (R313-393). From the evidence reviewed above, it appears that those statements alleged to have been false were in fact false, and not believed by accused to be true, except for the alleged false statements incorporated in Specification 14, Charge I, against Wilson and Specification 7 of the Charge against Cox, the findings of guilty of which were disapproved.

4. Captain George B. Palmer, 172nd Engineer Combat Battalion, a prosecution witness, was recalled as a witness for the defense. He testified that in September 1944, accused Wilson was authorized to obtain the battalion liquor ration at Sully and that he returned with two rations (R418). Accused Wilson and Kimmel furnished liquor for battalion parties held by the battalion after reaching the continent. Accused Kimmel furnished scotch for a party held at Borgloon, Belgium, about 30 October (R422,423). On cross examination, this witness testified that when accused Wilson was sent to secure battalion rations in September he was not instructed to draw for three battalions and that there was no connection between the 172nd, the 283rd and the 284th battalions (R419-421); that at one party accused Wilson told him he had "a good bit of money and it was easy to get", and that he offered to let the captain participate if he desired (R424).

Sergeant Rovieh, a prosecution witness, was recalled and testified that some time in November 1944 he overheard a conversation between accused Wilson and Captain Palmer, from which he understood that accused was directed to go for some cigarettes for the battalion (R428,429). This sergeant testified further that he accompanied the accused on the trip to Cherbourg for the cigarettes and that, in Paris on the way back, accused refused to sell part of the cigarettes to a civilian who offered to buy them; also, that later on accused instructed him to store the cigarettes in their billet until the commanding officer instructed what he wanted done with them (R430). This witness, on cross examination, admitted that he and two other enlisted men, all three being the enlisted men named in

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the specifications as parties to the conspiracy, shared in the proceeds of the sale of the cigarettes (R433). It was stipulated that when accused Cox went to Brussels on or about 4 December to draw officer liquor rations for the month of December for his organization, he was acting under authority of the 1142nd Combat Group (R415;def.ex.1).

The accused were individually advised of their rights as witnesses on their own behalf (R451). Accused Cox and Celaya elected to remain silent.

Accused Wilson took the stand and made an unsworn statement. His statement constituted an unqualified admission of his guilt of Specification 1, Charge I (R441). His testimony otherwise, as to the improper purchase of the liquor, to the making of the false requisitions in connection therewith, and as to the sale of the whiskey, constituted an admission of all of the unlawful acts involved in connection therewith. With respect to the cigarettes, he said that the original securing of these cigarettes was authorized, except that in the actual requisitioning he used the name of another organization as the drawer, at the suggestion of an officer at the place where the cigarettes were stored, in order to save his own unit from being charged with this particular issue in the event that this particular ration had already been issued to his unit through the Ninth Army. He said that after drawing cigarettes he refused to sell them to a civilian in Paris and that when he returned to his organization he found the battalion had received its first free ration and was in line for a regular supply thereafter and did not need these cigarettes (R442-443). With respect to the money exchange transactions, he said that he did not know that he was not supposed to convert German currency into Dutch guildens (R445). This accused told the court that he was glad that there were only two charges of false statements made against him, that he must have lied to the inspector general "about five thousand times", but that he did this to protect other people involved (R445). In his testimony, he exculpated accused Cox of any knowledge about the plan to use Cox' trip as a means of securing an unlawful and additional ration of whiskey (R446). In conclusion, accused Wilson said,

"I realize that I have done some things that are really bad, and I realize that there is nothing I can say about it that would undo everything. It is something that is over with, and I am really and truly sorry that it happened, I am sorry that it happened, not sorry that I got caught" (R447).

Accused Kimmel took the stand and made an unsworn statement. He said that while he was awaiting trial, he had begun to do a lot of introspective thinking and his first reaction on coming to his senses was one of amazement, shock and surprise. He attributed his present plight to a general let down in standards, commencing just before he left

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England for France. He said,

"We got a memo and there was a paragraph on this sheet which faced us and nobody in the battalion quite knew what to make of it. It said something to the effect that there will be no pilfering until we leave Southern England" (R447,448).

He stated, in effect, that it did not take long to find out what that meant because from then on it was a matter of getting what you could get and not getting caught. He said that "it came as a matter of course to be looked upon as something laudable to get extra T/E equipment". He did believe that obtaining and selling the cigarettes was "hitting from the dirty end of the stick". This attitude, which the witness described at some length, did not interfere with combat usefulness. He said that if there had been more combat there would have been less of this other sort of thing. He concluded with a plea for clemency (R447-451).

5. There was no real issue of either fact or law presented by the evidence in this case which requires lengthy analysis or discussion. A comprehensive and learned application of the law to the facts of the case may be found in paragraph 7 of the review by the Staff Judge Advocate, European Theater.

Accused Wilson, in his unsworn statement, admitted his guilt of conspiracy under Specification 1 of Charge I; and also admitted that he sold liquor obtained without authority to one of the enlisted men, that after obtaining the cigarettes the idea occurred to him that they could be sold and that he received some of the proceeds of the sale, that he wrote a letter which accused Celaya used to secure liquor on 29 November, that he secured the liquor described in Specifications 7 and 8 of Charge I and disposed of same, and that he made the false statements alleged in Specifications 13 and 14 of Charge I. He also admitted lying at the official investigation.

The transactions in which accused Kimmel participated and the surrounding facts and circumstances, as proved, show most convincingly that he was a partner in the conspiracy with Wilson and the enlisted men as alleged (Charge I, Specification 1 as to Kimmel)

The finding of guilty of the conspiracy Specification against Celaya was disapproved. He was also found guilty of all the remaining specifications and of the charges and such findings were not disturbed. The evidence fully supported such approved findings. It was shown that he wrongfully used a government vehicle worth over \$50, that he wrongfully obtained liquor rations to which he was not entitled which he wrongfully sold to a civilian, that he made two statements while under oath at

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an official investigation, which statements he did not believe to be true, add that with intent to defraud he forged a signature to a written instrument of a public nature which in fact did operate to the prejudice of another, all as alleged in the pertinent specifications. Each of these offenses was properly charged.

Accused Cox was not shown to have been a party to the conspiracy and his finding of guilty under the Specification so alleged was disapproved by the reviewing authority. It was, however, clearly shown that on one occasion this officer, while bent on a lawful mission to secure liquor for his organization, was approached by an enlisted man who accompanied him, one of the parties to the Wilson-Kimmel conspiracy, and asked to lend aid in securing an additional ration unlawfully. Accused Cox did not "go to the front" on this transaction, but he, at the very least, knowingly permitted the use by this enlisted man of an army vehicle for the purpose of obtaining and delivering the unlawful issue of liquor, that he thereafter participated in moneys which he must have known were the profits received from this unlawful transaction, and, furthermore, he failed to report what had occurred to his superior officer. When this accused was being investigated subsequently by the Inspector General's Department, he said, and obviously falsely, under oath that he knew of no one who obtained any liquor at the Institute's depot on the day on which he withdrew his ration. The evidence was very clear that accused knew that the enlisted man had withdrawn the liquor at the same place and on the same day.

The court overruled the motion of defense counsel that accused Cox be tried separately. Arguing this motion, defense counsel made it clear that his objection to either a joint or common trial arose from the issues raised by Specification 1 of Charge I, the Specification which alleged conspiracy. Moreover, the argument there presented was not directed toward a severance of trial on the remaining charges and specifications against this accused. Inasmuch as the finding of guilty of Specification 1 of Charge I with respect to accused Cox was disapproved by the reviewing authority, any error of the court in denying this motion was without prejudice to the substantial rights of this accused. In any event, the question of severance was within the sound judicial discretion of the court and its decision is not subject to appellate review in the absence of proof of abuse of that discretion. There was no abuse of discretion here (CM ETO 5764, Lilly and authorities therein cited).

All accused were charged with entering into a conspiracy with each other and with three enlisted men. It was separately alleged in Specification 1 of Charge I against each accused that he was a member of a conspiracy composed of each of the four officers, together with three enlisted men. The fact that accused Celaya and Cox were found by the reviewing authority not to have been members of this conspiracy did not affect the findings of guilty of this Specification with respect to the remaining accused.

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"It is well settled that although an indictment charges a conspiracy involving several persons and the proof establishes the conspiracy against some of them only, such variance is not material" (11 Am.Jur.,p.568).

The proof of the conspiracy was substantial and Wilson's, and Kimmel's participation therein was proved beyond doubt (CM ETO 8234, Young et al).

6. The charge sheets show that accused Wilson is 24 years eleven months of age, that he was inducted 23 September 1941 without prior service, commissioned Second Lieutenant, Corps of Engineers, 9 June 1943, and that he received a battle field promotion to First Lieutenant 14 November 1944; that accused Cox is 24 years and ten months of age, that he enlisted 31 October 1939 without prior service, was commissioned Second Lieutenant, Corps of Engineers, 3 February 1943 and promoted to First Lieutenant 7 December 1943; that accused Celaya is 25 years five months of age, that he was inducted 17 February 1941 without prior service, commissioned Second Lieutenant, Corps of Engineers, 7 July 1943, and promoted to First Lieutenant 19 February 1944; and that accused Kimmel is 24 years and ten months of age, that he was inducted 13 April 1942 without prior service, commissioned Second Lieutenant, Coast Artillery Corps, 28 October 1943, and was detailed to Corps of Engineers 15 April 1944.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of accused, not corrected by the reviewing or confirming authorities, were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty, as approved and confirmed, and legally sufficient to support the sentence, as to each accused.

8. Violation by an officer of Article of War 93 or 96 is punishable as the court-martial may direct. Designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept.1943, Sec. VI, as amended).

John Trumbull Judge Advocate

Joe L. West Judge Advocate

Anthony Julian Judge Advocate

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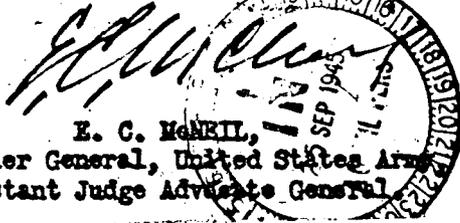
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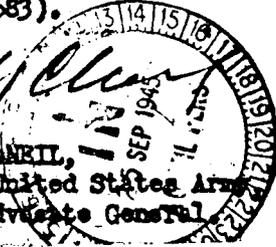
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War Department, Branch Office of The Judge Advocate General with
the European Theater 22 SEP 1945 TO: Commanding
General, United States Forces European Theater (Main), APO 757,
U. S. Army.

1. In the case of First Lieutenants ROBERT V. WILSON, JR. (O1114809), LOYD W. COX (O1109875) and ROBERT CELAYA (O1115209) and Second Lieutenant GEORGE KIMMEL (O1061994), all attached unassigned, Headquarters Special Troops, Ninth United States Army, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences as approved and confirmed, which holding is hereby approved. Under the provisions of Article of War 50a, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 14683. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 14683).


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



- (As to accused Kimmel, sentence ordered executed. GCMO 459, USFET, 6 Oct 1945).
- (As to accused Cox, sentence ordered executed. GCMO 460, USFET, 6 Oct 1945).
- (As to accused Celaya, sentence ordered executed. GCMO 461, USFET, 6 Oct 1945).
- (As to accused Wilson, sentence ordered executed. GCMO 462, USFET, 6 Oct 1945).

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

15 SEP 1945

CM ETO 14690

UNITED STATES)

3RD INFANTRY DIVISION

v.)

Trial by GCM, convened at Salzburg,
Austria, 10 May 1945. Sentence:

Private MICHAEL R. WHALEN
(33458184), Company A, 7th
Infantry)

Dishonorable discharge, total for-
feitures and confinement at hard
labor for life. United States
Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HEPBURN and MILLER, 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 Michael R. Whalen, Company "A", 7th Infantry, did, near Lure, France, on or about 14 September 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he surrendered himself at Clermont-Ferrand Region, France, on or about 9 November 1944.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced.

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Three-fourths of the members of the court present at the time the vote was taken concurring, accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 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.

3. Evidence for the prosecution is substantially as follows:

A technical sergeant of accused's platoon testified that accused was a member of Company A, 7th Infantry on 14 September 1944. On that date accused's platoon was going into the attack near Lure, France (R9). Artillery and mortar fire was received from the enemy and the platoon suffered casualties. When the objective was reached and company assembled, accused could not be found either in the area then occupied by the company or the area through which the company had just passed. He did not have permission to be absent (R10). On 15 September 1944 he was entered on the company morning report as missing in action, which is the practice until it is known that "they are awol" (R11). On 28 November 1944, the morning report entry was corrected to read "dy to AWOL" (R7, Ex.A; R9,10,11).

4. The accused, after being advised of his rights by the law member, elected to be sworn and testified in his own behalf substantially as follows:

He never got along with some of the men in his company including the platoon sergeant who always called on him for dirty jobs. Between that and the artillery, "it got the best of" him (R13) and he absented himself because he could not stand it any longer (R14). He was gone from 14 September until sometime in November when he surrendered himself at Clermont-Ferrand, France (R14).

5. The evidence clearly establishes absence without leave at the time and place alleged. The accused's own testimony corroborated prosecutions' evidence that he left his platoon on 14 September 1944. His platoon was under fire and suffered casualties. Accused admits that he could not stand it any longer. The court was justified in concluding that he willfully absented himself to avoid the hazards and perils of immediate operations against the enemy (CM ETO 7413, Gogel).

6. The charge sheet shows the accused to be 24 years and six months of age. Without prior service, he was inducted on 15 December 1942 at Wilkes-Barre, Pennsylvania.

7. The court was legally constituted and had jurisdiction of the accused 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.

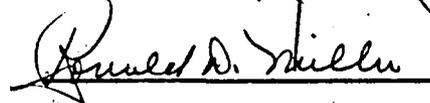
8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Penitentiary confinement is authorized for desertion in time of war (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).



Judge Advocate



Judge Advocate



Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

14 SEP 1945

CM ETO 14691

UNITED STATES)

v.)

Private PETER ENGLESE
(32055840), Headquarters
and Headquarters Company,
3rd Battalion, 15th Infantry)

3RD INFANTRY DIVISION

Trial by GCM, convened at Salzburg,
Austria, 11 May 1945. Sentence:
Dishonorable discharge, total
forfeitures and confinement at
hard labor for life. Eastern
Branch, United States Disciplinary
Barracks, Greenhaven, New York

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HEPBURN and MILLER, 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 Peter Englese, Headquarters and Headquarters Company, 3d Battalion, 15th Infantry, did, at Trofeti, Italy, on or about 17 October 1943, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was returned to military control at Nice, France, on or about 18 February 1945.

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He pleaded not guilty and all 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 members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, 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 $\frac{1}{2}$.

3. The prosecution's evidence shows accused was a member of Headquarters and Headquarters Company, 3rd Battalion, 15th Infantry, which on 17 October 1943 was located in the vicinity of Statigliano, Italy (R8,9). That battalion had crossed the Volturno River on 13 October 1943 and pursued the enemy, continuously moving up to Statigliano which was reached on 18 October 1943. Both immediately before and immediately after the date of 17 October 1943, the battalion was in contact with the enemy, but on 17 October 1943, though the regiment was then so engaged, the battalion was in regimental reserve, and enemy activity was not apparent in the battalion area. After reaching Statigliano on 18 October, the battalion was held up for approximately five days in contact with the enemy (R9).

An extract copy of the morning report of Headquarters Company, Third Battalion, 15th Infantry dated 19 October 1943 (Pros.Ex.A), was admitted in evidence over the defense objection (R7). It disclosed accused as "Dy to MIA 1700 since 17th"; "MIA to drpd fr rolls of Co & Regt", on 20 October 1943; and on 17 November 1943 correcting the prior entries to "fr dy to AWOL 17 Oct" (Pros.Ex.A). An extract copy of the unit morning report for 3 March 1945, showing accused "Fr AWOL to arr camp" at Pagny, Nord de Guerre, France (Pros.Ex.B), was admitted in evidence without objection (R10).

4. On being advised of his rights as a witness, accused elected to make an unsworn statement which included an unsworn psychiatric report dated 6 March 1945. It detailed accused's service with the Ninth Division in Tunisia and Sicily, including combat service in Tunisia to Maknessy, a slight gunshot wound in his leg in March 1943, and that he joined the 3rd Division in September 1943 (R12). It further indicated the psychiatric opinion that accused had not recovered from the psychological, oppressed feeling of the soldiers who had fought in Tunisia that "we 've done our part, we're doing all the fighting" (R13).

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His statement also recited his combat experiences with the 3rd and 9th Divisions, from the "D" day landing at Port Lyautey, Africa, to Tunisia, thereafter with a Headquarters Company in Sicily, and from Salerno across the Volturno River (R13,14). No other evidence was presented by the defense (R14).

5. "Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service" (MCM, 1928, par.130a, p.142).

Under Article of War 28 any person subject to military law who quits his organization in place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter. The undisputed evidence shows that accused was missing from his organization at a time when his unit was directly engaged in the drive north from the Volturno river, pursuing the enemy, and was in contact with the enemy both immediately before and immediately after accused absented himself. Elements of his regiment were in such contact at the time. His statement clearly indicates his extreme disgruntlement with his status as a member of a combat unit, and his prolonged absence of over 16 months confirms his intention to avoid further hazardous duty in combat. The fact that his battalion happened to be in a regimental reserve status on the day of his departure does not militate against the court's finding (CM ETO 11404, Holmes; CM ETO 5953, Myers).

The admission of the morning report extract referring to accused's absence without leave and correcting an earlier entry of "Dy to MIA" was not error (Op.JAG, SPGN 1945/3492, 29 Mar 45, IV Bull JAG 86). Though the morning report entry showing accused's return to military control was at variance with the place and time alleged in the specification, the difference is immaterial and prejudiced no substantial rights of the accused (CM ETO 15154, Sohn; CM ETO 800, Ungard).

6. The charge sheet shows accused to be 28 years of age. Without prior service, he was inducted 8 January 1941 at Newark, New Jersey.

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

8. The penalty for desertion in time of war is death or such other punishment as the court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks,

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Greenhaven, New York, as the place of confinement is authorized
(AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

Robert B. Smith Judge Advocate

Charles H. H. H. H. Judge Advocate

Robert D. Smith Judge Advocate

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Branch Office of The Judge Advocate General
with the
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BOARD OF REVIEW NO. 2

5 NOV 1945

CM ETO 14693

UNITED STATES

) 3RD INFANTRY DIVISION

v.

) Trial by GCM, convened at Salzburg,
) Austria, 10 May 1945. Sentence:
) Dishonorable discharge, total for-
) feitures, and confinement at hard
) labor for life. Eastern Branch,
) United States Disciplinary Barracks,
) Greenhaven, New York.

Private CHARLES ZOTTOLI
(32000846), Company B,
30th Infantry

HOLDING by BOARD OF REVIEW NO. 2
HEPBURN, MILLER and COLLINS, 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 on the following Charge and specifications:

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private CHARLES (NMI) ZOTTOLI, Company "B", 30th Infantry, did, at or near Epinal, France, on or about 14 November 1944, desert the service of the United States, by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he was apprehended at or near Marseille, France, on or about 2 February 1945.

Specification 2: In that * * * did, at or near Schmittviller, France, on or about 14 March 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he was apprehended at or near Nancy, France, on or about 25 March 1945.

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He pleaded not guilty and, all members of the court present when the vote was taken concurring, was found guilty of the Charge and specifications. Evidence was introduced of one previous conviction by summary court-martial for absence without leave for five days in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the findings as to Specification 1 except apprehension, approved the sentence, and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

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

a. As to Specification 1:

Over objection, the court admitted in evidence a duly authenticated extract copy of the morning report of Company B, 30th Infantry, for 16 November 1945 at St. Helena, France, referring to accused and stating "assigned NOT joined to ANOL since 1800, 14 Nov. 44" (R7 and Pros. Ex.A). Technical Sergeant Bristol, Service Company, 30th Infantry, testified that on 14 November 1944 his duty was to "take care of RTU's and General Reinforcements from the Third Division Replacement Depot" located at Bruyeres in the same district as Epinal, France (R8). On that day he "looked for" accused at that depot and was unable to find him, though "he was supposed to be picked up there" (R11). So far as he could find out he was absent. Accused did not have permission to be absent from the Reinforcement Depot, so far as Sergeant Bristol knew, and he had not given him permission to be absent (R9). Bristol had never seen accused and did not know him, and he did not know the reason accused was supposed to be at the Reinforcement Depot (R9,11,12). Accused was not present to go to the regiment (R10).

Over objection, the court admitted in evidence Special Orders Number 164, dated 18 November 1944, Headquarters, 30th Infantry, reading in part as follows:

"6. Having rptd to this Hq in compliance with Par 5, SO 291, Hq 3rd Inf. Div, cs, VOCC 14 November 1944 asgng the following EM, to orgns indicated, is hereby made of record * Co B * * Pvt CHARLES ZOTTOLI, 32000846" (R12,13 and Pros. Ex.B).

After a showing of its voluntary nature, there was introduced without objection a pre-trial statement of accused, of which the portion relevant to Specification 1 is as follows (R18,19):

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"On or about 14 November 1944, while at the 2nd Replacement Depot, I was to be assigned to an Infantry Company, and I knew that I just couldn't take it up there because I am too 'jumpy' and nervous. I have always been nervous. So I left the Replacement Depot and went to Marseille, France. I was ill all the time so I turned myself into the MP's at Marseilles, France on or about 2 February 1945. I was then returned to the Regiment and assigned to Company 'B', 30th Infantry. * * * I have always been very nervous and just can't take it. I want to soldier, but I just can't help myself" (Pros.Ex.C).

b. As to Specification 2:

Staff Sergeant Weiler, platoon sergeant, Company 'B', 30th Infantry, testified that he knew accused and that on 14 March 1945 accused was a member of his platoon (R13,14). On that day his unit was moving up to attack with the 44th Division, and marched from the assembly area to the forward assembly area and thence into the attack (R14-15). Accused had been informed that the company was going to attack, and was with the company before the march, but when the company was checked at the forward assembly area, five minutes before the assault, he could not be found (R14,15). The company actually attacked on that day, met strong enemy opposition, and lost "a lot of men" (R14). Accused was not given permission to be absent and was not present for duty with the company from 14 to 24 March 1945 (R15).

In that portion of his pre-trial statement relevant to Specification 2, introduced into evidence without objection, accused admitted leaving his unit as it was marching up to attack the enemy (Pros.Ex.C). Thereafter he went to a rest camp and stayed there until it closed, then went to Nancy, France, where he was "picked up" (Pros.Ex.C).

4. On being advised of his rights as a witness, accused elected to remain silent, and no evidence was presented by the defense (R20,21).

5. "Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty or to shirk important service" (MCM 1928, par. 130a, p. 142).

Under Article of War 28 any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter.

a. Briefly recapitulated, the evidence in support of Specifi-

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cation 1 consists of (a) accused's pre-trial statement that on 14 November, while he was at the 2nd Replacement Depot, he left because he was to be assigned to an Infantry Company; (b) the testimony of a sergeant of the regimental service company that he could not find accused at the Third Division Reinforcement Depot, though the latter "was supposed to be picked up there"; (c) the 30th Infantry Regimental Order assigning the accused to Company B thereof; and (d) the entry in the morning report for Company B stating that accused was "assigned NOT joined to AWOL". It is important to observe that the specification alleges that the accused absented himself from "his place of duty". It was therefore proper to prove that he absented himself from either the Replacement Depot or Company B of the 30th Infantry or any other place which was his place of duty at the time. The accused's confession admitted all of the essential elements of that part of the offense charged involving an absence without leave from the 2nd Replacement Depot.

A confession may not be considered as evidence against an accused unless there is other proof that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself (MCM 1928, par. 114a, p.115). In our opinion the testimony of the sergeant that he went to the Third Division Replacement Depot (it should be observed that this Depot was not the 2nd Replacement Depot referred to in the confession), "to pick him [accused] up" - a place where he expected the accused to be at that time - and could not find him and the morning report entry to the extent that he did not join that company on that date in accordance with a regimental order to do so was sufficient evidence that he was probably absent without leave and constituted a corpus delicti (CM ETO 17407, Abraham). In the ordinary course of events if not absent without leave accused would have been with the other arriving reinforcements.

Defense counsel objected to the admission in evidence of the morning report entry (Pros.Ex.A) and the regimental order (Pros.Ex.B) on the grounds that they constituted hearsay evidence. The morning report entry read "Assigned NOT joined to AWOL". When used merely for the purpose of showing that accused did not join the organization - facts well within the knowledge of the commanding officer of that organization - the entry is admissible as an exception to the hearsay evidence rule (MCM 1928, par. 117b, p.121). In sustaining the finding of guilty on the basis of the reasoning above it was not necessary to prove accused's absence without leave by the term "AWOL" in the morning report. Only the fact that he failed to join the company was used as a circumstance to help create the corpus delicti. It is therefore not necessary to pass upon the hearsay character of the questionable part of the entry, namely "AWOL".

With reference to Pros.Ex.B the same reasoning applies. That part of the exhibit to the effect that the accused had reported to the Regimental Headquarters was a statement of fact made by a person not before the court. The prosecution itself showed that it was not a true fact.

"It is to be borne in mind that the mere fact that a document is an official report does not in itself make it admissible in evidence for it is the hearsay assertion of a person not in court" (MCM, 1928, par. 117, p.120).

Notwithstanding, that part of the order reading "Having rptd to this Hq" was not important in sustaining the findings. The only probative value that the exhibit had was to show that the Regimental Headquarters assigned the accused to Company B of that regiment. This explains the reason the company commander entered in that company's morning report the fact that he had not joined. For the purpose of showing that there was such an order Pros.Ex.B was the best evidence and admissible (MCM 1928, par. 116, p.118).

The incidental admission of parts of the two questioned documents which might be considered hearsay and inadmissible did not injuriously affect the substantial rights of the accused for the reasons stated. They were not necessary to prove the offense charged.

Accused's confession properly being a part of the evidence for the prosecution, it established that on 14 November 1944 he absented himself without leave from the Replacement Depot where he was then situated. With respect to the element of intent to avoid hazardous duty, the facts in this case present a similar pattern to CM ETO 8172, St. Dennis in that the hazardous duty is not shown to be immediate and of a specific nature. There is no evidence of a particular nature that the company to which accused was about to be and was later assigned was actually in combat or anticipated immediate combat. However, the date of accused's initial absence is extremely significant in view of the well known combat situation then existing in the European Theater - a time when our forces, particularly the infantry, were heavily engaged with the enemy and replacement depots were functioning to the utmost to maintain the units at the front with sufficient men to replace casualties. The accused was in a replacement depot. He admitted that he knew he was going to be assigned as an infantry replacement and said "I knew I just couldn't take it up there" (Underscoring supplied). This case does not present the problem of finding in the record evidence of the immediate and specific hazardous duty of accused's unit from which evidence it may be inferred that accused knew of the hazardous duty and intended by his unauthorized absence to avoid it. Here the accused's statement clearly discloses both his knowledge of the dangers ahead and his intent to avoid them. No question of inferences is involved. The record is legally suffi-

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cient to support the finding of guilty of this Specification 1 (CM ETO 8172, St. Dennis; CM ETO 12044, May).

b. The undisputed evidence shows that accused was absent from his organization at the time and under the circumstances alleged in Specification 2, that is, without leave and with intent to avoid combat with the enemy. Accused's admissions corroborate the otherwise conclusive evidence of his guilt of this specification. This desertion is of a pattern well known to the Board of Review (CM ETO 8028, Burtis; CM ETO 8083, Cubley; CM ETO 9796, Emerson; CM ETO 8955, Mendoza).

Though the prosecution failed to prove, as alleged, that accused deserted "at or near Schmittviller, France", that error is immaterial, since the place of desertion is not of the essence of the offense and no substantial right of accused was injuriously affected thereby (CM ETO 15154, Sohn).

6. The charge sheet shows accused to be 29 years of age. He was inducted 7 January 1941, released and transferred to the Enlisted Reserve Corps 20 September 1941, and recalled and reported for active duty 30 November 1942. He had no prior service.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (Cir. 210, WD, 14 Sep 1943, sec. VI, as amended).

(ON LEAVE)

Judge Advocate

Ronald D. Kelly

Judge Advocate

John J. Collins, Jr.

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3

23 OCT 1945

CM ETQ 14735

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

NORMANDY BASE SECTION, COMMUNICATIONS
ZONE; EUROPEAN THEATER OF OPERATIONS

v.)

Privates EDWARD L. CLARK)
(37245282) and GORDON L.)
ASHLOCK (37404618), both of)
Detachment 89, 15th Reinforce-)
ment Depot.)

Trial by GCM, convened at Le Havre,
France, 8 June 1945. Sentence as
to each accused: Dishonorable discharge,
total forfeitures and confinement at
hard labor for 30 years, Eastern Branch,
United States Disciplinary Barracks,
Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, 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 by consent in a common trial upon the following charges and specifications:

CLARK

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

Specification 1: In that Private Edward L. Clark, Detachment 89, 15th Reinforcement Depot, (then a member of Detachment 70, 15th Reinforcement Depot), did, without proper leave, absent himself from his organization at Bezonnais Wood, Ecommoy, France, from on or about 5 October 1944, to on or about 22 October 1944.

Specification 2: In that * * * did, without proper leave, absent himself from his organization at Bezonnais Wood, Ecommoy, France, from on or about 2 November 1944, to on or about 28 November 1944.

Specification 3: In that * * * did, without proper leave, absent himself from his organization at Bezonnais Wood, Ecommoy, France, from on or about

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29 November 1944, to on or about 25 January 1945.

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

Specification: In that * * * , did, at Foret de Montgeon, Le Havre, France, on or about 21 February 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Ecommoy, Sarthe, France, on or about 30 April 1945.

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

Specification: In that * * * , having been restricted to the limits of the 488th Reinforcement Company area, did, at Bezonnais Wood, Ecommoy, France, on or about 29 November 1944, break said restriction by leaving the limits of said company area without proper authority.

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

Specification 1: In that * * * having been duly placed in confinement in the 70th Reinforcement Battalion Stockade, on or about 22 October 1944, did, at Bezonnais Wood, Ecommoy, France, on or about 2 November 1944, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that * * * , having been duly placed in confinement in the 15th Reinforcement Depot Stockade, on or about 18 February 1945, did, at Foret de Montgeon, Le Havre, France, on or about 21 February 1945, escape from said confinement before he was set at liberty by proper authority.

CHARGE V: Violation of the 93rd Article of War.
(Nolle prosequi)

Specification (Nolle prosequi)

ASHLOCK

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

Specification 1: In that Private Gordon L. Ashlock, Detachment 89, 15th Reinforcement Depot (then a member of Detachment 70, 15th Reinforcement Depot), did, without proper leave, absent himself

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from his organization at Bezonnais Wood, Ecommoy, France, from on or about 5 October 1944 to on or about 22 October 1944.

Specification 2: In that * * * did, without proper leave, absent himself from his organization at Bezonnais Wood, Ecommoy, France, from on or about 2 November 1944 to on or about 25 January 1945.

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

Specification: In that * * *, did, at Foret de Montgeon, Le Havre, France, on or about 21 February 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Ecommoy, Sarthe, France, on or about 30 April 1945.

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

Specification I: In that * * *, having been duly placed in confinement in the 70th Reinforcement Battalion Stockade, on or about 24 September 1944, did, at Bezonnais Wood, Ecommoy, France, on or about 5 October 1944, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that * * * having been duly placed in confinement in the 70th Reinforcement Battalion Stockade, on or about 22 October 1944, did, at Bezonnais Wood, Ecommoy, France on or about 2 November 1944, escape from said confinement before he was set at liberty by proper authority.

Specification 3: In that * * *, having been duly placed in confinement in the 15th Reinforcement Depot Stockade, on or about 18 February 1945, did, at Foret de Montgeon, Le Havre, France, on or about 21 February 1945, escape from said confinement before he was set at liberty by proper authority.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the votes were taken concurring, was found guilty of the charges and specifications against him. Evidence was introduced of one previous conviction of Clark by general court-martial for carnal knowledge of a female under 16 years of age in violation of Article of War 96. Evidence was introduced of two previous convictions of Ashlock by special court-martial, one for leaving a rifle exposed to

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weather, breach of restriction and breach of arrest in violation of Articles of War 83, 96 and 68 (sic) respectively, and one for absence without leave for five days in violation of Article of War 61. Three-fourths of the members of the court present at the time the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentences, reduced the periods of confinement to 30 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 Article of War 50 $\frac{1}{2}$.

3. The evidence introduced by the prosecution against Clark may be summarized as follows:

a. Specification I of Charge I (absence without leave from 5 October to 22 October 1944): The only proof of the alleged absence without leave consists of duly authenticated extract copies of the morning report of Clark's organization for 6 October and 28 October 1944, signed by the assistant adjutant, respectively showing him from duty to absent without leave as of 5 October 1944, and from absent without leave to confinement in the post stockade as of 22 October 1944 (R13-14, Pros. Ex. 4,5). Stipulated testimony shows that he was confined in the post stockade on 22 October 1944 (R30).

b. Specification 2 of Charge I (absent without leave from 2 November to 28 November 1944) and Specification I of Charge IV (escape from confinement on 2 November 1944): The testimony of the sergeant of the guard shows that Clark was in confinement in the stockade on 2 November 1944, and on that day he failed to answer a roll call and could not be found in the stockade area (R24-26). Morning report entries for 2 November and 29 November 1944, both signed by the assistant adjutant, respectively show him from confinement in the stockade ^{to} absent without leave, and from absent without leave to duty as of 28 November (R4-15, 30-32, Pros. Exs. 6,7). It was stipulated that he was returned to military control on 28 November 1944 (R33).

c. Specification 3 of Charge I (absence without leave from 29 November 1944 to 25 January 1945) and Specification of Charge III (breach of restriction on 29 November): The only evidence adduced as to these specifications consists of stipulated testimony showing that Clark was restricted to the company area on 28 November 1944 (R33), and a duly authenticated extract copy of the morning report of his organization for 29 November 1944, signed by the assistant adjutant, showing him from duty to absent without leave (R14-15, 30-32, Pros. Ex. 8).

d. Specification of Charge II (desertion from 21 February to 30 April 1945) and Specification 2 of Charge IV (escape from confinement on 21 February 1945):

Competent testimony and an extract copy of the guard report shows that Clark was confined in the 15th Replacement Depot Stockade at Le Havre, France, on 18 February 1945 (R18-19, Pros. Ex.11). Testimony of the acting sergeant of the guard shows that he was missing at roll call, without permission to be absent, on 21 February 1945, and could not be found (R27-29). An entry from the morning report of his detachment for 24 February 1945, signed by the personnel officer, shows him from confinement to escape as of 21 February (R16, Pros. Ex. 9). It was stipulated that he was apprehended 30 April 1945 at Ecommoy, Sarthe, France (R17).

4. The evidence introduced by the prosecution against Ashlock may be summarized as follows:

a. Specification 1 of Charge I (absence without leave from 5 October to 22 October 1944) and Specification 1 of Charge III (escape from confinement on 5 October 1944): Testimony of the sergeant of the guard and an extract copy of the guard report shows that Ashlock was "admitted" to the 70th Reinforcement Battalion Stockade at Bezonnais Wood, Ecommoy, France, on 24 September 1944 (R21-22, Pros. Ex. 12). Other testimony shows that he escaped from the stockade during the night of 5 October 1944, and could not be found the following day (R23-24). Stipulated testimony, and an extract copy of the morning report of his organization for 22 October 1944, signed by the assistant adjutant, each show that Ashlock was returned to the stockade on 22 October 1944 (R12,30, Pros. Ex.1).

b. Specification 2 of Charge I (absence without leave from 2 November 1944 to 25 January 1945) and Specification 2 of Charge III (escape from confinement on 2 November 1944): The only evidence in support of these specifications consists of a duly authenticated extract copy of the morning report of Ashlock's organization for 2 November 1944, signed by the assistant adjutant, showing him from "Abs Conf Stockade to AWOL 0100" (R12, Pros. Ex. 2), and a stipulation that he returned to military control and was confined on 28 January 1945 (R15).

c. Specification of Charge II (desertion from 21 February to 30 April 1945) and Specification 3 of Charge III (escape from confinement on 21 February 1945): It was shown by testimony that Ashlock was in confinement in the 15th Replacement Depot Stockade at Le Havre, France, on 18 February 1945 (R18), and that he was also in the stockade on the evening of 20 February; that he was absent without permission at roll call on the morning of 21 February, and could not be found, and was next seen about 14 May 1945 when he was in the stockade again (R27-29). A duly authenticated extract copy of the morning report of his organization for 24 February 1945, signed by the personnel officer, shows him from confinement to escape as of 21 February (R13, Pros. Ex. 3).

5. After their rights as witnesses were explained to them, both accused elected to make unsworn statements (R33-35).

Clark stated that at a replacement depot in England he volunteered to come to France and fight. He finally was sent to France with the 15th

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Replacement Depot. He got "about half enough to eat" and was with "nothing but guardhouse boys". He did not want to go to the front with such men. He has been in replacement depots for over 14 months and has had basic training "over and over and over and over and over again". He came overseas to fight for his country and not to stay in replacement depots. He had tried in vain to get transferred from them. When he "went AWOL from Ecommoy", he did not intend to desert the Army. He would accept any opportunity to go to the South Pacific or to go with the Army of occupation (R35-36).

Ashlock stated that he had come to the 15th Replacement Depot in France with "a bunch of ex-convicts", and got about "one-third enough to eat on top of a lot of kicking around", and was given basic training he had "taken a million times". He has been in replacement depots "so long I can't remember", and at one time saw a colonel in a futile effort to get transferred out so he could get a "chance to soldier". One Sunday he went to a ball game and drank "about two or three quarts of calvados". On returning to camp through Ecommoy, two second lieutenants grabbed one of his companions, and "winding up I was charged with striking an officer, drunk and disorderly and a bunch of other stuff". He was placed in and held in the stockade, although the charges against him were false. "They were going to give me a court-martial for some general principals (sic) of some kind" (R35).

6. At the outset of the trial, accused elected to defend themselves, apparently because special counsel whom they had requested was not present at the trial. Hearsay statements of Ashlock and the regularly appointed defense counsel indicate that the requested counsel was not available (R3). In the absence of an affirmative showing to the contrary, it will be presumed that individual counsel was not reasonably available and that there was no abuse of discretion on the part of the convening authority (see CM 202846, Shirley, 6 BR 337 (1935)).

The president and law member repeatedly impressed upon accused the advisability of using the regularly appointed defense counsel (R3-5, 11-12). His persuasion may have caused accused ultimately to accept and place undue confidence in such counsel, who then failed to make objections to certain inadmissible and incompetent evidence. Since there is no prohibition against an accused acting alone as his own defense counsel (CM ETO 4619, Traub), no undue amount of influence or persuasion should be employed in causing an accused to accept regularly appointed defense counsel whose services he does not desire. However, it appears from the record of trial that accused, as well as the defense counsel, actually participated freely in the cross-examination of witnesses and conduct of the defense, so that no prejudice resulted to accused's substantial rights from the action of the president and law member. Moreover, evidence which should have been excluded if proper objection had been made will be excluded from consideration here (see CM ETO 4756, Carmigliano).

7.a. It is now well settled that prior to 12 December 1944, in the European Theater of Operations, only the commanding officer of the reporting unit, or in his absence, the officer acting in command, had authority

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to sign, as distinguished from prepare, original morning reports (AR 345-400, 1 May 1944, sec. VI, par.42; CM ETO 6951, Rogers; CM ETO 7686, Maggie and Lewandowski; CM ETO 11693, Parke). Therefore, it is clear that in the absence of any affirmative showing in the record that the entries signed by the assistant adjutant prior to 12 December 1944 were made in the regular course of business so as to render them admissible under the Federal "shop book rule" (see CM ETO 14165, Pacifici), such entries were improperly received in evidence and cannot be considered here. Excluding them, there is no substantial, competent evidence to support the findings of guilty of Specifications 1 and 3 of Charge I and the Specification of Charge III as to Clark, and Specification 2 of Charge I and Specification 2 of Charge III as to Ashlock.

b. Independent of such inadmissible morning report entries, there is substantial, competent oral testimony which clearly establishes Clark's guilt of Specification 2 of Charge I and Specification I of Charge IV, and Ashlock's guilt of Specification I of Charge I and Specification I of Charge III.

c. With respect to the Specification of Charge II and Specification 2 of Charge IV against Clark, competent oral testimony establishes his escape from confinement and initial absence without leave on 21 February 1945, as alleged. He expressly agreed to a stipulation that he was apprehended 30 April 1945. From his established absence without leave in an active theater of operations for 67 days alone, the court was fully warranted in inferring an intent on his part to remain permanently away from the service (CM ETO 1629, O'Donnell; CM ETO 6093, Ingersoll; CM ETO 5406, Aldinger). In inferring such intent to desert, the court may have considered the improperly admitted evidence of his alleged absences without leave from 5 to 22 October 1944 and from 29 November 1944 to 25 January 1945, and his alleged breach of restriction on 29 November 1944. Clearly, such evidence was not introduced by the prosecution primarily to show intent to desert under Charge II, but to establish his guilt of other specifications and charges upon which he was properly arraigned, and as to which there was merely a failure of proof. Moreover, aside from such incompetent evidence, the court had before it properly admitted evidence of Clark's escape from confinement on 2 November 1944, and his ensuing absence without leave from 2 to 28 November 1944, together with the additional circumstances that the 67-day period of absence without leave was initiated by an escape from confinement and was terminated by apprehension. Aside from Clark's unsworn denial of any intent to desert, there is no evidence which is inconsistent with the inference of an intent to desert. Therefore, assuming that the evidence improperly admitted as to other specifications might have resulted normally in disapproval of the finding of guilty of Charge II and its Specification, the competent evidence from which an intent to desert might be inferred is so compelling and convincing that accused's substantial rights were not prejudiced thereby within the contemplation of Article of War 37 (see Dig. Op. JAG, 1912-40, sec.395 (2), p. 198; CM 255083, Hargrove, 36 BR 29 (1944)). The evidence supports the findings of guilty as to these specifications.

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d. With respect to the Specification of Charge II and Specification 3 of Charge III against Ashlock, competent testimony and documentary evidence establishes his escape from confinement and initial absence without leave on 21 February 1945 at Le Havre, France, as alleged. There is no showing, however, that the absence without leave existed until 30 April 1945, as alleged, or for any other certain period of time. One of the items of proof for desertion listed in the Manual is that accused's absence "was of a duration and was terminated as alleged" (MCM, 1928, par. 130a, p.143). In so-called "short" (AW 28) desertions, it is held that proof as to duration or termination of the absence is immaterial because the offense is complete at the moment the accused absents himself with the requisite intent (CM ETO 9975, Athens et al; CM NATO 2044, 3 Bull. JAG 232). Moreover, in "straight" (AW 58) desertions, such as is here alleged, neither the place nor manner of termination of the absence is an essential element of the offense (CM ETO 13018, Ostrowski; CM 233688, Aievoli, 20 BR 49 (1943)). The question here presented is whether it was necessary for the prosecution to establish affirmatively the time of termination of Ashlock's absence.

A simple showing that he escaped from confinement and absented himself without leave from his organization on 21 February 1945 is not sufficient alone to support the inference that he intended to desert the service (CM 261112, 3 Bull. JAG 379); and in the absence of other facts or circumstances from which such intent may be inferred, the prosecution must have established in some-manner the duration of the absence.

The Manual provides that once the condition of absence without leave is shown to have existed, it may be presumed to have continued, in the absence of evidence to the contrary, until accused's return to military control (MCM, 1928, par. 130a, p.143). But there is no evidence as to when Ashlock returned to military control. While he was seen in the stockade about 14 May 1945, he might well, under the evidence adduced on the trial of the case, have returned there within a few hours after he escaped, in which event the inference of an intent to desert would be unwarranted and unreasonable. Where, as here, the prosecution relies substantially upon the duration of an unauthorized absence to support an inference of intent to desert, such duration must be shown affirmatively, as any other fact essential to establish the guilt of the accused. Duration might have been proved in the instant case by merely showing the date or approximate date of return to military control, since the date of the initial absence had been proved and the condition would have been presumed to have continued until accused's return. In the absence of any proof of duration, as to the Specification of Charge II, ^{the} evidence is legally sufficient to show only absence without leave from 21 February 1945 to a date unknown.

8. The charge sheets show that Clark is 27 years two months of age and was inducted 2 December 1942 at Fort Leavenworth, Kansas. Ashlock is 24 years ten months of age and was inducted 17 December 1942 at Jefferson Barracks, Missouri. Neither accused had prior service.

9. The court was legally constituted and had jurisdiction of the

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persons and offenses. Except as noted herein, no errors injuriously affecting the substantial rights of the accused were committed during the trial. As to Clark, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 1 and 3 of Charge I and Charge III and its specification, and legally sufficient to support the findings of guilty of Charge I and Specification 2 thereof, Charge II and its Specification and Charge IV and its specifications, and the sentence. As to Ashlock, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 2 of Charge I and Specification 2 of Charge III and legally sufficient to support the findings of guilty of Charge I and Specification I thereof and Charge III and Specifications 1 and 3 thereof, and only so much of the findings of guilty of Charge II and its Specification as involves findings that Ashlock did, without proper leave, absent himself from his organization at Le Havre, France, from 21 February 1945 until a date unknown, in violation of Article of War 61, and legally sufficient to support the sentence.

10. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The penalty for absence without leave is such punishment as the court-martial may direct (AW 61). As to each accused, the designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 24; Cir. 210, WD, 14 Sept. 1943, sec. VI, as amended).

B. R. Sleeper Judge Advocate

Malcolm C. Sheiman Judge Advocate

(Temporary Duty) Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

18 AUG 1945

CM ETO 14745

UNITED STATES)
) v.)
Private OTTIS H. ROWELL)
(14073158), Headquarters)
Battery, 533rd Antiaircraft)
Artillery Automatic Weapons)
Battalion (Mobile).)

VI CORPS

Trial by GCM, convened at Igls, Austria,
14 May 1945. Sentence: Dishonorable
discharge, total forfeitures, confine-
ment at hard labor for life. United
States Penitentiary, Lewisburg, Penn-
sylvania.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, 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.

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

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

Specification 1: In that Private Ottis H. Rowell, Headquarters Battery, Five Hundred Thirty-third Antiaircraft Artillery Automatic Weapons Battalion (Mobile), did, at Wenterrieden, Germany, on or about 29 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Captain Vincent C. Niewoehner, Five Hundred Thirty-Third Antiaircraft Artillery Automatic Weapons Battalion (Mobile), a human being, by shooting him with a rifle.

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Specification 2: In that * * * did, at Wenterrieden, Germany, on or about 29 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Chief Warrant Officer Sigmund B. Diamond, Five Hundred Thirty-Third Antiaircraft Artillery Automatic Weapons Battalion (Mobile), a human being, by shooting him with a rifle.

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

Specification: In that * * * did, at Wenterrieden, Germany, on or about 29 April 1945, with intent to commit a felony, viz, murder, commit an assault upon Corporal Walter H. Batoha, Headquarters Battery, Five Hundred Thirty-Third Antiaircraft Artillery Automatic Weapons Battalion (Mobile), by willfully and feloniously shooting the said Corporal Walter H. Batoha in the back with a dangerous weapon, to wit, rifle.

He pleaded not guilty to and, all members of the court present when the vote was taken concurring, was found guilty of all of the charges and specifications. No evidence was introduced of any previous conviction. All members of the court present when the vote was taken concurring, he was sentenced to be shot to death by musketry. The reviewing authority, the Commanding General, VI Corps, approved the sentence and forwarded the record of trial for action under Article of War 48. The Commanding General, United States Forces, European Theater, 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 of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50g.

3. Accused, a member of Headquarters Battery, 533rd Antiaircraft Artillery Automatic Weapons Battalion (Mobile) (R12,20,24,42), was seen by Sergeant S. F. Wolny of a different organization on Sunday afternoon 29 April 1945 in Wenterrieden, Germany (R6). At that time accused "looked like he had a few drinks" (R8). Later that day about 7:00 pm, acting upon a report that someone was breaking windows,

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Wolny found accused at the house where the windows were broken (R7, 10). Accused "started an argument" with Wolny. He said he had been in the Infantry longer than Wolny and recognizing the divisional patch on Wolny's shoulder told him that he was "not so tough" (R7). He snatched Wolny's carbine away from him and pushed it in the ground and then struck Wolny (R7,10). Wolny then "let him have it" and beat accused with his fists. Accused went down and appeared to be hurt badly so Wolny went for aid. He met two other soldiers including Chief Warrant Officer Sigmund B. Diamond and told them what had happened. They returned to the scene of the affray and found that the accused had procured his own rifle. Fearing that the accused might make use of the rifle, the enlisted men forcibly took the rifle away from him. Captain Vincent C. Niewoehner, commanding officer of accused's organization, arrived at the scene (R13) and ordered accused to go to his quarters which were about two or three hundred yards away (R17) in a hotel building above the battalion command post (R22,29-30). Accused mumbled something about the fact he was not given a square deal when he came in the outfit, that he was in trouble and did not care much if he got into more trouble (R15). Two enlisted men started to forcibly conduct him to his quarters (R15). Accused then told Captain Niewoehner that he would go voluntarily if the soldiers would release him (R8,14,17). He was freed and started rapidly to his quarters, reaching there before the others (R8,14,16). He had no rifle with him at that time (R18,28). He entered the building by a rear door and went upstairs to the floors where the troops were quartered (R24). Shortly thereafter Captain Niewoehner, Mr. Diamond, Corporals Walter H. Batcha and James H. Hertz (R21) entered the same building through the front door. They stood in the hallway talking about the recent incident when the accused suddenly appeared on the stairway leading from the upper floor to the hallway. He had an M-1 rifle either raised to his shoulder or held at his hip and immediately began firing at the group below at a distance of about 15 feet (R21, 22,24,28). He fired at least three shots in rapid succession (R27). Captain Niewoehner and Mr. Diamond fell to the floor. Corporals Batcha and Hertz got out through the front door where Batcha fell to the ground crying in pain (R22,26-27). Accused then came out through the same door with his hands above his head saying, "Don't shoot" (R21). The shooting took place in less than a minute but about 20 to 30 minutes after accused was found by the group of enlisted men after his fight with Wolny (R18,27-28).

The accused was placed under guard on an upper floor of the building. He lay on the floor. A bottle of schnapps was removed from his shirt (R37-38). He was crying and said "Through my blindness, I saw Captain Niewoehner and I shoot at him (R58) * * if I hurt or kill someone, I didn't mean it. I just wanted to kill Captain Niewoehner" (R37).

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Almost immediately after the shooting, Captain Walter J. Becker, Medical Corps (R29) examined Captain Niewoehner and Mr. Diamond. While Captain Becker examined him, Captain Niewoehner had about three respirations and died. His death was caused by shock and hemorrhage caused by a bullet wound through the right side of the head, and a bullet wound through the right side of his chest (R30). Mr. Diamond had a chest wound which entered the left side and came out the right side; there was also a bullet wound which entered the right part of the groin area, came out at the right thigh, and then apparently entered the left thigh coming out on the side of the left thigh (R31). Shock and hemorrhage as a result of the gunshot wounds caused Mr. Diamond to die as he was being examined (R32). Corporal Batocha was examined in the aid station (R33) where it was determined he had been wounded by a bullet that entered on the side of the left thigh and departed at the rear of the pelvic region (R32). At about 2015 hours, approximately thirty minutes after the shots had been fired, Captain Becker examined accused, who was under guard in a room in the same building as the aid station (R34). The left eye was quite swollen, and accused stated he could not see out of it. The soft tissue about the eye and adjacent part of his nose were discolored, and there was a superficial laceration on the inner portion of his lower lip. "He was * * * quiet. There was a little bit of slur to his speech as one might expect with a partially swollen lower lip", and his speech was coherent (R34). There was an alcoholic odor to his breath, but it was Captain Becker's opinion that he was not intoxicated (R35). Accused had been treated previously by Captain Becker, about the 15th of March, for recurrent malaria (R35).

4. Defense evidence.

The rights of the accused were explained to him by the law member (R41-42) and he elected to testify in his own behalf. He stated he was reared on a farm in South Carolina (R42-43), and after entering the Army 10 February 1942, he served with the 38th Division until March 1943, when he joined M Company, 179th Infantry, 45th Division, at Camp Pickett, Virginia. He came overseas as a machine gunner 8 June 1943 (R43). He was with the 45th Division in the invasion of Sicily and at Salerno, Italy. Some time in September 1943, he was wounded by shrapnel and was out of the line about two months. Around the first of December 1943, he rejoined his company in the line and went to Anzio with them (R44). Approximately 1 June 1944 (R45) on the way to Rome he suffered concussion and a shrapnel wound (R44-45), but after three days in the clearing station he was back in the line and took part in the invasion of Southern France in August 1944. After coming up through Southern France, he was reclassified in November or December, because of wounds received in his left foot, and joined the 533rd Antiaircraft Artillery Automatic

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Weapons Battalion in January 1945 (R45). On 29 April at about 1300 hours he took a bottle of schnapps into town, drank most of it except two or three drinks which he gave some Slav (R46) refugees. "When that was gone, a couple refugees went and got some more of that" (R45). He did not know how much he drank, but the last he knew he was at a table drinking (R45-46). The next thing he remembered he woke up in a room in the battalion command post under guard (R46) on 30 April 1945 (R47). He did not remember getting into a fight with a soldier, seeing Mr. Diamond or Captain Niewoehner, or getting a rifle and shooting at them (R46). He did not recall the examination by the doctor (R47). Accused had drunk to excess on other occasions and had loss of memory twice before (R47-48). He has the Combat Infantry Badge, Purple Heart with oak leaf cluster and five battle stars for the Sicilian campaign, two campaigns in Italy, France and Germany (R46).

Several officers corroborated accused's extended combat experience. His previous military record had been good. The company of which the accused was a member had been engaged in very heavy fighting for about 380 days of combat and the accused was wounded on two occasions and was finally sent to the Aid Station because he appeared to be nervous and battle weary. There he was reclassified (R49,51,52-53).

5. Accused has been found guilty of two charges of murder and one of an assault with intent to commit murder. Murder is the unlawful killing of a human being with malice aforethought. It was conclusively established by the evidence that the accused did unlawfully (without legal justification) kill Captain Vincent C. Niewoehner and Chief Warrant Officer Sigmund B. Diamond, on the day and at the place alleged in the specifications. It was also equally established that at the same time and place he shot Corporal Walter H. Batoha in the back with a rifle. There remains only for discussion the question of the presence or absence of malice aforethought with reference to the murder charges, and the intent to commit murder with reference to the assault charge. Malice is defined as "an intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not * * *" (MCM, 1928, par. 148a, p.163).

"A legal presumption of malice may arise from the deliberate use of a deadly weapon in a way which is likely to produce, and which does produce, death" (Underhill's Criminal Evidence, sec.557 p.1090).

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The findings of guilty of the two specifications of Charge I alleging murder were therefore amply and legally supported by the evidence. Not only was the court justified in concluding the existence of malice from the use of the deadly weapon but also from accused's subsequent statement that he intended to kill Captain Niewoehner. The fact that he did not intend to kill Mr. Diamond is no defense under the circumstances (MCM, 1928, par.148a, p.163). His malicious intent to kill is transferred to the person whose death has been caused. The malice or intent follows the bullet (26 Am.Jur., sec.34-35, pp.178,179).

By virtue of the same reasoning if one of the bullets goes astray and strikes someone not intended, an assault with intent to murder has been committed.

"where the accused, intending to murder A, shoots and wounds B, mistaking him for A, he is guilty of assaulting B with the intent to murder him; so also where a man fires into a group with intent to murder some one, he is guilty of an assault with intent to murder each member of the group" (MCM, 1928, par.1491, p.179).

Again the malice, once proved, followed the bullet. Corporal Batocha received a serious wound and only by chance was he not killed as a result of accused's assault. The evidence clearly shows the assault in conjunction with the unlawful killing of the other two men.

The burden of adducing evidence to rebut the presumption of malice necessary to constitute the two killings murder and the shooting of Corporal Batocha assault with intent to commit murder, devolved upon accused at the close of the prosecution's case proving the apparently deliberate and unjustified shooting (see Winthrop's Military Law and Precedents (Reprint, 1920), p.673). Accused's only defense was that his voluntary intoxication caused him to remember nothing whatsoever about the fight with Sergeant Wolny, the subsequent shooting, or his examination by the medical officer about thirty minutes after the shooting. Voluntary drunkenness is no excuse for crime committed while in that condition, but may be considered as affecting mental capacity to entertain a specific intent (MCM, 1928, par.126a, p.136). Accused's asserted drunkenness to the extent that it affected his mental capacity to entertain a specific intent is refuted by certain facts inconsistent with such a condition. He recognized the 103rd Division patch on Sergeant Wolny's sleeve, he recognized Technical

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Sergeant Ranta and called him by name, he recognized Captain Niewoehner by addressing him as "Captain", he procured a rifle from the enlisted men's quarters and from a distance of approximately fifteen feet made several bullets effective. He also realized the danger of his position immediately after the shooting and raised his hands crying out to his captors not to shoot. Shortly thereafter he admitted intending to kill Captain Niewoehner whom he saw at the time he shot. Whether he was too drunk to consciously and purposefully execute a murderous design was a question for the court's determination. The record reveals sufficient grounds for the court's disbelief of accused's testimony in regard to his drunkenness.

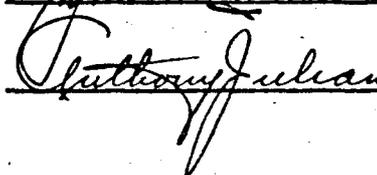
6. The charge sheet shows the accused to be 21 (now 22) years of age and single. He was inducted 10 February 1942 at Fort Jackson, South Carolina.

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

8. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454,567), and of assault with intent to murder by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

 Judge Advocate

 Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater. **18 AUG 1945** TO: Commanding
General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Private OTTIS H. ROWELL (14073158), Headquarters Battery, 533rd Antiaircraft Artillery Automatic Weapons Battalion (Mobile), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed and commuted, 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 CM ETO 14745. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 14745).



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

(Sentence as commuted ordered executed. GCMO 363, USFET, 30 Aug 1945).

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RESTRICTED

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3

22 SEP 1945

CM ETO 14764

UNITED STATES

v.

Privates KENNETH R. COLLINS
(14099816), Service Company,
507th Parachute Infantry
Regiment and BURTON SWEET, JR.
(6977878), Company C, 304th
Combat Engineer Battalion

SEINE SECTION, COMMUNICATIONS ZONE
EUROPEAN THEATER

Trial by GCM convened at Paris,
France, 30 March and 18 April 1945.
Sentence as to each: Dishonorable
discharge, total forfeitures and
confinement at hard labor for life.
United States Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, 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 arraigned separately and tried together upon the following charges and specifications:

COLLINS

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

Specification: In that Private Kenneth R. COLLINS,
Service Company, 507th Parachute Infantry Regiment,
European Theater of Operations, United States Army,
did, at Tidworth - Pennings-Wiltshire, England, on
or about 22 September 1944, desert the service of the
United States and did remain absent in desertion until
he came under military control at La Ferte-sous-Jouarre,
Seine & Marne, France, on or about 10 February 1945.

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

Specification 1: In that * * * in conjunction with
Private Burton SWEET Junior, Company C, 304th Combat
Engineer Battalion, 79th Infantry Division, European
Theater of Operations, United States Army, did, at

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Pantin, Seine, France, on or about 10 February 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Louis Cote, 7, rue des Rondonneaux, Paris, France, a purse containing fifty (50) francs and a wallet containing personal papers, the property of the said Louis Cote, total value of about one hundred and fifty (150) francs, of the value of about three dollars (\$3.00).

Specification 2: In that * * * in conjunction with Private Burton SWEET Junior, Company C, 304th Combat Engineer Battalion, 79th Infantry Division, European Theater of Operations, United States Army, did, at or near Moussy-le-Neuf, Seine-et-Marne, France, on or about 10 February 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person and presence of Fernand Cartier, 7 Allee Jean de la Fontaine, Pavillons-sous-Bois, Seine, France, an automobile, Viva Stella No. 5119-RN-1, value about eighty thousand(\$80,000) francs, a wallet and personal papers, and the sum of nineteen thousand (19,000) francs the property of the said Fernand Cartier, total value of about ninety-nine thousand (99,000) francs, of the value of about one thousand nine hundred and eighty dollars (\$1,980).

Specification 3: In that * * * in conjunction with Private Burton SWEET, Junior, Company C, 304th Combat Engineer Battalion, 79th Infantry Division, European Theater of Operations, United States Army, did, at or near Jaignes, Seine-et-Marne, France, on or about 10 February 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Leopold Monchy, Jaignes, Seine-et-Marne, France, a wallet containing four hundred (400) francs, and personal papers, the property of the said Leopold Monchy, total value of about four hundred (400) francs, of the value of about eight dollars (\$8.00).

Specification 4: In that * * * in conjunction with Private Burton SWEET Junior, Company C, 304th Combat Engineer Battalion, 79th Infantry Division, European Theater of Operations, United States Army, did, at or near La Ferté-sous-Jouarre, Seine-et-Marne, France, on or about 10 February 1945, by force and violence and by putting him in fear feloniously take, steal and carry away from the person of Raymond Balle, St. Jean-les-Deux-Jumeaux, Seine-et-Marne, France, ninety (90) francs and a watch and chain,

value about five hundred (500) francs, the property of the said Raymond Balle, total value of about five hundred and ninety (590) francs, of the value of about eleven dollars and eighty cents (\$11.80).

SWEET

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

Specification: In that Private Burton Sweet Junior, Company C, 304th Combat Engineer Battalion, 79th Infantry Division, European Theater of Operations, United States Army, did, at Reims, Marne, France, on or about 8 September 1944, desert the service of the United States and did remain absent in desertion until he came under military control at La Ferte-sous-Jouarre, Seine-et-Marne, France, on or about 10 February 1945.

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

Specification 1 through 4: Identical with Collins Specifications 1 through 4, Charge II, except for appropriate substitution of name.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, each was found guilty of the respective charges and specifications against him. No evidence of previous convictions was introduced as to either accused. Three-fourths of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved each of the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused, and forwarded the record of trial for action pursuant to Article of War 50 $\frac{1}{2}$.

3. The following evidence was not disputed:

a. Charge I and Specification as to each accused.

Both accused went absent without leave from their respective organizations, as shown by extract copies of their morning reports, Collins on 22 September 1944 and Sweet on 8 September 1944 (R8; Pros. Exs. A and B). Both were apprehended in a stolen vehicle at La Ferte-sous-Souarre, Seine et Marne, France, on 10 February 1945 at about 1400 hours by French civilian police (R23-24).

b. Charge II and specifications as to each accused.

Earlier on 10 February 1945 at 0700 hours in Pantin, a Paris suburb, the two accused, each armed with a carbine, approached Louis Cote, 7 Rue des

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Rondonneux, Paris, France. They kept him "under weapons" and after jostling and searching him, relieved him of 50 francs, a purse worth about 100 francs, personal papers, and a wallet, valued at about 100 francs (R10-14). Later at about 0830 hours near Moussez-le-Neuf, France, they came upon Fernand Cartier, a resident of Pavillons, Sous Boise Seine, France, whose motor vehicle was stalled. They helped him get it started and with his permission rode with him. After riding a short distance, they directed him to a side road, forced him out of the car at gun point and took from him his personal papers and between 19,000 and 20,000 francs. Sweet pointed a pistol at him and fired, the bullet wounding him in the scalp (R14-15,17). Collins pointed a carbine at him and said "Mr. you have a few minutes to live" (R16). Accused then drove away in the car, a Viva Stella Reynault, worth about 70,000 to 80,000 francs (R16-17). At about 1400 hours still in Cartier's Reynault near Jaignes, Seine et Marne, France, they stopped Leopold Monchy, a resident of that town and displaying their weapons obtained from him 400 francs, his wallet and his identification card (R19-20). At about the same time, near Lizy, France, they stopped the stolen vehicle near Raymond Balle of St. Jean le deux Jermeaux, Seine et Marne, France, who was riding a bicycle. Sweet pointed a pistol at him (R15,21) and deprived him of his watch and chain and 90 francs (R21-22;Pros.Ex.C).

When apprehended in the stolen vehicle about 2 pm in La Ferte-sous-Jouarre by French civilian police, accused had in their possession two Army rifles, two revolvers, and property taken from the four civilians (R23-28; Pros.Exs.D and E). They were both under the influence of liquor but were not drunk (R32).

Two agents of the Criminal Investigation Division obtained respectively from each accused on 16 February 1945 a voluntary statement, in which each admitted his absence without leave from his organization and the commission of the alleged robberies on 10 February 1945. Over defense's objection that these statements were not voluntarily made, both were received in evidence (R33-42, 43-44; Pros.Exs.H and I).

At the request of defense a continuance was granted to permit a psychiatric examination of Sweet (R45-46). The examination made accordingly by Major Roy Swank, MC, Chief Neuropsychiatric Section, 191st General Hospital, prior to 18 April 1945, disclosed that Sweet "was sane on or about 8 September 1944, on or about 10 February 1945, and is presently sane" (R47).

4. For the defense, after their rights were explained, each accused elected to make an unsworn statement (R47-48,49). Sweet described his combat service, his intention to return to his organization during the period of his absence without leave and his desire "to volunteer for the CBI Theater of Operations" (R49). He had no intention of doing what he did on 10 February when "we were quite drunk" (R50).

Collins also related his combat experiences. As to the events of 10 February "we were quite drunk" and "had been drinking all day. I know, myself, I wouldnt do anything like that if I was sober". He "was

put in for the Bronze Star, the Combat Engineer Badge, and the Purple Heart". He stated he was "ready to go back at any time to the front lines. I'll be glad to volunteer for any hazardous duty".

5. The court's findings of guilty were fully justified. All the elements of the offenses alleged against each accused were clearly shown by substantial evidence both as to desertion under Charge I and Specification (CM ETO 10250, Kates and authorities therein cited) and as to the four robberies set forth under Charge II and specifications (CM ETO 3677, Bussard and authorities therein cited).

6. The charge sheet shows the following concerning the service of accused. Collins is 21 years and eight months of age. Under "Data as to service" only the date "16 April 1942" is shown. He stated that he enlisted in Alexander, Louisiana (R51). Sweet is 23 years and one month of age. Under "Data as to service" only the date "15 January 1940" appears. He stated that he enlisted at Albany, New York (R51). No prior service of either accused is shown.

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

8. The penalty for desertion in time of war is death or such other punishment as a court martial may direct (AW 58). Confinement in a penitentiary is authorized upon conviction of desertion in time of war by Article of War 42 and of robbery by Article of War 42 and section 234, Federal Criminal Code (18 USCA 463). As to each accused, the designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir 229, WD 8 June 1944, Sec II, pars. 1b(4), 3b).

B. A. Keeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. S. Lewis Jr. Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3

7 AUG 1945

CM ETO 14792

UNITED STATES)

45TH INFANTRY DIVISION

v.)

Trial by GCM, convened at APO 45.

Private WILLIAM J. LANGAN)
(31330385), Company E,)
179th Infantry)

U. S. Army, 25 June 1945. Sentence:
Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, 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 58th Article of War.

Specification 1: In that Private WILLIAM J. LANGAN, Company E, 179th Infantry, did, at or near LEMBACH, FRANCE, desert the service of the United States, on or about 1 January 1945, by absenting himself from his organization without proper leave and with intent to avoid hazardous duty, to wit: combat operations against elements of the German armed forces, and did remain absent in desertion until he returned to duty on or about 11 January 1945.

Specification 2: In that * * * did, at or near ALTHORN, FRANCE, desert the service of the United States, on or about 12 January 1945, by absenting himself from his organization without proper leave and with intent to avoid hazardous duty, to-wit: combat operations against elements of the German armed forces, and did remain absent in desertion until he returned to duty on or about 15 January 1945.

Specification 3: In that * * * did, at or near ALTHORN, FRANCE, desert the service of the United States, on or about 15 January 1945, by absenting himself from his organization without proper leave and with intent to avoid hazardous duty, to wit: combat operations against elements of the German armed forces, and did remain absent in desertion until he returned to duty on or about 16 January 1945.

Specification 4: In that * * * did, at or near ALTHORN, FRANCE, desert the service of the United States, on or about 29 January 1945, by absenting himself from his organization without proper leave and with intent to avoid hazardous duty, to wit: combat operations against elements of the German armed forces, and did remain absent in desertion until he returned to duty on or about 2 February 1945.

Specification 5: In that * * * did, at or near NESSANTIAL, FRANCE, desert the service of the United States, on or about 31 March 1945, by absenting himself from his organization, without proper leave and with intent to avoid hazardous duty, to wit: combat operations against elements of the German armed forces, and did remain absent in desertion until he returned to military control on or about 14 April 1945.

Specification 6. In that * * * did, at or near Nuremberg, Germany, desert the service of the United States, on or about 16 April 1945, by absenting himself from his organization, without proper leave and with intent to avoid hazardous duty, to wit: combat operations against elements of the German armed forces, and did remain absent in desertion until he returned to military control on or about 9 May 1945.

He pleaded not guilty to, and was found guilty of, the charge and specifications. No evidence of previous conviction was introduced. Six-sevenths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the findings of guilty of Specification 1 as involved a finding that accused did, at or near Lembach, France, on or about 1 January 1945, absent himself from his organization without proper leave and did remain absent until on or about 11 January 1945 in violation of the 61st Article of War, approved the remaining findings of guilty and the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

Specification 1:

On or about 1 January 1945, Company E, 179th Infantry, was alerted for movement from Lembach, France, to Goetzenbruck, France (R6,10). On the evening of 1 January, accused's platoon was notified, by runner, that the company would move out early the following morning (R71). Later the same night, as the result of a report that accused was missing, a search was made of his platoon area but he could not be found (R6). The next day, the company proceeded to Goetzenbruck and there engaged the enemy. During the engagement, it was subjected to small arms, mortar and artillery fire which resulted in casualties (R7,10). Accused was next seen on or about 11 January (R7). He was absent from 1 January to 11 January (R7).

Specification 2:

On 12 January 1945, accused's squad, after having been "back in a house in Goetzenbruck for a rest," moved out in squad column to take up a defensive position near Althorn, France (R12). Upon reaching the outskirts of Althorn at about 1700 hours, accused's squad leader assigned him a position in a foxhole (R13,16). When the squad leader returned to the foxhole approximately one-half hour later after having assigned positions to the other members of the squad, accused was gone (R13). The defensive position into which the company moved was "getting quite a bit of artillery fire" (R14). Accused was next seen on or about 15 January in Althorn (R13). He was not present with his platoon from 12 January to 15 January (R13,15).

Specification 3:

On 15 January, while in Althorn after withdrawing from the position previously held and prior to taking up a new position, accused was returned to his squad by his platoon sergeant. After eating in Althorn, the platoon moved out to take up a new position outside the town. The position was "on the line" with the enemy some 100 yards distant (R17). En route, accused "lagged behind and when we got there he wasn't there" (R17,18). He was not seen by his squad leader until the following night at which time he returned with the explanation that he had become lost and had spent the previous night in a foxhole (R18).

Specification 4:

On or about 29 January 1945, accused's company entrucked for a move from the vicinity of Althorn to Kohlhutte. After riding for some distance, the company dismounted and proceeded the remainder of the distance on foot. After marching for about a mile, accused's platoon reached its destination and took over its assigned sector "on the line." The enemy was some 300 or 400 yards distant and "a few mortar shells" were received in the sector into which the platoon moved. Accused was with the unit when it dismounted and started to proceed forward on foot but by the time the sector was reached he was gone. He did not return until 2 February (R20,21).

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Specification 5:

On or about 31 March, two platoons of Company E were ordered to take a hill near Hesselthal. They encountered strong opposition, suffered casualties, and were forced to withdraw. Thereafter, accused's platoon marched for a mile and a half or two miles, reached a wooded area, and dug in. Accused was present at the beginning of this march but was absent when the wooded area was reached. The following morning, the platoon "pushed off and took a town." Accused was not seen by his platoon sergeant during the period from 31 March to 14 April (R24,25). During this period, the unit was engaged in "fast combat; we kept moving from town to town" (R26).

Specification 6:

On 16 April, accused's platoon was attacking "somewhere near Nurnberg" (R27,30). Some 200 prisoners were taken on the outskirts of a town and accused was among the men detailed to take the prisoners to the company command post (R30). Upon delivering the prisoners, he was ordered to return to his platoon, some 400 to 500 yards from the commandpost. At this time, the platoon was maintaining a road block on the outskirts of the town at the point at which the prisoners had been taken but was not actually in contact with the enemy. Some two hours later, the platoon moved to another position approximately one-half mile away, again contacted the enemy and again took prisoners (R27). Accused did not return to his platoon after having been ordered to do so and was not with it when it moved to the new position (R27,30). He was thereafter absent until 9 May (R29,30).

Duly authenticated extract copies of entries in the company morning report, admitted without objection by the defense, show accused absent without leave at the times and for the periods alleged (R5; Pros. Ex. A, B).

4. After having been advised of his rights, accused elected to be sworn as a witness on his own behalf. He testified that he had participated in the push on Rome, the invasion of southern France, the fighting in the Vosges Mountains, the crossing of the Moselle and the crossing of the Rhine, serving in these campaigns and engagements as a rifleman (R32,39). On 31 December 1944, he received permission from his platoon leader to go to the aid station to attempt to secure treatment for chronic severe headaches. He did so but saw only non-commissioned officers there on duty and was told to return the next day (R32,44). He rejoined his platoon in Lembach the night of 1 January, explained to his squad leader that he had received permission to report to the medical officer at the aid station and that, since he had not been able to do so, he was going to return to the aid station the following day. With this in mind, he did not remain with his platoon on the evening of 1 January but slept in another part of the town. Upon searching for the aid station the following day, he found that it had moved. He then attempted to rejoin his company but, due to the confusion and the frequency with which the various units were moving, he was unable to do so until 11 January (R32-36). He left his foxhole on 12 January because he had been advised at Battalion S-1 that his records indicated that he had been absent without leave and he intended to find the platoon commandpost in order to secure permission to go to the company command post to straighten the matter out. He became lost and was not able to rejoin his company until 15 January (R36-37).

He fell behind on 15 January because with all his equipment he had difficulty in keeping up, on 29 January because he was ill from a severe cold, and on 31 March because he was fatigued from the combat which had occurred during the day. On all three of these occasions, he thereafter attempted to rejoin his company, became lost, delayed or was misdirected, but ultimately succeeded in doing so on the dates alleged (R37-43).

On cross-examination, the following facts, among others, were developed: Nearly half of the officers and non-commissioned officers to whom accused testified he reported during his various absences were no longer with the division because they had been evacuated to the United States or for various other reasons (R44,48,51); during at least two of his absences, he stayed with civilians for short periods of time (R49,59); he had no permission to absent himself when he left his foxhole on the evening of 12 January (R53); he did not believe himself to be physically weaker than the other men in his company (R55); and that, on the occasion when he fell behind because suffering from severe cold, he made no effort to go to an aid station for treatment (R56).

5. The evidence shows that accused was absent from his unit without permission for the periods alleged. While he testified in some detail with respect to each of these absences except the last and sought to show that the absences concerning which he testified occurred under circumstances which would render them free from culpability, his testimony, not entirely credible at best, was seriously weakened on cross-examination. On the basis of the whole record, it is difficult to escape the conclusion that his repeated absences were deliberate rather than the result of any honest inability to keep up with or to find his company. Further, while there may have been insufficient evidence to show that he was aware of impending hazardous duty when he failed to accompany his platoon on or about 1 January, his remaining absences took place at times when hazardous duty was either impending or actively in progress and under circumstances from which it could properly be inferred that he had knowledge of the nature of the duty confronting him or in which he was engaged. It is accordingly concluded that the record of trial is legally sufficient to support the findings as approved and the sentence (cf. CM ETO 7413, Gogol, and authorities therein cited).

6. The charge sheet shows that accused is 21 years of age and was inducted on 22 March 1943 at New Haven, Connecticut. He had no prior service.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (A758). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York,

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as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept 1943, sec.VI, as amended).

B.R. Sleeper Judge Advocate

Walter C. Sherman Judge Advocate

B. L. Heway Jr. Judge Advocate

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He pleaded not guilty and, two-thirds of the members present when the vote was taken concurring, was found guilty of all charges and specifications. No evidence was introduced of previous convictions. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial pursuant to Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution identified accused as a member of Company B, 27th Armored Infantry Battalion (R35 and Pros. Ex.A). At about 2100 on 25 April 1945, in Zwenkau, Germany, being then in uniform, wearing a steel helmet and armed with a rifle, he gained admission to a civilian apartment house by knocking (R6-8, 14,30). He first insisted on looking through the rooms on the first floor constituting the residence of the Hennecker family (R6,7); then, accompanied by Mr. Hennecker, proceeded to the second floor apartment of the Kluge family - father, mother, married daughter with baby, and sixteen year old daughter, Gisela (R7,26,30). All of the Kluge family were then in bed, but accused visited every room of the apartment, including the bedroom occupied by Gisela Kluge (R7,12,24).

Thereafter, by gesturing with his weapon and working some of its mechanism, he compelled Mr. Hennecker to return to the lower floor of the building (R7). He then left the Kluge apartment and went to other parts of the building, Mrs. Kluge locking the door after he had gone (R24).

A few minutes later accused again knocked on the door of the Kluge apartment and, upon the door being unlocked, again went in (R27,30). After preventing the married daughter from leaving the rooms to go to another apartment, as she tried to do, he compelled all of the family except the daughter Gisela to go into the parents' bedroom, and locked them in that room (R27,30). Gisela was prevented by accused from accompanying the rest of the family into the parents' bedroom (R27). Instead, accused motioned her to stand aside until he had confined her parents, then required her to go over to a bed nearby (R19,31). During this time he retained his weapon in his hands and on occasion had pointed it at both Mr. Hennecker and Mr. Kluge (R27,28,30).

Accused then leaned his rifle against a mirror near the bed and removed his shoes, jacket and helmet (R14,18). Gisela Kluge was wearing a two-piece nightgown and accused removed the lower part of

her attire (R14). He then got "on top" of her, overcame her resistance and inserted his penis in her vagina (R14,15). She resisted as much as she could until she "didn't have any strength left", keeping her legs together until "he pushed them apart", and trying to cry out (R14,15). Accused prevented her outcries by holding his hand over her mouth (R14). She did not offer any greater resistance because she had recently been treated in the hospital for heart trouble and because she was afraid that more resistance would result in the shooting of her or her parents (R15,16). She gave accused no assistance in having intercourse with her (R16).

Thereafter, within an hour, accused had intercourse with her two more times, after which he got up, dressed, and left the apartment (R15). He then went downstairs to the Hennecker apartment and slept there until morning when he left the house (R33).

After accused left the Kluge apartment, Gisela Kluge unlocked the room in which her parents were confined (R21). She was in a distraught condition and told her family that she had been "raped" three times (R28,32).

On the charge of absence without leave, the prosecution submitted a duly authenticated copy of the morning report of accused's unit for 28 April 1945, with the entry pertaining to the accused "Fr dy to AWOL as of 2100 25 April 45" (R35 and Pros.Ex.A). The court accepted a stipulation between the prosecution, defense counsel and accused that if a Lieutenant Boddy of the 60th Armored Infantry Battalion were present he would testify that at about 1830 on 26 April 1945 in Zwenkau, Germany, he arrested the accused, who was then armed with a Browning automatic rifle, and turned him over to the Officer of the Day of his battalion (R35).

4. On being advised of his rights as a witness, accused elected to remain silent. A soldier from his unit testified that on 25 April 1945, accused, with the other enlisted men of his unit, was taken in turn to an undisclosed location for the purpose of taking showers (R36). Accused did not return to his unit on any of the vehicles which took the men to and from the showers (R36). No one was in charge of each group as it went to the showers (R36).

5. a. Rape is defined as the "unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.148b, p.165. The undisputed evidence in the instant case establishes the commission of that crime as found by the court (CM ETO 3933, Ferguson, et al., and accused was clearly identified as the perpetrator thereof.

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b. On the issue of accused's absence without leave, that offense is fully proven by the extract copy of the morning report establishing his initial absence on 25 April 1945, and the stipulated testimony of the officer who apprehended him on the following day.

6. The charge sheet shows accused to be 29 years and six months of age. Without prior service, he was inducted 27 January 1941 at Camp Joseph T. Robinson, Arkansas.

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

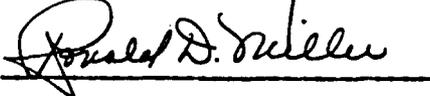
8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).



Judge Advocate



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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 2

21 SEP 1945

CM ETO 14824

UNITED STATES)

v.)

Private SAMUEL E. BARBER)
(33545983), 3979th Quarter-)
master Truck Company (Heavy))

DELTA BASE SECTION, COMMUNICATIONS
ZONE, EUROPEAN THEATER OF OPERATIONS

Trial by GCM, convened at Marseille,
France, 28 June 1945. Sentence:
Dishonorable discharge, total for-
feitures, confinement at hard labor
for life. U. S. Penitentiary,
Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HEPBURN and MILLER, 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 Samuel E. Barber, 3979th Quartermaster Truck Company (Heavy) did, at Heilbronn, Germany on or about 20 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Harvey Stanley, 3979th Quartermaster Truck Company (Heavy), a human being by shooting him with a pistol.

He pleaded not guilty and, two-thirds of the members present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence;

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designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. Evidence for the Prosecution. The accused was on 20 May 1945 and has since been in the military service of the United States (R7). On that date his organization was stationed at Heilbronn, Germany (R9,23). About 11 pm o'clock that night, three soldiers of the same organization as the accused were walking along a road leading to their station and observed the accused standing on a small bank paralleling the road in front of a bombed-out building talking to an old German woman. Accused had a pistol in his right hand. The old woman beckoned the three soldiers over (R9-10,12-13,22-25). It was a clear moonlit night. A light was burning at the next corner about fifty feet away (R9). Private Harvey Stanley was one of the three soldiers. He asked the accused what the trouble was. He replied that he had given a girl in the house some rations and she would not have him and he wanted the rations back (R11,25-26). Stanley urged him to come along and avoid trouble. Accused said he was going to stay until he got his rations. Stanley said he was acting like a "damned fool". A heated argument followed in angry tones. Stanley had no weapon and one of the soldiers heard him say that he would make the accused "eat his gun" (R27). Then Stanley stooped over with the side of his body toward the accused. One witness said he picked up a rock (R27-28). The other did not see any rock in his hand (R20). Both agree that as he raised up and before he raised his arm the accused lifted his pistol pointing it at the deceased and fired. The bullet struck the accused in the side of the head and he toppled over (R13,20,31-33). The three hurried away from the scene. Barber then said, according to one of the witnesses, "I got two more sons-of-bitches to kill and then I'll clear myself" (R14-15,29). While the accused's attention was distracted the other two ran away from him (R30). Stanley died as a result of the shot (R35).

When the accused was taken into custody he admitted that he shot Stanley (R50-51). Although he gave no specific reason for shooting him he stated that some of the men had been "riding" him and he was "fed up" with it (R51). In a pre-trial statement voluntarily given by the accused and admitted in evidence without objection (R39;Pros.Ex.1) the accused claimed that he was walking along with Stanley and the other two soldiers and got into an argument with one of the other soldiers when Stanley pushed his way between them. Accused told him that his argument was with the other soldier. Stanley then said, "Your sonofabitch you, I'll fix you" and bent down to pick up a rock. As he straightened up accused drew his pistol to "cower" him but not intending to shoot him. The gun accidentally went off, the bullet striking Stanley in the face.

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4. The accused having been fully advised as to his rights as a witness, elected to testify in his own behalf. He reiterated in substance his pre-trial statement (R55-56). He added that he had found the gun only the day before and was going to turn it in to the orderly room that night but he still had it (R57). He claimed it was on his belt in a holster (R57). He denied that he made any threats after the shooting. He was on friendly terms with the deceased (R57). Earlier that evening he tried the gun out by firing it twice (R58). He claimed that he could not run away from the deceased when the latter picked up the rock because of bomb craters, a building, and a brick wall (R59,60). He denied that he said anyone had been "riding him" (R60). He denied that he had any conversation or argument with the deceased about getting into trouble (R62).

Three officers testified that the accused's reputation with his organization for truth and voracity was good and his military efficiency satisfactory (R64,66,67).

5. The court recalled the two eye witnesses of the shooting. One reiterated his previous story of the deceased's efforts to get the accused to return to camp. He saw deceased stoop but did not see if he picked up anything. As deceased was rising with both hands extended down, the accused fired. Accused was up on the bank; the deceased was on the road about four feet from him (R68-69). He denied that accused had any argument with witness or that deceased said any words to the effect that he would "fix" the accused. The accused could have retreated by going through the bombed building by means of a hole five to seven feet away from him (R71-72). The other witness saw the rock in the deceased's hand. His arms were at his side and he was almost in an upright position when the accused fired (R76). He contended that accused could have run in any direction but he made no effort to do so. Deceased said nothing about throwing the rock (R78).

6. The evidence establishes, and the accused admits that at the time and place alleged in the Specification he fired the shot that killed Private Harvey Stanley. He claimed he drew the gun in self defense and that it accidentally went off. The court has found him guilty of the murder charged.

Murder is the unlawful killing of a human being with malice aforethought. Malice may be presumed from the deliberate use of a deadly weapon in a way which is likely to produce, and which does produce, death (Underhill, Criminal Evidence, (4th Ed.,1935), sec.557, p.1090). There was, therefore, substantial competent evidence to support a finding of guilty if the accused is not excused in the killing on the grounds of self-defense. To kill another in self-defense is legally excusable.

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"To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life * * * or to prevent great bodily harm to himself * * * . The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if after provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor" (MCM, 1928, par.148a, p.163).

There was substantial evidence of record that, after a heated argument over whether the accused should return to camp and avoid getting himself in trouble, the deceased stooped over to pick up a rock and the accused shot and killed him as he was straightening up and before deceased made any threat or any attempt to strike the accused with the rock. While the evidence was conflicting in some details and the accused's testimony was to the contrary as to the intent to discharge the weapon and the reason for the argument, nevertheless, as the court was the sole judge of the facts and has resolved them against the accused, the Board in reviewing the case must accept the facts as found and determined by the court so long as they are supported, as is the case here, by substantial evidence (CM ETO 4194, Scott).

The evidence supports the conclusion of the court that the accused did not believe or was not justified on reasonable grounds in believing that it was necessary to shoot or kill the deceased to save his own life or to prevent great bodily harm to himself. Deceased was not armed. The danger, if any existed, was not imminent. The necessity to shoot, if the danger was imminent, did not exist because accused could have retreated to a place of safety. The conviction is legally sustained.

7. The charge sheet shows that accused is 35 years and 7 months of age. Without prior service, he was inducted 21 December 1943 at Camp Lee, Virginia.

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

9. The penalty for murder is death or life imprisonment as

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the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4),3b).

(TEMPORARY DUTY) Judge Advocate

Frank Hephum Judge Advocate

James Driller Judge Advocate

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 2

15 SEP 1945

CM ETO 14831

UNITED STATES)

XII CORPS

v.)

Trial by GCM, convened at Regensburg,
Germany, 25 June 1945. Sentence:

Private JACK HART (13017734),)
Company C, 150th Engineer)
Combat Battalion)

Dishonorable discharge, total for-
feitures, and confinement at hard
labor for life. Eastern Branch, Unite
States Disciplinary Barracks, Green-
haven, New York.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HEPBURN and MILLER, 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 Jack Hart, Company C
150th Engineer Combat Battalion, did, on or
about 30 April 1945, at Nunsting, Germany,
forcibly and feloniously, against her will,
have carnal knowledge of Maria Kopp, Nunsting,
Germany.

He pleaded not guilty and, two-thirds of the members of the court
present at the time the vote was taken concurring, was found guilty

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of the Charge and Specification. Evidence was introduced of two previous convictions, one by summary court for absence without leave for two days in violation of Article of War 61, and one by special court-martial for failure to obey a lawful order of his superior officer in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. 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 $\frac{1}{2}$.

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

Accused is a member of Company C, 150th Engineer Combat Battalion (R7). On 30 April 1945, Maria Kopp resided in Nunsting, Germany with her husband, six months old daughter, her sister and her mother (R8,9,24,25). About midnight on that date, two American soldiers knocked on the door of the house where these people lived and when the knocking continued, Andreas Kopp, husband of Maria, answered the door and they came in (R9,25). Accused was one of the soldiers (R10). They searched the house and then entered the bedroom where Maria Kopp, her husband, their baby and her sister, age fourteen, slept (R9,31). Threatening Andreas Kopp with a pistol they forced him, his wife and sister-in-law to get into one bed. One of the soldiers lay down in the next bed (R9). Before they complied Kopp and his sister-in-law attempted to get out of the room but the soldiers blocked the door (R26). Accused's companion then threatened the sister-in-law with a pistol and forced her to get into the other bed with him (R10). He let her get out of the bed after a while "because he said she was too little, she was just a baby" (R26). At this point he came over to Maria Kopp's bed and demanded that she leave that bed and go into the other bed with him. At first she refused but as he threatened her with a pistol she complied (R26). While accused held her husband in bed with a pistol, his companion had intercourse with her three times (R16,23). He fell asleep and, thinking they would leave, she got up and went into her mother's room (R22). In one or two minutes accused and his companion followed her into this room and accused laid down in one bed in that room and his companion pulled her into her mother's bed (R11), where he had intercourse with her two more times (R19). Accused then got in bed with her and while his companion held her with both hands, he penetrated her private parts with his penis

and had a discharge (R12,18,20). She did not consent to this act at any time and she did not hit or scratch accused because his companion was holding her with both of his hands and threatening her with a pistol (R12,18,20). Accused's companion was attempting to have intercourse with her for the sixth time when two American soldiers entered the room and both soldiers got out of bed (R13,19,29). Her mother was present in the room when accused first got into bed with her but she left to seek aid from the American officers (R13,18,19).

After his wife and two soldiers left his bedroom, Andreas Kopp went out and attempted to persuade two officers to come to his house (R28). It was approximately 0145 hours when he reached the house where two Americans of the "CIC Detachment, XII Corps, MII Team" lived, but thinking it a hoax they ignored him (R42). When a woman returned seeking aid they dressed and went with her (R38). They went in the next house where Andreas Kopp got a lamp and they went into the room where Maria Kopp was in bed. There they found accused lying alone on one bed and his companion in the other bed with Maria Kopp (R40,41). While they were being taken to the Provost Marshal's office accused's companion escaped, but accused, who made no attempt to escape, was put under guard in a detention camp for the night (R38).

4. Accused after his rights as a witness were fully explained to him (R45), elected to remain silent and no evidence was introduced in his behalf.

5. There is uncontradicted evidence that accused had intercourse with the prosecutrix while his companion held her with both hands and that shortly before this she and her husband had been threatened with a pistol. Her testimony is corroborated in part by that of the two Americans who found accused's companion in bed with her and accused lying on another bed in the same room, and by the testimony of her husband. Under these circumstances, the court was fully warranted in determining that accused's act of intercourse with her was against her will and without her consent (CM ETO 12696, Parsons). All the essential elements of the crime of rape are established by substantial, uncontradicted evidence (MCM, 1928, par.148b, p.165).

6. The charge sheet shows that accused is 23 years of age and enlisted 4 September 1940. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substan-

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tial 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 rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457, 567). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

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BOARD OF REVIEW NO. 3

15 SEP 1945

CM ETO 14835

UNITED STATES

v.

Private MANUEL HERRERA
(19044290), Company C,
30th Infantry

) 3RD INFANTRY DIVISION

) Trial by GCM, convened at Salzburg,
) Austria, 8 May 1945. Sentence:
) Dishonorable discharge, total for-
) feitures and confinement at hard
) labor for life. Eastern Branch,
) United States Disciplinary Barracks,
) Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 3
SLERPER, SHERMAN and DEWEY, 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 MANUEL HERRERA, Company "C", 30th Infantry, did, at or near Consa, Italy, on or about 21 May 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he returned to military control at an unknown place on an unknown date.

Specification 2: (Finding of not guilty).

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

Specification: In that * * * having been duly placed in confinement in the 3rd Infantry Division Stockade, on or about 14 July 1944, did, at or near Mad di Quarto, Italy, on or about 14 July 1944, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty and was found not guilty of Specification 2, Charge I, and guilty of the remaining charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. 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 $\frac{1}{2}$.

3. On or about 21 May 1944, accused, as a member of Company C, 1st Battalion, 30th Infantry, was informed that the battalion was to spearhead an attack near Conca, Italy, in an attempt to break out of the Anzio beachhead (R9-11). On reaching the concentration area prior to the attack, accused was missing and could not be found despite a search (R10,13; Pros.Ex.A). Another search made after the first objective was taken also failed to reveal his presence (R10). He was next seen in Rome on 6 June 1944. In the interim, the company engaged in combat and sustained casualties (R10).

On 14 June 1944, accused was confined in the Division stockade, then located near Pozzuoli. On the morning of 15 June, he was not present for roll call and could not thereafter be found by the sergeant of the guard. He had no permission to be absent (R15-17).

4. After his rights as a witness were explained to him, accused elected to remain silent and no evidence was introduced on his behalf.

5. The evidence of record clearly supports the court's findings that accused absented himself without leave with intent to avoid hazardous duty as alleged by Specification, Charge I (CM ETO 6079, Marehetti; CM ETO 1406, Pettapiece). His offense was complete when he absented himself without authority with the requisite intent and allegation and proof of the duration of the absence was not essential (CM ETO 2473, Cantwell; CM ETO 9975, Athens). The evidence also clearly supports the court's finding that accused was guilty of Charge II and its Specification (MCM, 1928, par.139b, p.154).

6. The charge sheet shows that accused is 22 years of age and enlisted 30 January 1941. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. 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 in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

B. A. Keiper Judge Advocate

Mathew C. Sherman Judge Advocate

B. A. Dewey Judge Advocate

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 1

27 NOV 1945

CM ETO 14836

UNITED STATES

v.

Private EDWARD K. MACKAY
(32943059), Company K,
7th Infantry

3RD INFANTRY DIVISION

Trial by GCM, convened at
Salzburg, Austria, 15 May 1945.
Sentence: Dishonorable dis-
charge, total forfeitures and
confinement at hard labor for
life. Eastern Branch, United
States Disciplinary Barracks,
Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
STEVENS, DENEY and CARROLL, 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 on the following Charges and Specifications:

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

Specification: In that Private Edward K. Mackey, Company "K", 7th Infantry, did near Hachimette, France, on or about 22 January 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended at Guemar, France, on or about 16 March 1945.

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

Specification: In that * * * did, without proper leave, absent himself from his organization, near St. Bresson, France, from about 20 September 1944, to about 14 January 1945.

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He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for five days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution may be summarized as follows:
Charge II and Specification: The prosecution offered as evidence a duly authenticated extract copy of the morning report of Company K, 7th Infantry, containing entries as follows:

"23 Sept 44 Les Saumages, France * * * 32943059 Mackey, Edward K. Pvt Above two (2) EM abs sk & drpd fr rolls to reasgd to Co per LO#189, dtd 20 Sept 44. Dy to AWOL since they failed to jn Co at time. Three (3) other R.T.U.s on same LO jd Co. s/GEORGE W. LAUDERDALE
1st Lt. Inf.

* * *

Mackey, Edward K. Pvt
Fr AWOL to arrest in Regimental Work
Platoon, 16 Jan 45. X s/FRANCIS J. KRET, Capt. Inf"
(E7; Pros. Ex. A).

Defense counsel objected to the introduction of the extract copy of the morning report on the ground that the first entry above quoted was compiled from other than original sources and on the additional ground that the second entry was "hearsay on its face". These objections were overruled and the document admitted into evidence (E7).

The regimental sergeant major testified that he had made a search for Letter Order 189, referred to in the morning report entry first above quoted, but had not been able to find it because he "had all letter orders of 1944 destroyed in January" (E8-9).

Charge I and Specification: Duly authenticated extract copies of the morning report of Company K, 7th Infantry, admitted into evidence without objection by the defense, showed accused from duty to absent without leave on 22 January 1945 and from absent without leave to "placed in arrest in Regtl. Work Platoon as of 17 March 45" (E7-8; Pros. Exs. A,B). Staff Sergeant Anthony J. Balbaton testified that on 22 January 1945, when he was section sergeant of accused's section,

"We was crossing a footbridge which was zeroed in and at that time they were throwing some heavy stuff in and which caused everybody a little excitement so there was a littledifficulty to get them reorganized again. One man was killed out of twelve, two was shellshocked and Private Mackey just hollered out to me that he wouldn't go across, that he would sooner take a court-martial than go across. He told me that he had one brother killed and he didn't expect to be killed so when I tried to get them reorganized he was gone" (R10).

When Balbaton found that accused was gone, he attempted to find him but was unable to do so. He had given accused no permission to absent himself. Except for a period of about seven days spent in a hospital, Balbaton was present with the company from 22 January to 16 March 1945. Accused was not present in the company for duty during that time (R11).

Private First Class Jacob Prince, Jr., Military Police Platoon, 3rd Infantry Division, testified that on 16 March 1945, when he was serving as a clerk in the Provost Marshal's office of the 3rd Infantry Division, accused was brought to that office by "another MP unit" and, after first being advised of his rights under Article of War 24, questioned concerning the circumstances of his absence. Accused stated that on or about 22 January 1945 he suffered "near shellshock", left his unit, and went to the "medics". The medics gave him "some treatment" and advised him to return to his organization. However, instead of doing so, he "took off" and went to Guemar where he was later apprehended (R12-13).

4. Accused, after his rights as a witness were explained to him, elected to remain silent (R13-14) and no evidence was introduced on his behalf.

5. a. Charge II and Specification: The court's findings of guilty under this Charge and Specification rest almost exclusively upon the morning report entry for 23 September 1944 showing accused "abs sk & drpd fr rolls" to "reasgd to Co per LO #189, dtd 20 Sept 44" and from "Dy to AWOL since * * * failed to jn Co at time". Assuming that the morning report is competent proof of all of the facts recited therein, there still is nothing in the evidence to show that accused ever received the letter order referred to in the above entry or that its contents were brought home to him in any way. In CM ETO 11518, Rosati, the facts of which are quite similar to the facts of the instant case, the Board of Review said:

"It is * * * our opinion that there is no proof by which it can be inferred that accused had notice that he should report to this company, and therefore none that he was under a duty to be there. How could we hold him for absence without leave from a command to which he is not shown to have known he must report? Lack of permission from his company to be absent from it is immaterial, for the case does not show he was under any duty of which he had notice, to secure such permission. * * * The record

of trial is therefor in our opinion legally insufficient to support the findings and sentence" (See also CM ETO 11356, Crebessa; CM ETO 13565, Slominski).

It is the opinion of the Board of Review that the reasoning of the cases cited above is applicable here and that the instant record of trial accordingly is legally insufficient to support the findings of guilty.

b. Charge I and Specification: The evidence in support of this Charge and Specification clearly shows that accused absented himself from his unit at a time when it was attempting to cross a bridge under enemy fire. The circumstances surrounding his departure and his statements at the time support the inference that he absented himself with the then existing intent to avoid hazardous duty, as alleged. The court was therefore justified in finding him guilty of the offense charged (cf: CM ETO 10273, Hansberg; CM ETO 12729, Lanoue; CM ETO 14792, Langan).

6. The charge sheet shows that accused is 20 years of age and was inducted 11 August 1943 at Albany, New York, to serve for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted herein, 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 insufficient to support the findings of guilty of Charge II and its Specification and legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence.

8. The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (Cir. 210, WD, 14 Sept. 1945, sec. VI, as amended).

Edward L. Stevens, Jr., Judge Advocate.

B. H. Kury, Jr., Judge Advocate.

(DETACHED SERVICE), Judge Advocate.

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 4

30 AUG 1945

CM ETO 14845

UNITED STATES

v.

Private First Class JAMES T.
GERRINGER (34599398), Company
D, 114th Infantry

44TH INFANTRY DIVISION

) Trial by GCM, convened at Camp
) Pittsburg, France, 22 June 1945.
) Sentence: Dishonorable discharge,
) total forfeitures and confinement
) at hard labor for four years.
) Eastern Branch, United States
) Disciplinary Barracks, Greenhaven,
) New York.

HOLDING by BOARD OF REVIEW NO. 4
DANIELSON, MEYER and ANDERSON, 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 First Class James T. Gerringer, Company D, 114th Infantry did, without proper leave, absent himself from his organization near St. Michel, France from on or about 1630, 20 March 1945 to on or about 2100, 20 March 1945.

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

Specification: In that * * * did, near St. Michel, France, on or about 20 March 1945, unlawfully and wrongfully kill Private Marcy D. Czajka, Company D, 114th Infantry, a passenger in a military motor vehicle operated by the said

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Private James T. Gerringer, along a rough area of a public highway in a reckless and wanton manner, without due care and circumspection, while under the influence of intoxicating liquor, resulting in losing control of said motor vehicle and injuries to Private Nancy D. Czajka, Company D, 114th Infantry, from which he died on 20 March 1945.

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

Specification: In that * * * did near St. Michel, France, on or about 20 March 1945, wrongfully take and use, without the consent of the owner, a certain vehicle, to wit: one quarter ton vehicle, No. 20358580, property of the United States, of the value of more than \$50.00.

He pleaded not guilty, and was found not guilty of Charge III and its Specification, and guilty of the remaining charges and specifications. Evidence of one previous conviction by special court-martial for absence without leave in violation of Article of War 61 was introduced against him. 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 four years, designated the United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. a. The prosecution introduced substantial competent evidence tending to show that on 20 March 1945 accused absented himself without leave from his organization for the period of time and at the place alleged in Specification, Charge I, and the findings of the court, being responsive thereto, are not open to inquiry here.

b. In support of Specification, Charge II, the prosecution introduced evidence to show that on 20 March 1945, Company D, 114th Infantry, accused's organization, was in reserve near St. Michel, approximately four or five miles from Sarreguemines, France (R7). Accused was seen drinking in a cafe in Sarreguemines from about 1600 to 1830 hours that day, and the witnesses who observed him testified that he was intoxicated (R9,10,12). He left the cafe with the deceased, Private Czajka, at about 1830 hours (R9).

At approximately 1930 hours he was seen driving a $\frac{1}{4}$ ton army vehicle from Sarreguemines in the direction of his company. The deceased was with him and was riding in the right front seat (R16,18). Both he and Czajka were drunk (R17-19). Three enlisted men of accused's organization were walking toward the company at the time, and he stopped and gave them a ride to within a half-mile of the company. He then turned around and with the deceased started back toward Sarreguemines. He drove at a very fast rate of speed, one witness estimating the speed to be about 50 miles an hour, and was "wobbling all over the road" (R14-19).

At about 2100 hours a medical officer was called to the scene of an accident and found two bodies lying in the road, and a wrecked $\frac{1}{4}$ ton army vehicle on the right side of the road. One of the bodies was that of deceased who, it was stated, died of a crush injury of the chest. The accused was standing nearby, and no other vehicles, except an ambulance and the quarter ton truck, were present. The windshield of the $\frac{1}{4}$ ton army vehicle was broken and its right side was pushed in approximately six or eight inches (R22,23).

4.. Accused, after being informed by the law member of his rights, elected to remain silent (R27,28). No evidence was introduced in behalf of the defense tending to negative the issue of guilt of the specifications and charges of which accused was found guilty.

5. 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.149, pp.165,166). The specification alleges that accused caused the death of the deceased by reason of the reckless and wanton manner in which he operated a motor vehicle, and it was incumbent upon the prosecution, therefore, to establish that his culpable negligence was the proximate cause of deceased's death.

The evidence clearly shows that from approximately 1600 hours to 1930 hours, 20 March 1945, accused was in a drunken condition, ranging from "fairly drunk" to "drunk", and that when he was last seen in the presence of the deceased at 1930 hours he was driving in a reckless and drunken manner. The record of trial, however, is barren of any evidence as to the events occurring after 1930 hours and prior to the accident. There is no evidence showing how it occurred, whether it was caused by the recklessness of accused or by agencies independent thereof, or, indeed, whether he or another was driving. The time when the accident occurred is

not shown, but the medical officer was called at 2100 hours, or approximately one and one-half hours after accused and deceased were last seen; and the circumstances surrounding the scene of the accident when he arrived indicate a degree of recency inconsistent with any inference that it occurred shortly after accused and deceased drove off toward Sarraguemines at 1730 hours.

The record of trial being devoid of any substantial competent direct evidence bearing on the issue of culpable negligence, the probative value of the circumstantial evidence must be considered. Findings of guilty may be supported by circumstantial evidence (CM ETO 2686, Brinson and Smith; CM ETO 3200 Price; CM ETO 3837, Bernard W. Smith; CM ETO 7702, Shopshire), but such evidence, if standing alone, must be of such strength as to exclude every reasonable and fair hypothesis of innocence (CM ETO 9306, Tennant; CM ETO 7867, Westfield; CM ETO 6397, Butler; Buntain v. State, 15 Tex. Crim. Opp. 490; People v. Rzezicz, (1912), 206 N.Y. 249, 99 N.E. 557). Circumstantial evidence giving rise to suspicion or showing opportunity, but not excluding a reasonable hypothesis of innocence, is, of course, insufficient to support findings of guilty.

The circumstantial evidence here may exhibit an opportunity to commit the offense, or give rise to the suspicion that accused was culpably negligent and that his culpable negligence was the proximate cause of deceased's death, but it is not sufficiently persuasive to exclude a fair and reasonable hypothesis that other agencies were the proximate cause thereof. This is particularly true in view of the definite probability that the accident occurred approximately an hour and a half after accused was last seen. The negligence of the driver of another vehicle, faulty road construction, or, indeed, the negligent driving of deceased himself, or of the other deceased person, may severally have been the proximate cause of deceased's death. The evidence not being sufficiently compelling to exclude such other fair and reasonable inferences, it fails to support a finding that the culpable negligence of accused was the proximate cause of deceased's death.

6. The charge sheet shows that accused is 21 years of age and was inducted 8 January 1943 at Camp Croft, South Carolina. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted herein, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specification of Charge I, and Charge I, but legally insufficient to support the findings of guilty of Specification of Charge II, and Charge II, and legally sufficient to support the sentence.

8. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized.

Robert C. Paulson Judge Advocate

Walter A. Meyer Judge Advocate

John R. Anderson Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3

3 AUG 1945

CM ETO 14866

UNITED STATES)

45TH INFANTRY DIVISION

v.)

Private EDWARD LUPPE
(33702398), Company L,
180th Infantry

Trial by GCM, convened at APO
45, U. S. Army, 19 June 1945.
Sentence: Dishonorable dis-
charge, total forfeitures, and
confinement at hard labor for
life. Eastern Branch, United
States Disciplinary Barracks,
Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, 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 58th Article of War.

Specification 1: In that Private Edward Luppe, Company L, 180th Infantry, did, at or near Grandvillers, France, on or about 19 October 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat operations against elements of the German Army, and did remain absent in desertion until he surrendered himself at or near Bobenthal, Germany, on or about 24 December 1944.

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Specification 2: In that * * * did, at or near Wildenguth, France, on or about 9 January, 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat operations against elements of the German Armed Forces, and did remain absent in desertion until he returned to military control at or near Wimmenau, France, on or about 15 February, 1945.

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

Specification: In that * * * did, at or near Neuhof, Germany, on or about 16 March, 1945, desert the service of the United States and did remain absent in desertion until he returned to military control at or near Moosach, Germany, on or about 25 May 1945.

He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. All the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. 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 $\frac{1}{2}$.

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

Specification 1 of the Charge

On 19 October 1944, Company L, 180th Infantry, was located near Grandvillers, France. It was in an "attacking position" but had been unable to gain ground. The men were in foxholes approximately 500 yards distant from the enemy lines, and some mortar fire was received. As the result of a report that accused was missing, a search of the area was made but he could not be found. He was not thereafter present with his unit until 24 December 1944, at which time the company was near Bobenthal, Germany (R6-7).

A statement voluntarily made by the accused to an investigating officer prior to trial includes the following:

"I was blown out of my hole by a shell around Fremifontaine in October, but only went back as far as the Clearing Co. I was there two days when they sent me back to duty. I had been back about a week when I went AWOL. At that time, my organization was on the front near Grandvillers, France. My nerves had been bad and I told the company commander. He took my rifle and my equipment and told me to go and to not come back. I just bummed around. I left because I could not stand the shell fire. I gave up to the MP's in some small town. I got back to my organization the night before Christmas" (R13,14; Pros.Ex.F).

Specification 2 of the Charge

On or shortly before 9 January 1945, while the company was dug in in a holding position in the vicinity of Wildenguth, France, and receiving artillery and mortar fire, accused went "back to take a psychoanalysis or something" (R8,11). After 9 January, he was not again present with his unit until 15 February, at which time the company was in Wimmenau, France (R8,9). The artificer of the company testified that on 9 January 1945, accused rode with him in a vehicle in which rations and ammunition were being transported and was with the vehicle at a time when a stop was made to deliver supplies. While deliveries were being made, the area was shelled by the enemy. When the shelling ceased, accused could not be found (R11,12).

Accused's statement recites that, after he rejoined his organization on 24 December, he was assigned to the second platoon and

"remained with them until I went AWOL again. I had been back to see Major Kelling [the division psychiatrist] and went back to the kitchen. I started up on the chow truck on the 9th of January and they had to go back to get something. They let me off to continue on to my organization. I went back and remained absent until I was picked up above Hagen. I was returned to my organization on 15 February and the following day was sent to Bn. on the work detail. I would be willing to stay up there, but I do not think I could stand it" (R14; Pros.Ex.F).

A duly authenticated extract copy of the company morning report shows accused from duty to absent without leave on 9 January 1945 and from absent without leave to duty on 15 February 1945 (R5; Pros. Ex. B).

Specification, Additional Charge

On 15 March 1945, accused was admitted for treatment at Clearing Company, 120th Medical Battalion, 45th Infantry Division, the diagnosis being "exhaustion" (Pros.Ex. C). He was returned to duty the following day. The admission and disposition report reflecting this action recites, under the column "Brief Diagnosis", "Psychoneurosis, anxiety state, mild" (Pros.Ex.D). However, he did not return to his company, which was then located near Neuhoef and preparing to cross the Elbes river. He remained absent from his organization until 25 May 1945, at which time the company was at Moosach, Germany (R5,10). Duly authenticated copies of the company morning report show him absent without leave from 16 March 1945 to 25 May 1945 (Pros.Ex.E).

Prior to trial, accused voluntarily made a statement to an investigating officer in which he recited that on 16 March 1945 he went to the 120th Medical Battalion "because of a shell concussion". After staying there for four or five days, he was released and sent back to his company. When he returned, the first sergeant, who at the time was preparing to leave for the United States, did not assign him to a platoon. Without informing anyone where he was going to sleep, he spent the following night in a pillbox and awoke the next morning to find everyone gone. He turned himself in the next day to a platoon of the 260th Engineers which, two days later, turned him over to the 45th Division Artillery. They moved the following day but, not having sufficient room, could not take him with them. He tried to locate his company on foot but was unable to find it that day. He then found a house where, together with another soldier from the 45th Division, he stayed for about three weeks. He was found there by military police attached to the 28th Division and was thereafter taken successively to the military police of army, corps, division and finally of his regiment. After being taken to the division psychiatrist, he was returned to his battalion and then to his company (R15-17).

4. For the defense, Sergeant William T. Dietz, Jr., Company L, 180th Infantry, testified that accused had been under his command for about two weeks after "he came back from being AWOL" and that, during this period, he had been a "good soldier" and had cheerfully and willingly performed all duties assigned to him (R18,19).

After being advised of his rights, accused elected to be sworn as a witness on his own behalf. He testified that he joined the 45th Infantry Division while it was in Italy and participated in the fighting attendant upon the push on Rome. However, he participated in only three days of combat in that campaign since, after that period of time, his unit was taken out of the line. Subsequent thereto, he participated in the invasion of southern France and in the crossing of

the Moselle River. He had never been on sick call during the time he had served with the 45th Division and had not requested that he be sent to the clearing station on 15 March (R20-21). However, at this time he was "nervous and upset" (R22). While he felt that his general health was good, his vision was defective to the extent that he wore glasses in combat and he had been without glasses since shortly after the invasion of southern France. Both of the pairs which he had were broken and, despite a request on his part, no additional glasses had been furnished him (R23).

5. The evidence adduced by the prosecution, including accused's own pre-trial statements, clearly constitutes substantial evidence to support the court's findings that accused twice absented himself from his organization with intent to avoid hazardous duty as alleged in the Charge and specifications and that he was, in addition, guilty of "straight" desertion as alleged in the Additional Charge and its Specification.

6. The charge sheet shows that accused is 25 years of age and was inducted 20 September 1943.

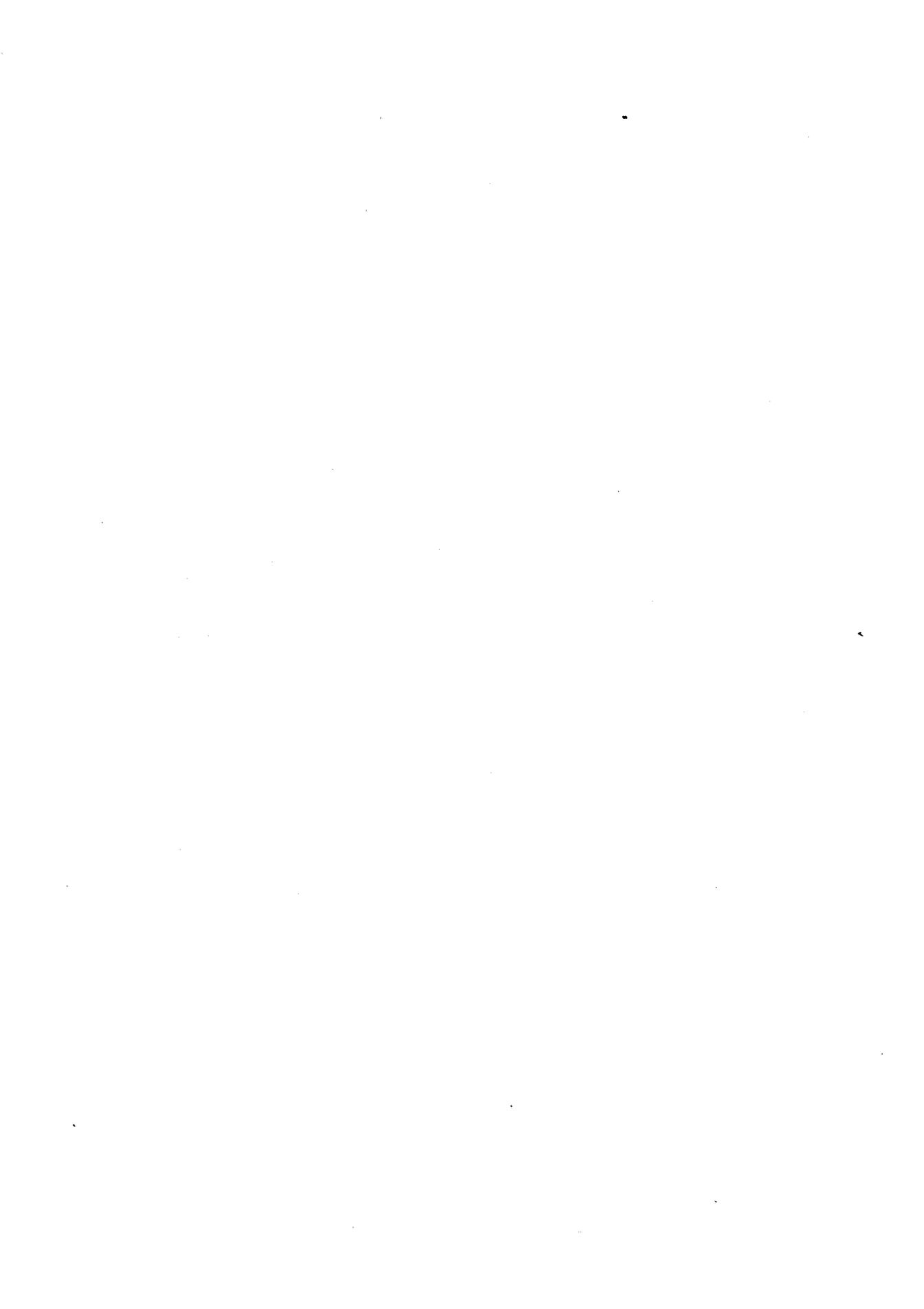
7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir. 210, WD, 14 Sept. 1943, sec. VI, as amended).

B. R. Deeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. H. Every, Jr. Judge Advocate



Branch Office of The Judge Advocate General
with the
European Theater
APO 887

8 September 1945

BOARD OF REVIEW NO. 3

CM ETO 14873

UNITED STATES)

99TH INFANTRY DIVISION

v.)

Trial by GCM, convened at Schweinfurt,
Germany, 14 and 20 June 1945.

Private First Class WILLIE D.
SCOTT (34412183), 4067th
Quartermaster Service Company)

Sentence: Dishonorable discharge,
total forfeitures and confinement
at hard labor for life. United States
Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN AND DEWEY, 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 First Class Willie D. Scott, 4067th Quartermaster Service Company, did, at or near Bad Kissingen, Germany, on or about 1600 hours, 10 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Luise Schmidt.

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

Specification: In that * * * did, at or near Bad Kissingen, Germany, on or about 1600 hours, 10 April 1945, with intent to do him bodily harm, commit an assault upon Karl Voit, by striking him on the head, with a dangerous weapon to wit: a pistol.

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He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 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 50 $\frac{1}{2}$.

3. The evidence for the prosecution showed that accused, after gaining entry by force into an apartment at No. 3 Bahnhof Strasse, Bad Kissingen, Germany, 10 April 1945 (R11,16,23), knocked Her Karl Voit to the floor by striking him on the head with a pistol and again struck him when he attempted to arise (R11,16,19,23). Thereupon he took Fraulein Luise Schmidt by the arm and, threatening her with the pistol, forced her to accompany him to an apartment next door where he threw her on a bed (R16-17, 24-25). There, despite her cries and struggles, he partially disrobed her, held her down, spread her legs apart with his hands, and inserted his penis into her vagina (R25,28). He was interrupted in the performance of the act by the appearance of other American military personnel, who had been summoned by one of the occupants of the house (R25-26, 38-39). At this time, Fraulein Schmidt was "very disturbed" and was "crying violently" (R41). Accused was drunk (R39). Medical officers were summoned and, upon examining Voit, found him to have a fractured nose and two or three moderately severe lacerations of the scalp (R35). Examination of Fraulein Schmidt revealed that her "vagina was quite reddened and there was a small tear in the vagina itself, and it had bled quite a bit" (R35).

In a pre-trial statement voluntarily made by accused on 12 April 1945, accused recited that he became "pretty high" on the afternoon of 10 April and entered a house in Bad Kissingen, Germany, thinking that he might "catch some German soldiers". He found none in this house and went into a second where he "knocked the old man out of the way with my pistol". He then motioned one of the women there to take him back to the first house and "a girl" returned there with him where they entered a room on the ground floor. He later came out of this room and met two soldiers, one of whom took his pistol away from him. He seemed to remember that thereafter the two soldiers helped him back to his area. While in the room with the girl, he neither touched her nor had intercourse with her. He had been "a good soldier" and had never been convicted by court-martial (R34; Pros.Ex.1).

4. After his rights as a witness were explained to him, accused elected to remain silent. One witness was called in his behalf but the only portion of her testimony favorable to the accused related incidents which occurred prior to the time he was shown to have entered the home of Herr Voit (R43-44).

5. The evidence adduced by the prosecution in support of the Specification of Charge II, including accused's own pre-trial statement, clearly shows that accused struck Karl Voit about the head with a pistol, thereby fracturing his nose and causing two or three moderately severe lacerations of the scalp. In view of accused's pre-trial statement, there was evidence from which the court could find that he was not too drunk to entertain the requisite specific intent to do bodily harm. There is thus ample evidence to show that accused assaulted Voit with intent to do bodily harm with a dangerous weapon, as alleged. Also, despite accused's denial of intercourse with Fraulein Schmidt, there is abundant evidence of record to support the court's finding that he had carnal knowledge of the complaining witness by force and without her consent and thus committed rape, as alleged in the Specification of Charge I.

6. The charge sheet shows that accused is 22 years of age and was inducted on 3 September 1942 at Fort Benning, Georgia. No prior service is shown.

7. The court was legally constituted and had jurisdiction of 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 rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457, 567) and upon conviction of assault with intent to do bodily harm with a dangerous weapon, instrument or thing by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

<u>Benjamin R. Sleeper</u>	Judge Advocate
<u>Malcolm C. Sherman</u>	Judge Advocate
<u>B. H. Deway, Jr.</u>	Judge Advocate

(250)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater 8 September 1945 TO: Commanding
General, 99th Infantry Division, APO 449, U. S. Army.

1. In the case of Private First Class WILLIE D. SCOTT (34412183),
4067th Quartermaster Service Company, attention is invited to the fore-
going 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 CM ETO
14873. For convenience of reference, please place that number in
brackets at the end of the order: (CM ETO 14873).

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

(Sentence ordered executed. CGMO 72, USFET, 11 March 1946).

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3

18 AUG 1945

CM ETO 14875

U N I T E D S T A T E S)
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Private ODELL SWAIN)
(39849943), 4067th Quarter-)
master Service Company)

99TH INFANTRY DIVISION

Trial by GCM, convened at Schweinfurt,
Germany, 20,21 June 1945. Sentence:
Dishonorable discharge, total forfeitures,
and confinement at hard labor for life.
United States Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, 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 1: In that Private Odell (NMI) Swain, 4067th Quartermaster Service Company, did, at or near Bad Kissingen, Germany, on or about 9 April 1945 forcibly and feloniously, against her will, have carnal knowledge of Therese Schuetz (civilian female).

Specification 2: In that * * * did, at or near Bad Kissingen, Germany, on or about 9 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Hilde Kreutz (civilian female).

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

Specification: In that * * * did, at or near Bad Kissingen, Germany, on or about 9 April 1945, with intent to commit a felony, viz, rape, commit an assault upon Edeltraut Kuhn, (civilian female), by willfully and feloniously attempting to have carnal knowledge of Edeltraut Kuhn.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by special court-martial for wrongfully carrying a weapon not required by the nature of his duty in violation of Article of War 93. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 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 50 $\frac{1}{2}$.

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

At about 2330 hours on 9 April 1945 Frau Therese Schuetz, about 37 years of age, was preparing to go to bed at No. 3 Schlossburg Strasse, Bad Kissingen, Germany, where she was employed as a directress and kindergarten leader in "a home for mothers and children of the former National Socialist Party". Also present at the home at the time were Frau Deising, another member of the staff, "Rene", a French prisoner of war, Hilde Kreutz, employed as "house help", and various "women with their children living upstairs" (R14,32,33,36,37). As Frau Schuetz was preparing to get into bed, she heard a knock on the door of her room and, upon opening the door in response to the knock, saw a colored soldier (the accused) with a pistol in his hand. She immediately shouted for Rene and closed and locked the door (R32). In the meantime, Rene appeared on the scene and Frau Schuetz heard him conversing in French with the accused outside her door. A moment later Rene called to her that she would not be harmed but that she should open the door because the soldier had threatened to shoot him unless she did so (R33,36). She complied with his instructions and both Rene and the accused, who still had his pistol in his hand, entered the room. Upon entering, accused pointed the pistol at Frau Schuetz and indicated that he wanted to have sexual intercourse with

her. Frau Schuetz held her hands over her face, told Rene to help her and also shouted for Frau Deising. When Frau Deising entered from an adjoining room, accused told her in German to leave (R33,36). When she did so, he pushed Frau Schuetz on a sofa and started to unbutton his trousers, at the same time telling Rene that he might remain. Rene told Frau Schuetz that he could not help her, but "he also could not stay in the room and witness it" and started to leave (R33). As he was leaving, accused pointed the pistol at him and warned him not to notify the military police (R36). When Rene left the room, accused locked the door, again pushed Frau Schuetz on a sofa, kissed her, lay on top of her and "entered" her vagina. He had apparently placed his pistol in his belt shortly before he began his advances but drew it each time she attempted to resist and at one time used it to push her hands away when she placed them over her face (R34). When asked whether she consented to the act of intercourse she testified, "No, I was terrified; absolutely not" (R35). She stated, however, that accused did not hurt her physically (R35). When, upon completing the intercourse, accused walked slowly from the room, she again locked the door and, because she was afraid that he might return, spent the remainder of the night in an adjoining storeroom (R34). She made a complaint to the military police that same night (R35). On the following day, Frau Schuetz was examined by a medical officer. His examination revealed multiple abrasions of the external vagina which could have been produced by sexual intercourse (R9).

Hilde Kreutz, 16 years of age, "house help" at the home, testified that she was awakened on the night of 9 April and told to get up and get dressed because there was a colored soldier in the house. She did so and joined others of the girls and women who lived in the house who were congregated in a room on the first floor (R37,41). She heard voices on the ground floor and later someone tried the door of their room (R37). One of the women present opened the door and Hilde saw a colored soldier, whom she later identified as the accused, standing in the hallway (R38,40). After scrutinizing each of the women in the room, he indicated by gestures that Hilde was to come out into the hall. He did not have his pistol in his hand at this time. When she went out into the hall, accused lifted her skirt and Hilde, understanding for the first time what he wanted, attempted to push him away. However, despite her efforts, he laid her on the floor, and, when she continued to attempt to push him away, reached toward his pocket for his pistol, the grip of which was visible to Hilde. She testified, however, that he did not reach for his pistol each time she resisted but only "at first" and stated that at no time did he actually withdraw the pistol from his pocket. After placing her on the floor, he leaned over her and kissed her and, although she tried to resist, "he

was so strong I couldn't do anything against him". Then, without her consent, he laid on top of her and inserted his penis in her body. In doing so, he did not remove any of her clothing nor did he physically hurt her. She submitted because "he was much stronger than I" and because "I was afraid he might do something to me". After he had satisfied himself, he helped her up and thereafter went downstairs (R39,40). Later than night, she went with other women of the house to the police (R41).

On the following day, Hilde also was examined by a medical officer. His examination did not reveal any signs of external violence on her body but did reveal diffuse redness of all the external genitala and two minor tears of the vaginal orifice (R9). Only the entrance ring of the hymen was broken and the hymen itself appeared to be intact (R9,10). The tears around the vaginal orifice could have been produced by "attempted sexual intercourse", but in the opinion of the examining officer Hilde had not had "sexual intercourse", by which he meant "a complete entrance of the penis into the vagina" (R9).

At about 0200 hours on the same night, accused entered a house at 6 Bahnhof Strasse in Bad Kissingen and came into a room where Herr and Frau Kuhn and their eleven year old daughter Edeltraut were sleeping (R20,21,25,31). When he entered, Herr Kuhn arose and went to him to learn what he wanted but accused, who had his pistol in his hand, pushed him aside and went to Edeltraut's bed (R20). When Herr Kuhn urged him not to molest her, accused threatened him with the pistol and Herr Kuhn, becoming frightened, departed to seek aid (R21,22). After checking to make sure that he had gone, accused returned to the girl's bed, lifted the covers, and placed his hands on her breasts (R22,25). He then pointed the pistol at her and directed her to get out of bed. Edeltraut was frightened and "begged him to leave her alone" but accused insisted and she obeyed (R22,25). Then, despite the protests of her mother, accused forced Edeltraut to accompany him to the living room where he threw her on a couch and removed her pants (R22,25). Thereafter, according to Edeltraut, he "lay on top of me and tried to enter my vagina and he went off again and listened, and he repeated that process three times" (R25). She testified that "it hurt a little bit, but it wasn't bad" (R25). After the third occurrence, accused got off the girl, told her that he was finished, and permitted her to return to the bedroom (R25). Shortly thereafter, he departed (R23,25). Edeltraut testified that she did not know what accused wanted when he took her into the living room and Frau Kuhn testified that she heard her daughter moan "a little bit" while she was in the living room with the accused (R22,28). At a medical examination the next day, the examining officer found no evidence of violence on Edeltraut's body or anything which would indicate that there had been an attempt at penetration (R8,9).

On 17 April 1945 accused made a statement to an investigator attached to the 504th Military Police Battalion (R13,14; Pros.Ex.1). After a showing upon the basis of which the court properly could find that such statement was voluntarily made, it was admitted into evidence as Prosecution Exhibit No. 1. It reads, in part, as follows:

"On the night of 9th April 1945, I left my bivouac area and went to a home nearby. I entered the house through a window. I went through a room and opened a door where I found some people in bed. I saw a girl whom I asked to come out into the other room. She appeared to be about 12 years old. She appeared to be too young for intercourse so I told her to go back to bed".

* * *

"I went on down the street to another house which I entered. I went into the room at the end of the hall. There was one woman in this room. I asked her to FIGGY, FIG. I understood her to say she was a mother. Then she called a man into the room. They talked to each other, but I didn't understand them. I said to the women, you me FIGGY, FIG. She sat on the sofa and pulled off her panties. I then had intercourse with her".

"After finishing with this woman I went upstairs and knocked on a door. A man opened the door. I saw a young girl in the room, whom I motioned to come out into the hall. She appeared to be about eighteen to twenty years old. This girl came out into the hall and I asked her to FIGGY, FIG. She pulled off her stepsins and layed on the hall floor. I then had intercourse with her. After finishing I got up and helped her up. I said thank you, an sis then left".

4. For the defense, it was brought out by the testimony of three enlisted men of accused's company that accused was a "good soldier", that his basic weapon was a rifle, and that he had never been seen with or known to possess a pistol (R15-19).

5. The evidence adduced by the prosecution in support of the specifications of Charge I, including accused's own pre-trial statement, clearly shows that accused had carnal knowledge of Therese Schuetz and is sufficient to support the court's implicit conclusion that he effected at least some degree of penetration of Hilda Kreutz. There being no question as to identity or penetration, the only remaining question is whether the acts shown constituted rape. The essence of the crime of rape has been said to be "the violence done to the person

of the sufferer and to * * * her quick sense of honor and pride of virtue" (Winthrop's Military Law and Precedents (Reprint, 1920), p.677, footnote 80). Both of the complaining witnesses here were employed at a "home for mothers and children of the former National Socialist Party". As described, it is probable that this home was an institution for unwed mothers who were producing children for the Nazi state. If so, their surroundings, with its accompanying background and ideology, probably had materially weakened the "quick sense of honor and pride of virtue" of each and it may be doubted whether either possessed these qualities in the traditional sense, at least to that degree which has led the crime of rape to be regarded in Anglo-American law as one of the most heinous of crimes. Yet, it has long been held that rape can be committed even upon the person of a common harlot (see Winthrop's Military Law and Precedents (Reprint, 1920), p.677; see also CM ETO 4589, Powell, et al). Here, notwithstanding any possible low standard of personal morals, both prosecutrices testified that they did not consent to the act of intercourse in question and under the circumstances shown there is nothing inherently improbable in their testimony. Neither had ever seen the accused before and there is no reason to suppose that they would consent to sexual intercourse under the conditions shown. Although neither prosecutrix was physically harmed, where a rape is accomplished by putting the victim in fear rather than by the use of overpowering physical violence, the mere fact that the prosecutrix shows no evidences of having been struck or beaten does not necessarily show that she consented to the intercourse. If, because of fear, the prosecutrix interposes little resistance, there is small occasion to use physical force (44 Am.Jur, sec.6, p.905). Further, as to Hilde Kreutz, the youth of the prosecutrix is at least a partial explanation of the comparatively minor quality of the resistance offered. Both women testified that they submitted only because of the strength of the accused and because they were placed in fear. It was shown that accused was armed and countered such resistance as was offered either by drawing his pistol or by making threatening gestures in its direction. Each resisted sufficiently to manifest her lack of consent to the accused and, despite this knowledge, he proceeded to enforce his demands by employing his superior strength and by menacing each of them with a lethal weapon. It is the conclusion of the Board of Review that the court properly could find that accused had carnal knowledge of each of the prosecutrices by force and without her consent, as alleged, and that the evidence accordingly is legally sufficient to support the findings (cf: CM ETO 8837, Wilson; CM ETO 9083, Berger and Bamford).

The record similarly supports the findings under Charge II and its Specification. The undisputed testimony of the girl, corroborated as to surrounding circumstances by the testimony of her parents, shows that accused committed acts upon her which clearly amounted to an assault and the nature of these acts, especially when considered in the light of accused's activities earlier that evening, was such

that the court was warranted in inferring that the assault was accompanied by the specific intent to commit rape (Cf: CM ETO 4386, Green).

6. The charge sheet shows that accused is 23 years eight months of age and was inducted on 14 September 1942 at Fort MacArthur, California. He had no prior service.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 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 proper (Cir.229, WD, 8 June 1944, sec.II, . pars.1b(4),3b).

BRSleep Judge Advocate

(ON LEAVE) / Judge Advocate

B.Hewey Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

(259)

BOARD OF REVIEW NO. 2

18 Oct 1945

CM ETC 14905

UNITED STATES)

v.)

Private MATTHEW J. MURTHA
(18180680), Company A,
92nd Chemical Mortar
Battalion.)

IX CORPS

Trial by GCM, convened at
Friedberg, Germany, 19 June
1945. Sentence: Dishonor-
able discharge, total for-
feitures and confinement at
hard labor for life.
United States Penitentiary,
Lewisburg, Pennsylvania.)

HOLDING BY BOARD OF REVIEW No. 2
HEPBURN, MILLER and COLLINS, 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 1: Violation of the 66th Article of War.

Specification 1: In that Private Matthew J. Murtha, Company A, 92nd Chemical Mortar Battalion, did, at or near Reitberg, Germany, on or about 2 April 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and important service, to wit, combat operations against the enemy, and did remain absent in desertion until he surrendered himself at Altenbogge, Germany, on or about 11 April 1945.

Specification 2: In that *** did, at or near Seehausen, Germany, on or about 16 April 1945, desert the service of the United States by absenting himself without proper leave from his organization

with intent to avoid hazardous duty and important service, to wit, combat operations against the enemy, and did remain absent in desertion until he surrendered himself at Lehrte, Germany, on or about 20 May 1945.

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

Specification 1: In that . . . having been restricted to the limits of his company area, at Heitberg, Germany, on or about 2 April 1945, break said restriction by leaving said area.

Specification 2: In that . . . having been restricted to the limits of his company area, did, at Seehausen, Germany, on or about 16 April 1945, break said restriction by leaving said area.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of three previous convictions, one by summary court for absence without leave for seven days, and two by special court-martial, one for two absences without leave of three and one day and one for three absences of six and one and one days respectively, all in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for 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 60 $\frac{1}{2}$.

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

Accused, on 2 April 1945, was a gunner and ammunition handler in Company A, 92nd Chemical Mortar Battalion (RG, 8,12), which was commanded by Captain Athas Athanapoulou (RG). The latter's best recollection at the trial of the status the company was that it was not "in position" but was in an assembly point "in support" at Heitberg, Germany. The company was attached to the 30th Division, which in turn was supporting the 2nd Armored Division in its drive across the continent. Prior to this time the company had been going from one firing place to the other, "usually from an assembly point at a given time and then received orders as the situation developed and went into position" (RG, 7). Captain Athanapoulou

testified that sometime during the afternoon on 2 April 1945 he received instructions to prepare to move. He called in the platoon leaders and warned them of it (R7, 13).

"We did not know at that time whether we were going into an assembly point or into position. All we knew, we were attached to the 30th and we would support them if the situation developed, and a report came back from the platoon commander that Matthew Murtha was absent, so I told him there was still time, that we wouldn't have to pull out till about 1600 hours. We were in that town * * * and they searched the area as best it could be searched and reported back that Murtha wasn't available and no one knew of his whereabouts * * *" (R-7).

Accused had no permission to leave the area. He was not seen by the company commander until 11 April 1945 (R7).

When asked if he was sure that accused knew "what was coming up" on 2 April the company commander replied:

"I wouldn't say that, no more than about anybody in the company. In a rapidly moving situation it takes a little more time for everyone in the company to appreciate what is exactly going on. I am sure that everyone was aware of the fact that we had pulled out of a rest area and we were going into combat" (R8).

In response to a question by the president of the court, he stated that to the best of his knowledge the 30th Division, on 2 April 1945, had orders to continue along with the 2nd Armored Division "and contain any pockets that developed" and when the president continued, "In other words, they were in combat, is that correct?" he replied, "Yes, sir" (R9, 10). When asked if the 30th Division was in contact with the enemy at all times, he answered that he "wouldn't know" (R20). The first sergeant of accused's company testified that at the time it was noticed that accused was missing the company was "doing nothing-- we just pulled in the night before" (R15).

The company commander could not recall any casualties suffered on and after 2 April 1945. Only a few minor casualties had been sustained by his unit since it crossed the Rhine (R10) on 28 March 1945 (R9). Accused had been restricted to the company area prior to 2 April for a period of three months commencing 6 February 1945 as a result of a conviction by a special court-martial and had been personally so informed by his first sergeant (R17).

On 11 April 1945 accused was seen by Captain Athanasopoulou at Altenboge, who instructed a sergeant to keep him in the company headquarters until they could "get him tried" (R7). He was kept in the rear area and not sent forward with the platoon at that time.

"It was at that time that we were moving rather rapidly and pulling into firing position, etc., and it was from that time on that he was kept with our rear echelon, our kitchen and our CP" (R12).

Accused was brought into the company on the night of 11 April. About 7:30 to 8:00 A.M. on 16 April the company moved out to move into firing positions across the Elbe river, leaving behind the kitchen and rear echelon. At that time it was reported that accused was missing. Shortly afterwards, about 8:00 to 8:30 A.M., he appeared and was ordered to work around the kitchen. He informed his First Sergeant that he did not see any reason for working as he was going to get court-martialed anyway. When the kitchen moved shortly thereafter, accused again was missing and was not seen in the company until 20 May 1945 (R15-16). He did not have permission to absent himself at this time (R8). No casualties were sustained during any of these maneuvers (R16).

The accused's unit was in actual combat from 4 July 1944 until hostilities ceased. During that time the accused had a good combat record (R9, 13). His company commander testified that "while he was at the front, I have no complaint whatsoever about his work" (R9). His platoon commander said he "had an admirable record" when in combat (R13).

4. Accused's former platoon leader was recalled as a witness and testified for the defense, stating that when he was detailed as a forward observer, at times when they were in contact with the enemy, accused repeatedly volunteered to go with him as security (R18).

Defense counsel stated that accused's rights as a witness had been explained to him and that he had elected to remain silent (R19).

5. Charge I and its specifications. The accused has been found guilty under two specifications of desertion with intent to avoid hazardous duty and important service, to wit, combat operations against the enemy. The following elements must be proved to establish desertion in cases of this nature: (1) That accused absented himself without leave, (2) that either he or his immediate

JAGF CM ETC 14095

organization did or was about to perform the hazardous duty or important service alleged,—"combat operations against the enemy", (3) that the accused was notified, or otherwise informed, or had reason to believe that he or his immediate organization was about to engage in the hazardous duty or important service alleged, and (4) that at the time he absented himself he entertained the specific intent to avoid such hazardous duty or important service (CM ETC 1921, King; CM ETC 2396, Pennington; CM ETC 5958, Perry and Allen).

If the first three elements are proved, the court may, in the absence of any other reasonable explanation, infer the intent described in the fourth.

The record clearly discloses that accused was absent without leave from his organization at the time and place alleged in the specifications of Charge I. With reference to Specification 1, the evidence disclosed that on 2 April 1945 his organization moved out of the assembly point at Seitzberg, Germany and continued on toward the Elbe River. There is no evidence that his unit ever contacted the enemy or performed any combat operations on or about 2 April 1945. It was conceded that no casualties were sustained after 16 April and after crossing the Rhine on 25 March until a time not designated, the company suffered a "few minor casualties." History will show that insofar as actual combat is concerned, hostilities had ceased in that vicinity during April and the American forces moved up to the Elbe river taking prisoners reportedly anxious and willing to surrender and there awaited the arrival of the Russians from the East. There was no evidence that the accused's organization was subjected to enemy fire or even anticipated any. A mortar battalion usually operates from the rear similar to an artillery organization. It is not often subjected to small arms fire. The accused's battalion was supporting the 30th Division and went where it was directed to go when the emergency arose. The record is completely void of any hazards undertaken or experienced by that organization on or after the date mentioned. It is not enough to say that it was supporting the 30th Division, which in turn was supporting an Armored Division, which may have been in contact with the enemy. Furthermore the record of trial is devoid of any evidence as to accused's whereabouts or his relation to the company at any time prior to his initial absence and there is no evidence that he participated in or was even aware of his organization's activities for the week or five days preceding 2 April 1945. Likewise, while there is evidence that accused's platoon commander informed his squad leader of an alert and that the information "was handed down by way of command", there is a complete absence of any testimony that accused was present at this time or that this information actually reached him by any means. The record is vague and indefinite as to the actual time of accused's departure, whereas it is clearly stated by his company commander that it was some time in the afternoon

that he received instructions to prepare for a move and after that he called the platoon leaders and apprised them of their impending movement. Furthermore, he stated that even at that time it was not known whether they were going into an assembly point or into position. In our opinion, therefore, the prosecution has failed to prove (1) that if accused had remained with his organization he would have engaged in "combat operations against the enemy" and (2) that he was notified or otherwise informed, or had reason to believe that his organization was about to engage in hazardous duty (CM STG 1921, King; CM STG 3700, Straub; CM STG 3300, Faxson).

With respect to Specification 2 of Charge I there is a similar deficiency in the evidence on the issue of intent to avoid hazardous duty. While there is evidence that early on the morning of 16 April, accused's company moved out into a firing position across the Elbe river, there is no testimony that discloses he either knew of this move or was expected to participate in it. On the contrary there is positive testimony that since his return from his first absence, his company commander ordered him kept in the company rear echelon and, as a matter of fact, he was kept there and ordered to work in the kitchen. There is no showing that the position he occupied in the kitchen was in any way hazardous and, at the time he absented himself, this was his place of duty. The fact that his unit did not suffer any casualties during this operation lends credence to the inference that it was not hazardous. Likewise the record fails to disclose accused was aware that any "important service" as contemplated by Article of War 29, was expected of him. He was restricted to the rear area and was told to work in the kitchen until it could be determined what was to be done with him. This was not his normal assignment in the company and there is every indication that nothing more than an administrative restriction, as a result of his previous unauthorized absence, was contemplated. Accordingly, the record of trial insufficient to sustain the finding of guilty of desertion with intent to avoid hazardous duty and important service as alleged in this specification (CM STG 3300, Faxson, supra).

Charge II and its specifications: There is substantial evidence of all the elements of the offenses charged in these specifications. It was established that accused was properly restricted; that he was so notified, and that he violated the restrictions imposed. Such conduct constitutes a violation of Article of War 98 (MCM, 1923, par. 103), p. 9; and par. 139a, p. 164; CM STG 2023, Corcoran; CM STG 2239, Grimes).

6. The charge sheet shows that accused is 31 years one month of age and enlisted 29 October 1942 at New York, N. Y. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein noted 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 only so much of the findings of guilty of Specifications 1 and 2, of Charge I and Charge I as involves findings that accused did, at the times, places and for the periods of time alleged, absent himself without leave from his organization in violation of Article of War 61, legally sufficient to support the findings of guilty of Charge II and its specifications, and legally sufficient to support the sentence.

8. Penitentiary confinement is not authorized for the offenses of absence without leave or breach of restriction (AW42; CM ETC 2432, Juris). Confinement should be in a place other than a penitentiary, Federal correctional institution or reformatory.

EARLE HARBURN, Judge Advocate

RONALD D. MILLER, Judge Advocate

JOHN J. COLLINS, Judge Advocate

1st Ind

War Department, Branch Office of The Judge Advocate General with the
European Theater 15 Oct 1945 TO: Commanding
General, XIX Corps, APO 870, U. S. Army

1. In the case of Private MATTHEW J. MURINA (12190830), Company A, 92nd Chemical Mortar Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of Charge I and its specifications as involves findings that accused did, at the times and places and for the periods of time alleged, absent himself without leave from his organization in violation of Article of War 61, legally sufficient to support the findings of guilty of Charge II and its specifications 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. Confinement in a penitentiary is not authorized upon conviction of the military offenses of absence without leave and breach of restrictions. Confinement should be in a place other than a penitentiary correctional institution or reformatory. This may be effected in published court-martial order. I suggest consideration be given to a reduction in the period of confinement in view of the finding that accused was not guilty of desertion.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETC 14808. For convenience of reference, please place that number in brackets at the end of the order: (CM ETC 14808).

B. FRANKLIN RYER
Colonel, JAGD
Acting Assistant Judge Advocate General

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 4

2 AUG 1945

CM STO 14925

UNITED STATES)
v.)

UNITED KINGDOM BASE, COMMUNICATIONS
ZONE, UNITED STATES FORCES, EUROPEAN
THEATER

Technician Fifth Grade
JAMES H. BULLOCK (34856104),
1332nd Engineer General
Service Regiment

Trial by CGM, convened at Stoneleigh
Park, Warwickshire, England, 15 June
1945. Sentence: Dishonorable discharge,
total for failures and confinement at
hard labor for five years. - United
States Penitentiary, Lewisburg, Pennsyl-
vania

HOLDING by BOARD OF REVIEW NO. 4
DANIELSON, MEYER and ANDERSON, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the sentence.

2. The sentence of confinement at hard labor for five years is supported equally by the finding of guilty of indecent assault (CM STO 4235, Bartholomew) and by that of wrongfully taking and using a government vehicle, in the latter case by analogy either to the offense described in the District of Columbia "joyriding statute" (CM STO 6383, Wilkinson) or to misapplication in violation of Article of War 94. Neither offense, however, justifies penitentiary confinement, which is authorized, not on any basis of analogy as in the matter of maximum punishments, but only for offenses specifically enumerated in Article of War 42 or falling within the category described therein as "so punishable * * * by some statute of the United States of general application within the United States * * * or by the law of the District of Columbia" (CM STO 2195, Shorter). Indecent assault is not such an offense (CM STO 2195, Shorter). The wrongful taking and using of a government vehicle may be, provided that it is alleged and proved, among other things, that the vehicle taken was "furnished or intended for the military service" of the United States (section 36, Federal

Criminal Code, 18 U.S.C. § 7) or provided that the taking was of a character proscribed by section 22-2204 (6:62) District of Columbia Code (CM ETO 6383, Wilkinson; CM ETO 8338, How). In the instant case, it is not alleged that the vehicle was furnished or intended for the military service of the United States nor is it shown that the taking was effected under the circumstances or from the kind of place contemplated by the District of Columbia statute. Hence the designation of the United States Penitentiary as the place of confinement was unauthorized.

LESTER A. DANIELSON Judge Advocate

MARTIN A. MEYER Judge Advocate

JOHN R. ANDERSON Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

22 SEP 1945

CM ETO 14987

UNITED STATES)

v.

Private ROE V. HARRISON
(34340681), 655 Port
Company, 516th Port Bat-
talion, T. C.

NORMANDY BASE SECTION, COMMUNICATIONS ZONE,
EUROPEAN THEATER OF OPERATIONS

Trial by GCM, convened at Cherbourg,
Manshe, France, 20 June 1945. Sentence:
Dishonorable discharge, total forfeitures,
and confinement at hard labor for life.
United States Penitentiary, Lewisburg,
Pennsylvania

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HEPBURN and MILLER, 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 92nd Article of War.

Specifications: In that Private Roe V. Harrison, 655th Port Company, 516th Port Battalion, did, at or near Cherbourg, Manshe, France, on or about 28 May 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill Roland Lavignes, a French soldier, by stabbing him in the stomach with a bayonet.

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He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for breach of restriction in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor 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 under Article of War 50g.

3. Evidence for the Prosecution:

During the evening of 28 May 1945 seven American soldiers, five of whom were colored, came into the cafe of Monsieur Simonin in La Glacierie near Cherbourg, France. They were drunk. The accused, a private in the 856th Port Company, 516th Port Battalion (R9,10,11), was one of the colored soldiers (R14). They demanded salvagos and when refused the proprietor's daughter was threatened by the accused with a bayonet or dagger. The proprietor ran out of the cafe to seek help (R10,14,19).

The American soldiers then went out of the cafe one after the other. On the outside were three French soldiers who had been in the cafe but, after observing the disturbance created by the American soldiers, had immediately departed (R28). The first American soldier out of the cafe was a white soldier and without provocation he attacked Roland Lavignee, the deceased, one of the French soldiers. Lavignee returned his blows and knocked the American soldier down just when the other Americans emerged from the cafe door. The Americans then set upon the French soldiers. Two of the colored American soldiers were armed with bayonets. Two of the French soldiers escaped after an exchange of a few blows by running away. Three of the American soldiers, of whom two were colored, were seen to attack Lavignee, the deceased. He was seen to fall (R29-30,35). The last American soldier seen with the deceased as he lay on the ground was a colored soldier who held a "dagger" in his hand (R36). The above described attack in which the Americans were the aggressors took place about 50 yards from the cafe (R31,32-33,38). When the fighting ceased Lavignee was sprawled on the ground holding his stomach. There was a gash on the left side of his head (R40). The accused was standing 10 to 20 feet away from him (R42). Accused was seen to have a bayonet with him during that day and also when he was in the cafe that evening (R41,45).

The physician who examined the body of Lavigne the day after the above occurrence testified that he died that day. His body showed three wounds: A cut on the left side of the face, a stab in the left side of the chest, and a deep stab in the abdomen. The cause of the death was the wound of the abdomen. In the physician's opinion this wound was caused by a dagger or bayonet (R6-8). The deceased's blood was type "O". The blood found on the accused's bayonet was also type "O". Approximately 50 per centum of humans have blood type "O" (R44-45). On 29 May 1945, after the accused was apprehended, he lead a CID agent to a field where he said he had hidden his bayonet. After a half hour's search he found it and turned it over to the agent (R46-47). He also said at that time that he had been drinking calvados the night before and was feeling like a "madman". He knew what he was doing (R48).

4. The defense called as witnesses four of the American soldiers who were in the cafe with the accused including the two white soldiers. The white soldier who was described as the first one out of the cafe stated that he had been drinking and that all he remembered was seeing "the man laying in the road". He did not recall any fight. He thought he was the last one to come out of the cafe (R62). He did see one of the French soldiers strike the other white American soldier who then chased the French soldier. The latter got away and the two Americans walked down the road (R63). The other white soldier testified that when he came out of the cafe he did not observe any fight or anything unusual. He and the other white soldier who had come out of the cafe walked along the road and observed a French soldier "laying across the road" (R65). While in the cafe he saw a bayonet in the possession of one of the soldiers. He believed it was the accused (R66). Two of the colored soldiers testified that ten minutes or more elapsed between the time the first white soldier went out of the cafe and before the rest of the group followed (R64,68). They then saw the French soldier and the white soldier fighting about 40 to 50 yards from the cafe. The French soldier knocked the white soldier down. Some time thereafter they saw two French soldiers on top of the accused in the ditch beating him. They did not see how the fight started (R65,68). They returned to camp. One claimed he did not interfere because he saw the accused and his assailants desist and get up (R69).

The accused, having been advised fully regarding his rights as a witness, elected to testify. He joined the group of American soldiers on the evening of 28 May 1945 in a cafe where they had some drinks. They left this cafe and played for about 15 minutes with accused's bayonet by chucking it at a telephone post. They then went into the cafe described above and asked for salvados. They were told that there was none. They started to leave. A white soldier went out first and a few minutes later the accused went out and saw the

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soldier lying face down on the ground. Without warning he was set upon by two French soldiers. He was struck in the eye and knocked down and then got kicked. As he tried to arise one grasped him by the shoulder while the other punched him in the side. One grabbed accused's bayonet and tried to take it. Accused shook himself free and hit the soldier who had hold of the bayonet. He let it go. Accused was shoved into the hedgerow. He arose with the bayonet now in his own hand and one of the French soldiers, who proved to be Lavignes, came at him and grasped the bayonet with his left hand "and at the same time I must have struck him in the stomach. After that he backed off and . . . run in and grabbed it again. I raised it up and cut him on the side of the face and then I ran back to camp" (R67-68). On the way back to camp he hid the bayonet and washed the blood from his hands at camp (R69). Prior to the fight he had drunk about one fourth of a pint of salvados (R68). He had no intention of killing his assailant. He intended to prevent him from taking the bayonet because at that time he thought that if the French soldier took the weapon he would kill him, the accused. He had never seen the Frenchmen before (R69). He had been carrying the bayonet only since 6:45 pm that day. It was the only weapon in the crowd (R70). He denied that he threatened any girl with it in the cafe (R76).

5. The accused has been convicted of the murder of Roland Lavignes, a French soldier. The evidence clearly established and the accused admitted that at the time and place alleged in the Specification he stabbed, or as he put it, stuck a bayonet into the stomach of the French soldier named therein. As a result of the wound the soldier died. Murder is the unlawful killing of a human being with malice aforethought. Malice may be presumed from the deliberate use of a deadly weapon in a way which is likely to produce, and which does produce, death (Underhill, Criminal Evidence (4th Ed., 1935), sec.557, p.1090). The evidence for the prosecution showed that the American soldiers attacked the French soldiers without provocation. Accused was one of the group and admittedly the only one armed with a weapon. Three American soldiers were seen to attack the deceased and throw or knock him to the ground. There were three stab wounds in or about his face or body. The accused admitted to causing two of the wounds, including the fatal one. There was, therefore, substantial competent evidence to support a finding of guilty of murder on the part of the accused unless he was excused in the killing on the grounds of self-defense. To kill another in self-defense is legally excusable.

"To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life . . . or to prevent great bodily harm to himself . . . The danger must be believed on reasonable grounds

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to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if after provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor" (MCM, 1928, par.148a, p.163).

The accused's contention of self-defense raised an issue of fact. He claimed that he was attacked and in order to save his own life he stabbed the deceased with the bayonet. The prosecution's testimony was to the contrary and showed that he was the aggressor and that the fatal blow was not struck in self-defense. The determination of the issues of fact was vested in the exclusive province of the court. Inasmuch as it has resolved the issues against the accused and its findings are based upon substantial evidence in the record, its decision will not be disturbed by the Board upon review (CM ETO 4194, Sectt; CM ETO 18189, Ridancour).

6. The charge sheet shows that accused is 21 years and five months of age. He was inducted at Camp Shelby, Mississippi, 29 June 1942. No prior military service is shown.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. 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 murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 484, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

(TEMPORARY DUTY) Judge Advocate

EARLE HERRICK Judge Advocate

RONALD B. MILLER Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

CM ETO 15062

20 AUG 1945

UNITED STATES)

v.)

Second Lieutenant HAL J.
FINIGAN (O-1018241),
Cavalry, 66th Armored
Regiment)

2ND ARMORED DIVISION

) Trial by GCM, convened at Headquar-
) ters, 2nd Armored Division, APO 252,
) U. S. Army, 17 May 1945. Sentence:
) Dismissal, total forfeitures and
) confinement at hard labor for two
) years. Eastern Branch, United States
) Disciplinary Barracks, Greenhaven,
) New York.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, 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.

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

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

Specification: In that 2nd Lt. Hal J. Finigan, 66th Armored Regiment, did, without proper leave, absent himself from his company at or near Baesweiler, Rhein-Provinz, Germany, from about 1500A, 2 December 1944, to about 1730A, 2 December 1944.

CHARGE II: Violation of the 94th Article of War.
(Finding of not guilty).

CONFIDENTIAL

Specification: (Finding of not guilty)

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

Specification: In that * * * was at or near Haanrade, Holland, on or about 2 December, 1944, drunk and disorderly in uniform, to such an extent as to bring discredit upon the military service in a private home in the presence of civilians.

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

Specification: In that * * *, did, at or near Haanrade, Holland, on or about 2 December 1944, threaten to shoot Privates Frank J. Gaccione and Harry L. Amiriam, both of 2nd Armored Division Military Police, with a caliber .45 service pistol, while said Military Police were in the execution of their office.

He pleaded not guilty, and was found not guilty of Charge II and its Specification, and guilty of the remaining charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War-48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, ^{and} withheld the order directing the execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

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

About 1500 hours 2 December 1944, the accused, a second lieutenant and supply officer of Company A, 66th Armored Regiment, then stationed in the vicinity of Baesweiler, Germany, left that vicinity in uniform in a two and a half ton truck (R4-5) driven by an enlisted man and went to the nearby town of Haanrade, Holland, 3 miles distant, to inquire about laundry facilities (R8). He left the vehicle for about an hour and when he returned his breath smelled of alcohol (R6). He then entered the home of a civilian nearby and could be seen through the window with an

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elderly woman and "a couple of girls". He summoned the enlisted man from the truck into the house and directed the driver to return without him and to pick him up in the morning (R7).

About 1750 hours of the same day, two enlisted personnel of the military police, in full uniform with "MP" arm bands and "MP" lettered on their helmets, as the result of a report of a disturbance went to a house in Haanrade and found therein the accused seated at a table. He was dressed in uniform except that he had on a sweater (R9-10,14-15). He said to them, "What the hell do you want?" They told him they were military policemen and one of them told the accused that it was reported that there was someone in trouble in that house and they were there to do their duty. The accused ordered them out. They did not go. The accused then pulled an automatic pistol out of a holster on his belt and pointed it toward them holding it in a wobbling manner. He then aimed it at the wall and fired a shot into the wall and said that the next one was for them. The police left, but returned to the house with a lieutenant. As the latter was about to enter the building another shot was fired. The lieutenant borrowed one of the MP's pistols and shot the accused in the hand, which was then on a bottle. A shot was fired out of the window. A captain then arrived who ordered the accused to throw his gun out of the window. The gun, a .45 automatic, came out of the window and the officers rushed in and seized the accused, who was "hollering" about his wounded hand "cussing and swearing" (R11-12,16). He was drunk (R13,17). An extract copy of the morning report of the accused's organization for 5 December 1944 introduced in evidence without objection showed accused from "Duty to AWOL, 1500A, 2 Dec 44" (R14; Pros.Ex.A).

4. In defense, a Major Herbert S. Long, Jr., testified that prior to "this incident", it was his opinion that accused's manner of performance of his duties was good and that in combat he performed his duties well (R19). Accused had been recommended for an award of the Silver Star (R20).

The accused elected to testify concerning Charges I and II and their specifications. He has been in combat from 27 August 1944 until 2 December 1944 when he went to the nearby town to ascertain if there were any laundry facilities for his company as he desired to collect the laundry after inspection that day. He visited the "29th Officers' Mess" to make inquiry about the laundry and "had a few drinks, three or four approximately, and I don't know how many more, and I don't remember anything after that" (R20-21). He was to attend a foot inspection formation at 1500 that date. He had no authority to be absent from it (R21).

5. Discussion.

a. Charge I and its Specification (Absent without Leave). Accused's absence without leave at the time, place and for the period alleged was adequately established by the evidence (MCM, 1928, par.132, pp.145-146).

b. Charge III and its Specification (Drunk and disorderly in uniform). The evidence clearly established and the accused admitted that he was drunk on 2 December 1944. His conduct toward the military police in threatening them, firing his pistol into the walls of the private home and through the windows and causing the disturbance that followed, described by the evidence, was undoubtedly a disorder. The accused was therefore rightfully convicted of being drunk and disorderly at the time and place alleged. The Specification adds in the phraseology of the 96th Article of War that his conduct brought discredit upon the military service in a private home "in the presence of civilians". The record does not disclose that there were any civilians present during the main disturbance after the military police and officers entered the house. However accused admitted that he was drunk after leaving the 29th Infantry mess and before he entered the house. There is evidence that three women were present in the house at that time. The evidence makes out a clear violation of the 95th Article of War. It was clearly shown that the accused was drunk in uniform in the presence of other military personnel, including enlisted men, and in their presence, was conspicuously disorderly. His conduct under the circumstances was such as to dishonor and disgrace him as an officer and seriously compromise his character and standing as a gentleman. The court's findings of guilty of the Charge and of the Specification, are clearly established (CM 221591, Brown, 13 B.R. 183 (1942); CM 226357, Betette, 15 B.R. 89 (1942)).

c. Charge IV and its Specification (Threat to shoot the military police). Undoubtedly the two military policemen who entered the house were military police acting on patrol and were dressed in the usual uniform of military police. It had been reported to them that there was a disturbance in that house and they entered it for the purpose of investigating and, no doubt, to quell the disturbance. While the record is devoid of any evidence concerning the authority of a military policeman on patrol duty to enter a private home for such a purpose, such authority may reasonably be inferred from the circumstances shown.

After entering the house their testimony discloses only that they saw the accused seated at a table with his blouse off. They were both armed and so was the accused. The accused asked them what they wanted. The one who acted as spokesman said

that they "had gotten a report to come there as someone was in trouble" and they had come to do their duty. Accused ordered them out. They did not go. He then fired his pistol in their presence and threatened to shoot them if they did not leave. There is no evidence that accused had the right to be in the house or room in which he was found. On the contrary the inference was warranted on all the evidence that he was himself at best a mere visitor and did not have the right to expel the two soldiers from the premises. The evidence established that accused threatened to shoot the two members of the military police as alleged. There was no legal justification or excuse for his act. A violation of Article of War 96 was thus made out.

The same facts and circumstances may give rise to two or more offenses and an officer may be charged with and found guilty of violations of Articles of War 95 and 96 although the separate offenses stem from the same set of facts. There was, therefore, no improper multiplication of charges (CM ETO 1197, Carr; CM ETO 10362, Hindmarch).

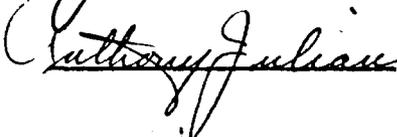
6. The charge sheet shows that accused is 33 years of age. Without prior service he entered on active duty 22 May 1943 at Fort Knox, Kentucky.

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. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed.

8. Dismissal is mandatory upon a conviction of Article of War 95. Violations of Articles of War 61 and 96 by an officer may be punished as the court-martial may direct. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

 Judge Advocate

 Judge Advocate

 Judge Advocate

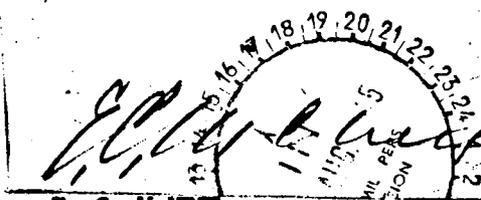
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1st Ind.

War Department, Branch Office of The Judge Advocate General
with the European Theater. **20 AUG 1945** TO: Command-
ing General, United States Forces, European Theater, APO 887,
U. S. Army.

1. In the case of Second Lieutenant HAL J. FINIGAN,
(O-1018241), Cavalry, Company A, 66th Armored Regiment, atten-
tion is invited to the foregoing holding by the Board of Re-
view that the record of trial is legally sufficient to support
) the findings of guilty and the sentence, which holding is
hereby approved. Under the provisions of Article of War 50½,
you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded
to this office, they should be accompanied by the foregoing
holding and this indorsement. The file number of the record
in this office is CM ETO 15062. For convenience of reference,
please place that number in brackets at the end of the order:
(CM ETO 15062).



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

(Sentence ordered Executed. GCMO 368, USFET, 31 Aug 1945).

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

23 August 1945

BOARD OF REVIEW NO. 1

CM ETO 15063

UNITED STATES)

5TH ARMORED DIVISION)

v.)

) Trial by GCM, convened at Muhlhausen,
) Germany, 19 May 1945. Sentence: Dis-
) honorable discharge, total forfeitures
) and confinement at hard labor for life.
) United States Penitentiary, Lewisburg,
) Pennsylvania.

Private First Class ALBERT A.
ADAMS (32038879), Battery A,
71st Armored Field Artillery
Battalion

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS AND CARROLL, 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 First Class Albert A. Adams, Battery A, Seventy First Armored Field Artillery Battalion did, at Westphalia, Germany, on or about 4 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Lena Landwehr.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 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 50 $\frac{1}{2}$.

3. This is a companion case to CM ETO 14040, McCreary. A detailed statement of the facts concerning the commission of the alleged offense by accused and his company McCreary is set out there and need not be repeated here. There is sufficient evidence in the record to support accused's extrajudicial confession (Cf: CM ETO 14040, McCreary), which confession, together with such evidence, is sufficient to establish that he had carnal knowledge of the prosecutrix by force and without her consent, as alleged (CM ETO 11621, Trujillo et al; CM ETO 12162, Grose; CM ETO 12869, DeWar; CM ETO 14256, Barkley).

4. Accused, after being warned of his rights, elected to remain silent.

5. One question concerning the propriety of the exclusion of certain evidence deserves mention. Her August Fetts, the father of the prosecutrix and a witness for the prosecution, was asked on cross-examination:

"Are you a member of the NSDAP?"

An objection by the prosecution to the question was sustained (R14). The defense was obviously trying to ascertain whether the witness was a member of the National Socialist German Labor Party, a Nazi. It was an attempt to show bias against accused (Wigmore, Code of Evidence (3rd Edition, 1942), sec. 856, p. 180), the possible existence of which is a commonplace of current history. While we think it would have been better to permit the question to have been answered, the extent of cross-examination on such matters is within the discretion of the trial court and its decision will not be disturbed on appellate reviewing the absence of a clear abuse of discretion (3Wharton Criminal Evidence (11th Ed., 1935) sec. 1308, p. 2181). We need not, however, determine whether or not this was an abuse of discretion, because even if it were, the error was not prejudicial in view of the other evidence.

6. The charge sheet shows that accused is 38 years and 2 months of age and was inducted on 11 April 1941, to serve one year. He was transferred to an inactive status, Enlisted Reserve Corps, on 1 November 1941 and called to active duty on 22 January 1942, to serve for the duration of the war plus six months.

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

8. The penalty for rape is death or life imprisonment at the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 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 proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

WM. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald K. Carroll Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater. 23 August 1945 TO: Commanding
General, 5th Armored Division, APO 255, U. S. Army.

1. In the case of Private First Class ALBERT A. ADAMS (32038879), Battery A, 71st Armored Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 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 CM ETO 15063. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15063).

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

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Specification 2: In that * * * did at London, England, on or about 5 December 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 26 June 1945.

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

Specification: In that * * * having been duly placed in confinement in the Central District Guardhouse, United Kingdom Base on or about 29 November 1944, did, at London, England, on or about 5 December 1944, 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 * * * did, at London, England, on or about 28 November 1944, feloniously take, steal, and carry away one (1) solitaire diamond ring, and one (1) eight-stone diamond cluster ring, of a total value of about twenty-five pounds (£25-0-0), lawful money of the United Kingdom, of an exchange value of about One hundred dollars (\$100.00), the property of Mrs. Lilian Holmes.

Specification 2: In that * * * did, at London, England, on or about 26 June 1945, with intent to commit a felony, viz., murder, commit an assault upon Police Constable Sidney Onslow by willfully and feloniously shooting the said Police Constable Sidney Onslow in the foot with a pistol.

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

Specification 1: In that * * * did, at London, England, on or about 19 June 1945, wrongfully take and use without consent of the owner, a certain motor car, to wit: a black Buick saloon motor car, 30 h.p. engine number 3078077, property of Harry Binguely, of a value of more than Fifty dollars (\$50.00).

Specification 2: In that * * * did, at London, England, on or about 26 June 1945, wrongfully take and use without consent of the owner, a certain motor car, to wit: an Austin 12 h.p. saloon motor car, index number D.M.L. 231, property of Frederick Edward Mockford, of a value of more than Fifty dollars (\$50.00).

He pleaded guilty to Specifications 1 and 2 of Charge I except the words "desert" and "in desertion", substituting therefor respectively the words "absent himself without leave from" and "without leave", not guilty to Charge I but guilty of a violation of the 61st Article of War, and guilty to all other charges and specifications except Specification 2 of Charge III, to which he pleaded not guilty. Two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of all charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and 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, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

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

a. Specification 1 of Charge I and Specification 1 of Charge III:

A duly authenticated extract copy of the morning report of Squadron A, 13th Replacement Control Depot (Avn), for 22 July 1944, introduced in evidence without objection, shows accused from duty to absent without leave as of 21 July 1944 (R11; Pros.Ex.1).

On 28 November 1944, accused was apprehended in civilian clothing and without a pass by an officer of the London Metropolitan Police, who suspected him of having stolen two rings that day from the bedroom of Mrs. Lilian Holmes. Later that day the officer found the rings in a kettle on a stove in the room in which accused had been arrested that morning. There was no military clothing in the room (R8-10). It was stipulated that the rings were of a total value of about 25 pounds with the exchange value of \$100.00 (R28). In a voluntary written statement made on 27 June 1945, accused admitted that on 28 November 1944, he entered the flat of Mrs. Lilian Holmes, while she was away from home, and took two diamond rings. He admitted his absence without leave and that he wore civilian clothing and a Belgian uniform on several occasions before his apprehension (R36; Pros.Ex.7).

b. Specification 2 of Charge I, Specification of Charge II and Specification 1 of Charge IV: A duly authenticated extract copy of the morning report of the Detachment of Patients, 4261 U. S. Army

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Hospital Plant, for 5 December 1944, introduced in evidence without objection shows accused a prisoner attached for hospitalization to absent without leave (R11; Pros.Ex.2). In voluntary statements made on 26 and 27 June 1945, he admitted escaping from military custody on 5 December 1944 while "awaiting a charge of absent without leave" at the 150th Station Hospital in London. He also admitted wearing civilian clothing without authority because he "thought it would be harder for them to apprehend me". He "intended to go back to the army, but I didn't know when; I was just having a run" (R35,36; Pros.Exs.6,7).

On 19 June 1945, Henry Binguely, of London, parked his black Buick saloon motor car, stipulated to be of a value of over \$50.00, in front of a store in Knightbridge. As he returned about 5 or 10 minutes later he saw the car being driven away, although he had not authorized anyone to use it. He reported the matter to the police and next saw the car on 22 June in a badly damaged condition (R20-21). During the morning of 20 June, a police constable on patrol duty in London saw the Buick car parked on a road. Three men later got in the car and drove away before he could apprehend them (R11-12). Later the same morning a police constable in a patrol car saw the Buick and recognized accused as its driver when accused turned to look back. Accused was dressed in a brown jacket and a trilby hat. The Buick and its occupants escaped the patrol car (R12-13). Still later the same morning the Buick crashed into the side of a bus and careened into the side of a warehouse. Accused was identified as one of two men who jumped from the car and ran away (R21-22). In a voluntary statement made on 26 June 1945, accused admitted driving the Buick car away on 19 June and later colliding with the bus and escaping with a companion on a lorry by pointing a gun at the driver (R35; Pros.Ex.6).

Accused was apprehended in London on 26 June 1945 by the London police (R26).

c. Specification 2 of Charge III and Specification 2 of Charge IV: During the afternoon of 26 June 1945, Frederick Edward Mockford parked his Austin saloon motor car, stipulated to be of a value of more than \$50.00, opposite a stadium in London, and on returning about an hour later found that it was gone. He reported the matter to the London police (R23-24).

Later the same afternoon Police Constables Sidney Onslow, Frederick Lewis and David Waldrop, each of whom was unarmed and in uniform, gave chase to the Austin car driven by accused and another man, which stopped near London Bridge. The other occupant of the car was immediately arrested by Lewis, but accused ran and got on a bus,

which was stopped in the middle of London Bridge by Constables Onslow and Waldrop. Accused jumped from the bus and ran, with Onslow and Waldrop giving chase. Accused stopped, pulled an automatic pistol (Pros.Ex.4), and pointed it at Onslow, saying, "If you come near me I will shoot you, by God I will". He then cocked the pistol and Onslow, walking slowly toward him, said, "Don't be a fool". After they had moved 15 to 20 yards and accused had again pointed the pistol at Onslow and demanded that he "get back", accused turned and Onslow jumped on his back and grabbed his right arm. Both fell on their knees to the ground and accused turned so they were facing each other. Onslow tried to turn the pistol away from himself by pushing on the middle of accused's arm, but did not put his hands on accused's wrists or hands. Accused fired three shots in quick succession, after which Onslow felt a sharp pain in his "left toe". He continued to struggle, however, and grabbed the pistol from accused and hit accused on the head with the butt at about the same time that Waldrop hit accused with a motor jack handed him by a taxi driver. Accused was rendered unconscious and was driven with Onslow to a hospital where, upon examination by two doctors, it was determined that Onslow had a bullet wound in his left great toe and that accused's injuries were not serious, accused being conscious and sober, although he had been drinking. The pistol still contained three live rounds of ammunition. Accused was dressed in a brown suit and trilby hat. Onslow's shoe had a bullet hole through the upper toe and sole, and his tunic had a bullet hole between the first and second buttons on the left side. His trousers had a bullet hole approximately two inches above the cuff of the left leg (R14-17,24-34; Pros.Exs.3,5).

In voluntary statements, one given a London detective inspector later that day and another given the following day to an agent of a Criminal Investigation Division, accused corroborated the testimony of the constables, stating that he fired the pistol accidentally as he and Onslow fell to the ground, and that he did not intend to shoot the "bobbie". He admitted taking the Austin car (R35,36; Pros.Exs.6,7).

4. After his rights as a witness were fully explained to him, accused elected to testify (R39). In 1940, while only 19 years of age, he obtained a good job with a cigarette company in Texas, but went "haywire" and began drinking, lost his job and was sent to a reformatory in Oklahoma for three years for stealing an automobile and taking it across a state line. While there he was allowed to join the army, and although he was assured that the fact of his reformatory confinement would not appear in his service record, he was not promoted later on because such fact did appear therein. While in a "hot outfit" in the states he was absent without leave for three days and almost missed

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coming overseas with his outfit. After arriving in England he was sentenced to six months' confinement and forfeiture of two-thirds of his pay. In the guardhouse he strained himself and was then moved from one hospital to another without ever receiving proper treatment or pay. He then went to a replacement depot where all he did was "pull K.P. one day and guard duty the next", and went absent without leave until he was apprehended in uniform in November 1944. From the guardhouse he was sent to the hospital with pneumonia and put in a ward under two guards. He escaped through the window of a latrine in his pajamas and bathrobe and stayed in bed for weeks at the home of a friend of his girl. He then met Beryl Coffey, who "is in the family way" and whom he was to marry on 30 June 1945. He intended to give himself up to the army after his marriage. He admitted taking the rings from Lilian Holmes. He took the two cars, but each time he had been drinking and just wanted to go for rides in them. He bought the pistol as a souvenir and did not intend to shoot the policeman with it, but was actually trying to bluff the policeman. He did not recall pulling the trigger during the scuffle and was trying to release the gun (R39-51).

For the defense, Mrs. Evelyn Rose Sullivan testified that about 5 days before he was apprehended, accused told her he was a deserter from the army and was going to return to his unit as soon as he was married (R51-52). Miss Beryl Coffey testified that she was to have married accused on 30 June 1945. During the four months she knew him he never wore a military uniform or intimated to her that he was an American soldier (R54-55).

5. Competent evidence and accused's pleas of guilty clearly support the findings of guilty of Charges II and IV and their specifications and Charge III and Specification 1 thereof. In view of accused's plea of guilty to Charge II and its Specification, and his testimony admitting his escape on 5 December, no prejudice resulted to him because of the variance between the specification alleging escape from a guardhouse and the proof showing escape from a hospital.

As to Charge I and its specifications, the evidence and accused's pleas of guilty establish without doubt his absences without leave for 130 days under Specification 1 and for 203 days under Specification 2. In addition to such prolonged absences, it appears that he wore civilian clothing during a large portion if not all of each period of absence, that the second absence was initiated by an escape from confinement, that he committed several crimes while absent, including larceny, and that he was apprehended each time, forcibly resisting arrest the last time. The evidence thus shows competent and compelling circumstances from which the court could infer the necessary intent on the part of accused to remain permanently away from the service (MCM, 1928, par.130a, p.144; CM ETO 1577, Le Van; CM ETO 1726, Green; CM ETO 2901, Childrey).

While accused denied any intention of murdering Police Constable Onslow and asserted that the discharge of the pistol was accidental, the evidence clearly shows that while he was a fugitive from justice, he pulled and cocked a loaded automatic pistol and threatened to shoot the unarmed officer who was attempting to arrest him if the officer came near him. During the ensuing struggle, the officer's hand did not touch the pistol and accused's hands and wrist were free--yet he fired three shots, two of which went into the officer's clothing and one of which wounded him in the left foot. Such circumstances fully warrant the court's conclusion that accused entertained the requisite intent to commit murder at the time he fired the shots (CM ETO 533, Brown; CM ETO 3911, Jackson). Even if he merely intended to frighten or bluff the officer, his willful acts indicate "a heart reckless of social duty" and a "reckless disregard of human life", and as such are punishable to the same extent as if accompanied by a specific intent to murder the officer (CM ETO 2899, Reeves).

6. The charge sheet shows that accused is 23 years two months of age and was inducted 1 April 1943 at Oklahoma City, Oklahoma. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. 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 in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized upon conviction of desertion by Article of War 42, of larceny of property of a value exceeding \$50.00 by Article of War 42 and section 287, Federal Criminal Code (18 USCA 466), and of assault with intent to commit murder by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455).

D. R. Kieper Judge Advocate

Melvin C. Sherman Judge Advocate

B. J. Kealey, Jr. Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

18 AUG 1945

CM ETO 15080

UNITED STATES)

UNITED KINGDOM BASE, COMMUNICATIONS
ZONE, EUROPEAN THEATER OF OPERATIONS

v.)

General Prisoner HERBERT LAWTON)
(42057725), United Kingdom Base)
Disciplinary Training Center)
(formerly of 3247th Quartermaster)
Service Company)

Trial by GCM, convened at Shepton
Mallet, Somerset, England, 30 May,
21 June 1945. Sentence: Dishonor-
able discharge, total forfeitures
and confinement at hard labor for
40 years. United States Peni-
tentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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. Accused was charged with commission of four separate assaults with intent to commit a felony, viz., murder, upon Privates Frank Brown, Isaac L. Williams and Clarence Higgins and a British civilian, Mr. Frederick Napper. He was a member of a group of colored American soldiers - ten in number - who were involved in a murderous riot at Kingsclere, Hampshire, England, on 5 October 1944. Nine of the members of this mob were convicted of the murder of two American soldiers and a British civilian and also of riotous conduct as a result of their participation in this affair and each 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 for the term of his natural life. The sentences were approved, and the Board of Review and Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations found the record of trial legally sufficient to support the sentences (CM ETO 5764, Lilly et al; GCMO No. 1031, Headquarters United Kingdom Base, Communications Zone, European Theater of Operations, 5 May 1945).

Accused Lawton was brought to trial jointly with the nine convicted soldiers upon the three murder charges and the charge of riotous conduct. He was also charged with absence without leave for a period which included the time of the riot and homicides. Upon this trial Lawton was acquitted of the charges of murder and riotous conduct but was found guilty of absence without leave for a short period preceding the riot and murders and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The sentence was approved, but the dishonorable discharge was suspended until the soldier's release from confinement at 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England (GCMO No. 219, Headquarters United Kingdom Base, Communications Zone, European Theater of Operations, 19 December 1944).

Subsequent to his acquittal of the charges of murder and riotous conduct, the present charges were preferred against him. Reference is made to the holding of the Board of Review in CM ETO 5764, Lilly et al, supra, for a description of the riot and the surrounding facts and circumstances which gave rise to charges against accused now under consideration.

At the opening of the instant trial, the defense interposed a special plea wherein it asserted that the acquittal of accused of the charges of murder and riotous conduct, above described, barred the prosecution of the present charges of assault with intent to commit murder upon four persons not named in the charges in the former case. In support of said plea, defense counsel offered in evidence the record of trial in CM ETO 5764, Lilly et al (R6). The court, however, refused to admit it in evidence but did admit General Court-Martial Order No. 1031, United Kingdom Base, Communications Zone, European Theater of Operations, 5 May 1945, supra, which was the order promulgating the result of the trial as to the nine convicted accused in said case of Lilly et al. The court also admitted in evidence General Court-Martial Order No. 219, United Kingdom Base, Communications Zone, European Theater of Operations, 19 December 1944, supra, under which order accused has been confined (R6), as a result of the sentence imposed upon him in the Lilly case.

While defense counsel in the presentation of the plea and in his argument in support thereof, used language which designated the plea as that of double jeopardy, an examination of the record of trial indicates clearly that he fully presented to the court the substance of a plea of res judicata regardless of the nomenclature used by him. The plea itself was in the following language:

"The accused by his defense counsel pleads in bar of trial that he has already been tried and acquitted for the same acts and offenses that do constitute the gravamen of the present charge and specifications thereunder * * *" (R6) (Under-scoring supplied).

After the court refused to admit in evidence the record of trial in the Lilly case, defense counsel continued:

"The defense is still of the opinion that the charges and specifications in the GCMO are not sufficiently explicit. That is so because the specifications in the exhibit allege three distinct murders occurring on October 5, 1944. They do not show that there was but one series of - shall we say shootings - which form the basis of the present specifications. The acts complained of in the previous case are necessarily the acts complained of in this case. In other words, it does not appear from the GCMO to be necessarily so, that the same shots that caused the deaths in the previous case in which the accused was acquitted are the very same shots which form the basis for the present charges of attempting to murder the individuals in this case" (R6).

In his argument defense counsel further declared:

"The charges, specifications, findings, read in conjunction with the record of trial in the former case are clearly indicative of the assertion by the accused that the acts and offense committed then are the same acts and offenses with which the accused is presently charged. All ten soldiers were then charged with being AWOL from 2130 hours to 2200 hours, 5 October 1944, engaging in a riotous assembly, and conspiring to murder three people. The other nine soldiers were found guilty of all of these charges and specifications, while the court found the accused not guilty. The same conspiracy is alleged in the present case; that is the same offense. The same shots are alleged to have been fired not necessarily by the accused but by some members of this group of ten soldiers; those are the same acts. The prosecution will argue that the victims selected for the specifications in this

case are different from those in the previous trial but the accused submits that this is far from determinative of the present issue. If ten soldiers are jointly tried for the murder of X and one is found not guilty while nine are found guilty, it is obvious that these findings can only be interpreted in one way. The court found that X was murdered by nine soldiers but that the tenth soldier did not join in or did not have the joint intent. The defense agrees that such findings do not preclude the possibility that the tenth soldier was actually present and fired some shots at X. In which case the plea of former trial would not be available to the tenth soldier in a second trial where he is charged with attempting to murder X for such a charge would necessarily involve a different series of acts. But the tenth soldier could not be charged jointly with the other nine for attempting to murder X - for if he did not join in the conspiracy that resulted in the murder of X, he could not be a member of the same conspiracy involving an attempt to murder X. Pressing the analogy to its logical conclusion, the plea of former trial would not be available to the accused if he were presently charged alone with the attempt to murder Privates Frank Brown, Clarence Higgins, and Isaac L. Williams, and Frederick Napper, for such charges and specifications would involve different elements of proof. But the plea is available here where the charge is joint for if the accused did not join in the conspiracy which produced the fatal shots in the previous trial, he was certainly not a member of the conspiracy as to the non-fatal effects of the very same shots" (R7,8).

The court denied the plea in bar (R9).

2. The law member committed serious error in refusing to admit in evidence the record of trial in CM ETO 5764, Lilly et al (Standard Surety and Casualty Co. v. Standard Accident Insurance Co. (CCA 8th, 1939) 104 F (2nd) 492,496; United States v. De Angelo (CCA 3rd 1943) 138 F (2nd) 466,468; Oklahoma v. Texas, 256 U.S. 70, 88, 65 L.Ed. 831,835 (1921)).

Paragraph 68, (p.53) Manual for Courts-Martial 1928, was misinterpreted by him in his ruling. Paragraph 68 specifically authorizes the admission in evidence of the record of trial of the prior case if the General Court-Martial Order "is not sufficiently explicit". Defense counsel asserted that General Court-Martial Order No. 1031 did not reveal the actual issues involved in the Lilly case, which contention was entirely correct as will be hereinafter demonstrated. Ordinarily such error would require the setting aside of the findings of guilty and a rehearing. However, in view of the disposition of the instant case as hereinafter indicated, the Board of Review will disregard the technical ruling of the law member, treat the instant case on its merits, and consider the record of trial in the Lilly case as having been admitted in evidence. Such trial record is on file in the Branch Office of The Judge Advocate General with the European Theater, and is before the Board of Review, which may take judicial notice of the records in said Branch Office (CM ETO 1737, Mosser; CM ETO 1981, Fraley).

3. It may be taken for granted that the charges of murder of Coates, Anderson, and Mrs. Napper of which accused was acquitted in the Lilly case are separate and distinct offenses from those of the assaults upon Brown, Williams, Higgins and Napper with intent to murder them upon which accused was tried in the instant case. The holdings in CM ETO 422, Green; CM ETO 4570, Hawkins, CM ETO 6229, Creech, and CM ETO 5155, Carroll and D'Elia contain an abundance of authorities to sustain this conclusion. Reference is made to said holdings for an elucidation of the principle that

"The same act or group of acts may constitute two or more distinct offenses, different in kind as well as in degree. Under such circumstances, the state may elect to prosecute for either offense, or where separate and distinct offenses are committed the offender may be indicted for each separately" (16 CJ, sec.9, pp.58,59).

The application of the foregoing rule leads to the conclusion that

"A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other" (Morey v. Commonwealth, 108 Mass. 433).

It is clearly evident from the record of trial in the instant case that the law member in denying accused's plea in bar fell into error as a result of applying the above stated principles to the plea and concluded that because the murders with which accused was charged and of which he was acquitted in the Lilly case were crimes separate and distinct from the felonious assaults with which accused is charged in the instant case, the plea was bad. It will be assumed without deciding the question that had accused's plea in bar simply presented the issue of double jeopardy or autrefois acquit the plea would have been vicious and without legal force (Ex parte Nielsen, 131 U.S. 176, 33 L.Ed. 118 (1889); Burton v. United States, 202 U.S. 344, 379, 50 L.Ed. 1057, 1070 (1906); Gavieres v. United States, 220 U.S. 338, 55 L.Ed. 489 (1911); United States v. Adams, 281 U.S. 202, 203, 74 L.Ed. 807, 808 (1930); Blockburger v. United States, 284 U.S. 299, 76 L.Ed. 306 (1932); Tritico v. United States (CCA 5th, 1925), 4 F(2nd) 664; Bertsch v. Snook, Warden (CCA 5th, 1929) 36 F (2nd) 155; Short v. United States (CCA 4th, 1937), 91 F (2nd) 614, 112 AIR 969; 16 CJ, sec. 453, pp.272,273; 1 Wharton's Criminal Law (12th Ed. 1932), sec. 394, pp.531-536). However that is not the end of the matter but in truth only its commencement.

The portion of the plea in bar underscored above as supplemented and explained by defense counsel in his argument, when considered with his insistence that the record of trial in the Lilly case be admitted in evidence, makes it manifest that he was primarily concerned with the actual issues of fact with respect to Lawton which were decided by the court in the Lilly case. Note the language used by him:

"The other nine soldiers were found guilty of all of these charges and specifications, while the court found the accused not guilty. The same conspiracy is alleged in the present case; that is the same offense. The same shots are alleged to have been fired, not necessarily by accused but by some members of this group of ten soldiers; those are the same acts. The prosecution will argue that the victims selected for the specifications in this case are different from those in the previous trial, but the accused submits this is far from determinative of the present issue * * *. But the plea is available here where the charge is joint for if the accused did not join in the conspiracy which produced the fatal shots in the previous trial, he was certainly not a member of the conspiracy as to the non-fatal effects of the very same shots" (R8).

It is the considered opinion of the Board of Review that the plea, in intention and substance, was of res judicata rather than of double jeopardy. It will be so considered (Cf: United States v. Barber, 219 U.S. 72, 55 L.Ed. 99 (1911)). In support of such plea is the record of trial in the Lilly case which in connection with the record of trial in the instant case has been the subject of intensive study and analysis by the Board of Review.

a. The doctrine of res judicata, by which a fact or matter distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed by the parties, is applicable to judgments in criminal prosecutions.

"This doctrine is peculiarly applicable to a case like the present, where, in both proceedings, criminal and civil, the United States is the party on one side and this claimant the party on the other. The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts" (Coffey v. United States, 116 U.S. 427, 444, 29 L.Ed. 681, 687 (1886)).

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society

by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them" (Southern Pacific R. Co. v. United States, 168 U.S. 1, 48, 42 L.Ed. 355, 377 (1897)).

"It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 Sup. Ct. Rep. 18. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction" (Frank v. Mangum, 237 U.S. 309, 333, 59 L.Ed. 969, 983 (1915)).

"Upon the merits the proposition of the government is that the doctrine of res judicata does not exist for criminal cases except in the modified form of the 5th Amendment, that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb; and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offense charged. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightfully mentioned with solemn reverence, are less than those that protect from a liability in debt.

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The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms,

there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (Jeter v. Hewitt, 22 How. 352, 364, 16 L. ed. 345, 348) in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time" (United States v. Oppenheimer 242 U.S. 85,87,88, 61 L.Ed. 161,164 (1916)).

"There is no reason why a final judgment in a criminal prosecution or proceeding should not, under proper circumstances, be given conclusive effect as an estoppel or bar. The same policy which dictates the rule in civil cases required it in criminal cases. * * *. The principles applicable to judgments in criminal cases are, in general, identical, so far as the question of estoppel is involved, with the principles recognized in civil cases. An acquittal or a conviction, under an indictment for any offense, is a bar to any subsequent indictment substantially like the former, but its effect as res judicata in such a case is necessarily to a considerable extent lost sight of in the broader doctrine of former jeopardy" (Freeman Judgments, 5th Ed., sec.648).

For further authorities in support of above proposition see annotation, "Doctrine of res judicata in criminal cases", in 147 AIR 991-994.

It may therefore be concluded that the issues of fact and law between the United States and accused which were adjudicated and determined by the court's finding in the Lilly case are binding upon the Government in its subsequent prosecution of accused in the case under review.

b. There is a definite and marked distinction between the plea of res judicata and pleas of former jeopardy, autrefois acquit and autrefois convict. Two important differences exist: (1) Jeopardy may attach, so as to support a plea of former jeopardy (but not one of res judicata), before the rendition of any judgment (15 Am. Jur., sec.369-373, pp.46-48)*;(2) The plea of res judicata may be available in cases (for example, where there is no identity of offenses

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* But the 40th Article of War has its own connotation of the word "trial" in the case of a finding of guilty. The question whether the rule of the civilian courts applies in other cases in military law is an open one and need not be considered here.

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in the two prosecutions) in which a plea of former jeopardy, autrefois acquit or autrefois convict could not be sustained.

"The argument on behalf of the government and the cases cited in the briefs would be persuasive of the government's position, if the effect of the previous acquittal were solely based upon the guaranty of the Fifth Amendment that a person shall not be subject for the same offense to be twice put in jeopardy. But counsel for the defendant take their stand upon the doctrine of res adjudicata, rather than upon the endeavor to show that the offense charged in the prior indictment was substantially that charged in the present one, and are not invoking that doctrine in the "modified form" of the Fifth Amendment. The doctrine of res adjudicata has been repeatedly held to apply to criminal as well as civil cases" (United States v. McConnell (ED Pennsylvania 1926), 10 F (2nd) 977, 979).

"There is no identity of offenses, and therefore no merit in the plea of autrefois convict. * * * The general conspiracy is well pleaded, and several overt acts within the statutory period of limitation are alleged. The motion of Lee Myerson to quash the indictment is denied.

By a parity of reasoning, the Katz motion cannot be sustained as a plea of autrefois acquit in bar to the indictment, because the offenses are not identical. The prior judgment of acquittal is, however, conclusive upon all questions of fact or of law distinctly put in issue and directly determined upon the trial of the former indictment.

* * *

The question of fact which was distinctly put in issue and determined upon the trial of Katz upon the former indictment was his participation in the devising of a scheme to defraud creditors of the Silverstein-Wald Clothing Company, and it was there directly determined that the defendant Katz had no

knowledge of, and did not participate in, devising or executing that scheme to defraud. The pending indictment includes the same fraud within its description of the general conspiracy with which the defendant Katz is now charged in the pending indictment. Katz's participation in the scheme, whether it be called a scheme to defraud or a conspiracy, is no longer open to inquiry in any proceeding between him and the United States. Nor can the effect of the former adjudication of acquittal be avoided by adding new elements to the old scheme, and thus broadening the charge of conspiracy. The old scheme is still alleged as an essential part of the conspiracy, and, while it may be that the defendant Katz could be indicted and tried for a separate conspiracy between the same individuals relating to bankruptcies of concerns other than the Silverstein-Wald Clothing Company, his nonparticipation in a conspiracy which includes that concern has been conclusively determined" (United States v. Myerson (SD NY 1928) 24 F (2nd) 855-857).

As further delineating the differences between the plea of former jeopardy and the plea of res judicata see United States v. Oppenheimer, supra; Harris v. State (1941), 193 Ga. 109, 17 SE (2nd) 573, 147 AIR 980; United States v. De Angelo, supra; United States v. Carlisi (ED, NY, 1940) 32 F.Supp.479; United States v. Halbrook (ED, MD, 1941) 36 F.Supp. 345; United States v. Dookery (ED, NY, 1943) 49 F.Supp. 907.

The foregoing authorities clearly demonstrate the error under which the trial judge advocate, the law member, and the staff judge advocate (in his review of the case) labored. The question of former jeopardy was not solely involved in the instant case. In all fairness to them, it should be stated that the problem here presented is one that has been confused by the courts themselves and authoritative legal text writers. The absence of an adequate law library undoubtedly added to the difficulties of these officers. Neither Wharton (1 Wharton's Criminal Law (12th Ed., 1932), sec.394 et seq., pp.531-567) nor Corpus Juris (16 CJ, sec.453 et seq., pp.272-281) make clear-cut, decisive distinctions between the two pleas. Further the statement contained in the classic opinion of Morey v. Commonwealth, quoted above with respect to the effect of an acquittal is misleading unless considered in connection with the doctrine of res judicata. As an example of the

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confusion which befores the problem, reference is made to the case of Spanell v. State, - Tex. Crim. Rep. - 203 SW 593, 2 AIR 593 (1918)
(See also Annotation 2 AIR 606).

Defense counsel grasped the substance of the legal problem. While his elucidation of same was faulty and at times confused, in effect he exhibited the same for the consideration of the court. He first presented the plea at the opening of the trial. Ordinarily a court cannot in advance of the trial of the charge determine a plea of *res judicata* because factual issues are involved (United States v. Dockery (ED, NY, 1943) 49 F.Supp. 907). However, the defense at the conclusion of prosecution's case in chief moved for a finding of not guilty, thereby preserving accused's rights to have the issue considered upon appellate review (Cf: CM ETO 4165, Fecica and authorities therein cited).

4. a. With the foregoing legal principles as a guide it is now necessary to consider exactly the issues of fact which were determined with respect to accused by the court's findings in the Lilly case. Accused and nine other colored soldiers were charged jointly with and were tried for the murders of Anderson, Coates, and Mrs. Napper (Charge I, Specifications 1, 2 and 3), and also engaging in and becoming a part of a disorderly and riotous assembly of soldiers (Charge III and Specification). Accused separately was charged with and tried for absence without leave from his organization from about 2130 hours, 5 October 1944, to about 2200 hours, 5 October 1944 (Charge II, Specification 4). He was acquitted of the murder and riot charges but was found guilty by exceptions and substitutions of absence without leave from his organization from about 1900 hours, 5 October 1944 to about 2100 hours, 5 October 1944. The defense of accused in said action was a denial of his presence at the time and place of the murders and the riotous assembly of the soldiers which implicitly included the denial of his participation in the commission of the offenses. Prosecution and defense introduced evidence on this issue and it was, insofar as accused was concerned, the vital question for determination by the court as a fact finding body. By its findings of not guilty of Charges I and III the court determined that accused was not present at the time and place alleged and therefore did not participate in the riotous disturbance or the murders. This conclusion is made manifest by its action in finding by exceptions and substitutions that accused was guilty of absence without leave from his organization not during the period when the murders were committed and the disturbance of the public peace occurred but during a period of two hours preceding the return of the nine guilty defendants from their camp to the village. The finding on Charge II, Specification 4, therefore served to identify positively and particularly the factual basis of the findings of not guilty of Charges I and III. A rationalization of the findings and the evidence introduced at the trial clearly and irrefragably

indicates that the court, having before it conflicting evidence on the issue as to whether accused was present at the time and at the place of the commission of the murders and occurrence of the riotous conduct, elected to believe that offered by the defense. It determined that accused was not present and therefore did not participate in the murders and rioting. No other rational or consistent interpretation can be placed on the proceedings of the trial with its resultant findings.

b. The second step in applying the doctrine of res judicata is to define the issues of fact which were before the court in the instant case. Accused was tried upon a Charge and specifications which alleged that he committed felonious assaults upon Brown, Williams, Higgins and Napper in conjunction with the nine other colored soldiers (convicted of murder and riotous conduct in the Lilly case) at the time and place of murders and riotous disturbance in the Lilly case. The evidence in the instant case follows the same pattern as that presented in the Lilly case and in substance and effect is the same, with the exception hereinafter indicated. There arose again the same issue of fact with regard to accused as arose in the Lilly case, viz., whether accused was present at and participated in the riotous proceedings before and at the Crown public house of which the felonious assaults were a part. The issue was stubbornly fought. On the first session of this trial certain of the nine convicted accused became witnesses for the prosecution. After an abortive attempt to secure from them testimony incriminating accused and after instructing the trial judge advocate to secure more evidence on this issue, the court went into a recess. The law member expressed the desire of the court that there be presented to it "any other evidence which the trial judge advocate can obtain by further investigation of the circumstances to either substantiate or refute the statement of accused that he was present in the camp at the time of the shooting" (R89). Upon convening of the court after a recess of three weeks' duration, the prosecution presented testimony of certain of the same accused convicted in the Lilly case to the effect that Lawton, the instant accused, was present at the time and place of the felonious assaults. Without doubt the resultant findings of guilty were based largely, if not exclusively, upon this supplemental evidence which was specifically directed to the issue of accused's presence in the riotous assembly at the time and place of the assaults. It therefore appears that the determinative issue of fact upon which accused's guilt of the assaults turned was identical with the factual issue with respect to accused in the Lilly case. The proceedings in the trial of the present cause wherein the court called for additional evidence "to either substantiate or refute the statement of the accused that he was present in the camp at the time of the shooting" (R89) are a further indication that the court was primarily concerned with this issue. The evidence offered in the Lilly trial and the evidence admitted in the trial of

the instant case showed beyond all doubt that the murders and riotous conduct proved in the former case were coincident with the felonious assaults in the case at bar. The riotous disturbance in the Lilly case was the same riotous disturbance as was involved in the instant case. The murders and the assaults were all incidents of this unlawful demonstration.

The following quotations possess great relevancy to the situation thus developed:

"In the former trial for murder there was not the slightest pretense of justification on the part of the defendant. The whole contention in that case centered upon the one single question whether the defendant participated with another in the murder and robbery of the deceased. If he did, he was necessarily guilty of murder. By acquitting him the jury necessarily found that he did not participate in the transaction. This was the sole issue that was tried and determined. It is now sought, after such a solemn determination, to test again the same issue, and to undo the necessary effect of the former judgment by adjudicating that the defendant did in fact participate in the robbery and murder, from which the jury has already absolved him. Since it indisputably appears that the defendant could not be guilty of the present charge without also being guilty of the crime of which he has been tried and acquitted, he cannot now be put in jeopardy for the purpose of again adjudicating the issue which has already been determined in his favor" (Harris v. State, supra, 147 ALR at p.991).

"Among the facts so litigated and submitted for the jury's determination at the trial for the robbery were the questions as to whether De Angelo was present at and had participated in the robbery as the driver of the car used in the perpetration of the robbery. The jury, by its verdict of acquittal as to De Angelo, determined those issues adversely to the government's allegations. They should not therefore have been gone into again at the trial of the conspiracy indictment; and, when reintroduced by the government, the appellant was entitled to show the former verdict of acquittal and what it had concluded as to the facts. We think that the trial court's rejection of the

appellant's offers, which became relevant because of the government's allegations and evidence, constituted substantial error. Cf. Crawford v. United States, 212 U.S. 183, 203, 29 S.Ct. 260, 53 L.Ed. 465, 15 Ann.Cas.392. It was of course unnecessary for the government, in the light of the evidence as to the co-conspirators, to prove that DeAngelo was an actual perpetrator of one of the overt acts alleged. But, for the government to re-litigate in the conspiracy trial the facts as to DeAngelo's alleged presence at and participation in the robbery and the resubmission of those issues allowed the jury in the conspiracy case to find the facts in such regard contrary to the findings as impliedly established by the verdict of acquittal of the robbery. Such a finding by the jury in the conspiracy case was capable of directly influencing the verdict to the appellant's harm" (United States v. De Angelo (C.C.A., 3rd 1943) 138 F(2nd) 466,469).

"Res judicata, however, does not rest upon any constitutional provision. It is 'a rule of evidence' which is imported into the criminal law by virtue of section 392 of the Code of Criminal Procedure, which provides that the rules of evidence in civil cases are applicable to criminal cases. People v. Cryan, 123 Misc. 358 /205 N.Y.S. 852/. To bring himself within the res judicata rule it is not necessary for the defendant to show that the offense for which he is being tried is identical in law or in fact with the earlier criminal proceeding. Res judicata usually concerns itself with evidentiary or intermediate facts determined in the prior litigation. It must be noted, however, that the evidentiary or intermediate fact may, in some instances, be a complete bar to a second prosecution for another offense. An example of this will be found in a case where the defense upon the earlier trial was an alibi and the later trial is one for the commission of a crime committed at the same time and place. Other examples will be found in the cases hereafter referred to where the defendant was charged with having committed a single criminal act which resulted in two or more legally distinct crimes and where there has been a trial and acquittal for one of the crimes" (quotation in United States v. Carlisi,

supra(32 F.Supp. at pp.482-483), from the mono-graph "Res Judicata with respect to Criminal Judgments" by Harry G. Anderson, Esq. of New York Bar in New York Law Journal, December 18,19,20, 1939).

The conclusion of the matter is that in the case of United States v. Lilly et al there was determined the exact issue of fact with respect to accused as arose in the instant case, and, it was there found that accused was not a participant in the riotous assembly nor was he present at the time and place of the murders. Inasmuch as the murders and assaults were simultaneous incidents, it follows he was not present at nor did he participate in the assaults. The issue which was determined was accused's guilt under the circumstances of both cases, whether that guilt be of the murder of Anderson, Coates and Mrs. Napper or of the felonious assaults upon Brown, Williams, Higgins and Napper. Having had its opportunity - its day in court - to prove accused's presence at the place and during the time of the commission of the crimes and having failed in sustaining the burden imposed upon it by law in the Lilly case, it cannot, upon discovering or obtaining other and additional evidence, litigate that fact. It was judicially determined adversely to it in another case wherein that fact was also the vital issue in the case.

"Res judicata is a principle of peace" (Opelousas-St. Landry Securities Company v. United States (C.A. 5th 1933) 6 F (2nd) 41,44).

The Board of Review is of the opinion that accused's plea of res judicata should have been sustained by the court at the conclusion of the case and that therefore the record of trial is legally sufficient to sustain the findings of guilty and the sentence.

5. The charge sheet shows that accused is 29 years nine months of age. He was inducted 1 December 1943 to serve for the duration of the war plus six months. He had no prior service.

6. The court was legally constituted and had jurisdiction of the person and offenses. For the reasons herein set forth the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

[Signature] Judge Advocate

[Signature] Judge Advocate

[Signature] Judge Advocate

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

28 SEP 1945

CM ETO 15091

UNITED STATES)

XXI CORPS

v.)

Private First Class GEORGE
W. GALLAHAN (33443236),
Private JOHN A. MARSHALL
(35707651) and Private First
Class MIGUEL PERDOMO
(18231448), all of Battery
"C", 385th Field Artillery
Battalion

) Trial by GCM, convened at
) Leipzig, Germany, 13 June
) 1945. Sentence: Gallahan-reduction
) to grade of private, con-
) finement at hard labor for
) three months in Battalion
) Stockade, 385th Field Artillery
) Battalion and forfeiture of
) \$33 per month for a like period;
) Marshall - Dishonorable dis-
) charge, total forfeitures and
) confinement at hard labor for
) ten years, United States
) Penitentiary, Lewisburg, Pennsyl-
) vania; Perdomo - Dishonorable
) discharge, total forfeitures
) and confinement at hard labor
) for life, United States Penit-
) entary, Lewisburg, Pennsyl-
) vania..

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HEPBURN and MILLER, 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 arraigned separately and with
their consent were tried together upon the following
charges and specifications:

GALLAHAN

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

(Finding of not guilty)

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Specification: (Finding of not guilty)

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

Specification 1: In that Private First Class George W. Gallahan, Battery C, Three Hundred Eighty-Fifth Field Artillery Battalion, did, at Wollbrandshausen, Germany, on or about 11 April 1945, wrongfully and unlawfully commit an assault upon Fraulein Kethe Heidbuchel, by pointing a dangerous weapon, to wit, a carbine, at the said Fraulein Kethe Heidbuchel.

Specification 2: In that * * * did, at Wollbrandshausen, Germany, on or about 11 April 1945 wrongfully and unlawfully commit an assault upon Fraulein Nellie Heidbuchel, by pointing a dangerous weapon, to wit, a carbine, at the said Fraulein Nellie Heidbuchel.

Specification 3: In that * * * did, at Wollbrandshausen, Germany, on or about 11 April 1945 wrongfully and unlawfully commit an assault upon Frau Magdalena Schnelle, by pointing a dangerous weapon, to wit, a carbine, at the said Frau Magdalena Schnelle.

Specification 4: In that * * * did, at Wollbrandshausen, Germany, on or about 11 April 1945 wrongfully and unlawfully commit an assault upon August Heine, by pointing a dangerous weapon, to wit, a carbine, at the said August Heine.

Specification 5: In that * * * did, at Wollbrandshausen, Germany, on or about 11 April 1945 wrongfully fraternize with German civilians, by entering and spending several hours in a German residence in violation of undated Memorandum, Headquarters Twelfth Army Group entitled: "SPECIAL ORDERS FOR GERMAN-AMERICAN RELATIONS."

MARSHALL

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

Specification: In that Private John A. Marshall, Battery C, Three Hundred Eighty-Fifth Field

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Artillery Battalion, did, at Wollbrandhausen, Germany, on or about 11 April 1945, aid and abet Private First Class Miguel Perdomo, Battery C, Three Hundred and Eighty-Fifth Field Artillery Battalion, to forcibly and feloniously, against her will, have carnal knowledge of Fraulein Nellie Heibuchel.

CHARGE II: Violation of the 93rd Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty).

PERDOMO

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Miguel Perdomo, Battery C. Three Hundred Eighty-Fifth Field Artillery Battalion, did, at Wollbrandhausen, Germany, on or about 11 April 1945, forcibly and against her will, have carnal knowledge of Fraulein Nellie Heibuchel.

Each accused pleaded not guilty. Two-thirds of the members of the court present at the time the votes were taken concurring, accused Gallahan was found not guilty of Charge I and the Specification thereunder; accused Marshall was found not guilty of Charge II and of the Specification thereunder, and each accused was found guilty of the remaining charges and specifications preferred against him. Evidence was introduced of one previous conviction by summary court as to Gallahan for absence without leave for one day in violation of Article of War 61. No evidence of previous convictions was introduced as to Marshall and Perdomo. Two-thirds of the members of the court present at the time the vote was taken concurring, Gallahan was sentenced to be reduced to the grade of Private, to be confined at hard labor for three months and to forfeit \$33.00 per month, for a like period; Marshall 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. All of the members of the court present at the time the vote was taken concurring, Perdomo was sentenced to be dishonorably discharged the

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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. On 6 July 1945, the court reconvened and revoked its former sentence as to the accused Marshall, all members of the court being present who were present at the close of the previous session in this case. All members of the court present at the time the vote was taken concurring, accused Marshall 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. As to the accused, Marshall and Perdomo, the reviewing authority approved the sentence as to each, but reduced the period of confinement of Marshall to ten years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50 $\frac{1}{2}$. The proceedings as to Gallahan are published in GCMO Number 16, Headquarters XXI Corps, 16 July 1945.

3. The evidence for the prosecution shows that on 11 April 1945 between 0800 and 1100 (R13,16,31) the three accused entered the house of August Heine in Wollbrandhausen, Germany (R9,10,15,22,23) which was occupied by Mr. Heine, his wife and children, a Polish servant girl and her child, a Mr. and Mrs. Schnelle and the latter's two daughters, Kethe Heidbuchel, age 19, and Nellie Heidbuchel, age 16 (R16,26). The accused drank "schnapps" which they had brought with them (R10,16,17,24) and ate eggs which they secured from Mrs. Heine (R17,24). Kethe and Nellie Heidbuchel attempted to leave the house but the accused "put their rifles from 'safety' to 'fire' and told us we should stay there" (R10,13). Later they again tried to leave and got as far as the courtyard when accused Gallahan "came to us put his rifle from 'safety' to 'fire' and told us to go back" (R10,13,17). He "threatened" them with his rifle by pushing them back with the butt of his rifle (R17,22,24). Mr. Heine had to water the cattle and was accompanied by accused Perdomo who took his rifle along (R10,17,18,25) Kethe Heidbuchel then went to the latrine near the barn (R11) and upon her return to the house was met by Marshall who pushed her toward

the barn (R11) saying "Zig Zig" and touching her legs (R11). She called to Mr. Heine for help but accused Gallahan pointed his rifle at Mr. Heine so that he could not come to her assistance (R11,28) and also pointed his rifle at Mrs. Schnelle who had come to the door of the house and forced her to go back inside (R25,26). Accused Perdomo then came out of the house pushing Nellie Heidbuchel toward the barn with his rifle (R11,12,19). At this point Kethe managed to escape from Marshall and ran for help (R12) returning with an American Officer, Captain Davis Frank (R37). In the meantime, according to the testimony of Nellie Heidbuchel, Perdomo, who had pointed his rifle at her inside the house and ordered her outside, and upon her refusal, had pulled her up from a sofa and pulled her outside (R18), pushed her against a wall of the feed loft outside and crushed her there and said "You kiss-kiss and Zig-Zig". She did not desire to accede to his demands. He threatened her again with his rifle and said "boom-boom". He wanted to touch her legs. She resisted. So he then threw her down on the floor of the barn and tried to undress her. She got up and tried to run away, but "he grabbed me and pointed to me that I should go to the other barn, the one next door, and threatened me with his rifle and wanted to fire". As a result of fear she went over to the barn next door and climbed a ladder up to the loft where he tore off her clothes and when she tried to yell he beat her in the face with his fist (R19). Marshall then came up into the loft and pointed his rifle at her while Perdomo undressed himself (R20). Perdomo then had intercourse with her (R20). Prior to that time she was a virgin (R23,43).

Captain Frank, upon arriving at the Heine house with Kethe Heidbuchel, found accused Gallahan sitting in the courtyard with a carbine on his shoulder, holding a child on his knees (R37) and surrounded by four or five civilians (R37,40). In response to the Captain's inquiry as to what was going on around there he replied "Nothing" (R38). Kethe then led him to the barn. Inside the barn Captain Frank found Marshall armed and standing at the foot of a ladder leading to a hayloft. He asked Marshall what he was doing and what was going on. Marshall said "Nothing". Then he heard cries coming from the hayloft and Kethe pointed up the ladder. Ascending to the hayloft, Captain Frank found Perdomo engaged in sexual intercourse with Nellie Heidbuchel. She was screaming and crying for help and he was holding her down. Perdomo had on only shirt and socks and the girl was nude (R38) Her

clothing, dirty and crumpled, was scattered about in the hay (R38,39). When examined shortly thereafter she was hysterical, unable to speak, and it was necessary to administer a sedative to her (R40-42). Examination revealed particles of straw, dirt and hayseed inside her vagina, the skin torn in three places, the entire area highly inflamed and there was evidence of profuse bleeding (R42). While Captain Frank was in the hayloft, accused Marshall ran away, although the officer had ordered him to remain (R38).

4. Each accused, after being duly warned of his rights as a witness, elected to take the stand and be sworn as a witness on his own behalf (R43,44,54,61).

Accused Gallahan testified that on the morning of the alleged offense he entered the Heine house with Marshall and Perdomo in order to drink some cognac which they had. They were there for several hours drinking cognac and eating eggs which he secured from the kitchen. While he was in the kitchen boiling more eggs, Marshall departed. Later he went to the latrine and upon his return found that Perdomo had also left the house. He then proceeded to leave and was at this time met in the courtyard by Captain Frank (R45). At no time did he threaten any of the occupants of the house with his rifle (R46,52) nor did he see either of his companions commit any act to frighten the occupants of the house (R46,47). He did not know that Perdomo was in the hayloft with Nellie Heidbuchel (R47).

Accused Marshall testified that he went to the Heine house with Gallahan and Perdomo in the morning of the day of the alleged offense. He remained there about forty minutes drinking cognac and eating eggs and then returned to his battery. He did not again return to the Heine house on that day (R55,58,60). That while there he did not threaten any of the occupants of the house. He expressly denied having molested Kethe Heidbuchel or of having attempted to pull her to the barn. He further testified that he did not know that Perdomo was in the hayloft of the barn with a girl, that he himself was not in the barn (R55) and that he had never seen Captain Frank prior to the day of the trial (R60).

Accused Perdomo testified that on the day of

the alleged offense he was at the house of Mr. Heine with Gallahan and Marshall drinking cognac and eating eggs (R61,62). That Marshall left and he continued eating eggs with Gallahan (R62). That thereafter he was pretty drunk (R66,67) and walked out to the barn with one of the German girls (R62), that he had his rifle on his shoulder but did not threaten her, "push her or anything" (R62); that she went up a ladder to the hayloft and helped him up (R63). That he there had intercourse with her and that she did not cry until she heard her sister returning with Captain Frank (R63). During the intercourse he asked her if it was good and "she said yes She nodded her head" (R63). That neither he nor his companions at any time threatened the occupants of the house with their rifles or in any other way (R64).

5. Discussion GALLAHAN

(a) The accused Gallahan has been found guilty of committing a separate simple assault upon the four persons named in the four specifications - by "wrongfully pointing a dangerous weapon, to wit, a carbine at" each in violation of Article of War 96. The pointing of an unloaded gun at another in a threatening manner constitutes a simple assault (Price v. United States, C.C.A. 9th, 1907, 156 Fed. 950). If the gun is loaded the offense may rise to a higher degree of an assault (CM 274647, Trujillo, IV Bull. JAG 279). A simple assault constitutes a violation of the 96th Article of War (MCM, 1928, par. 152c, p. 189). There was clear and substantial evidence that Gallahan did, as alleged, point his carbine at each of the four persons named in the specifications in a threatening manner and did thereby commit a separate assault upon each in violation of the 96th Article of War.

(b) The evidence is clear that for several hours accused Gallahan with his companions drank schnapps and ate eggs in the Heine household and peacefully associated with them. When found by Captain Frank he was holding the baby of the Polish girl in center of a circle of German civilians. A clear case of fraternization in violation of the then existing regulations of the European Theater was proved (CM ETO 6203, Mistrella; CM 10501, Limer; CM ETO 10947, Harris; CM ETO 11854, Moriarty and Sberna).

(c) Gallahan's denial of the acts constituting the assaults created at most issues of fact which were within the exclusive province of the court for resolution. Inasmuch as the findings were, in each instance supported by substantial evidence they are binding upon the Board of Review upon appellate review (CM ETO 4194, Scott;

CM ETO 895, Davis, et al).

PERDOMO.

Perdomo was convicted of committing rape upon Nellie Heidbuchel. Rape is defined as the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par. 148b, p. 165). That Perdomo had carnal knowledge of the female named at the time and place alleged in the specification is admitted by him. According to the victim Nellie Heidbuchel, she was dragged by Perdomo from the presence of her mother and at the point of a gun was escorted by him to the barn where she was compelled to ascend to the hayloft. There she was disrobed and was subjected to physical violence by Perdomo and was forced to submit to his desires. She was corroborated by other witnesses as to the force and threats used in the movement to the barn. Subsequent physical examination showed the rough treatment from which she suffered and the violence used upon her during the act of intercourse. The findings of guilty are well supported by the evidence in spite of the accused's protestations that the 16-year-old girl voluntarily consented. The issue of fact thus created having been resolved by the court against the accused and as its findings are supported by the evidence, its decision will not be disturbed (See authorities cited above). The conviction of Perdomo was not only proper but was the only finding consistent with the evidence (CM ETO 9083 Berger et al; CM ETO 8837, Wilson; CM ETO 14587, Teaghey).

MARSHALL has been charged with and found guilty of aiding and abetting Perdomo in the commission of the rape in violation of AW 92. The victim narrated her resistance to the attack of Perdomo and testified that when she had an opportunity to escape while Perdomo was undressing himself, she was prevented from doing so by Marshall, who barred her way with a pointed rifle. This evidence, if believed, clearly made Marshall a party to the crime committed by Perdomo. Her testimony was partially corroborated by Captain Frank who found Marshall, armed, standing at the foot of the ladder when he arrived. True, he heard no cries from the hayloft

at that time and only heard them after he had spoken. This does not impeach the girl's testimony. She may not have previously called for help because at that time she knew that all who might have come to her assistance were at the mercy of the other armed soldiers. The fact that she heard a strange male voice of authority may well have inspired her cries.

Although definitely identified by several witnesses as present before and at the time of the commission of the rape, Marshall denied his presence. The court resolved the issues of fact thus raised against him and, as stated above, as its finding of guilty of the specification is based on substantial evidence, it will not be disturbed.

With reference, however, to the finding of guilty of a violation of AW 92, a question of law arises. The court, after finding this accused guilty of the charge and specification, originally imposed a sentence of confinement upon him of 5 years (R72). The convening authority returned the record of trial to the court advising it that the minimum sentence of confinement was impossible by the court for a violation of AW 92 was imprisonment for life. In accordance with this mandate, the court reconvened and revoked its sentence, and, all members present when the vote was taken concurring, sentenced the accused to be dishonorably discharged from the service, to forfeit all pay and to be confined at hard labor for the term of his natural life. Did the court have the power to change its sentence in this manner? The action of the court is governed by the provisions of AW 40. It provides, inter alia, that no authority shall return a record of trial to any court martial for reconsideration of the sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentences fixed by law for the offense upon which conviction has been had (underscoring supplied) (CM.251451, Monaghan 33BR243, 250). If the accused has been charged with and found guilty of committing rape in violation of the 92nd Article of War, there can be no question but that the court had the right to increase the sentence to the mandatory sentence fixed by law under the terms of Article of War 40. Any other sentence would be illegal, because Article of War 92 provides that it was mandatory upon the court to impose one of the two punishments named: death or imprisonment for life. Its action in vacating its original sentence of confinement of 5 years and imposing the increased sentence of life imprisonment

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would have been proper. In the case under discussion, however, the specification of which the accused was found guilty by the court alleged that the accused did "aid and abet" Perdomo to commit rape. The Article of War provides: "Any person * * who commits * * rape shall suffer death or imprisonment for life * *". Did Congress intend this mandatory sentence to apply to those who aided and abetted the commission of this crime?

In CM ETO 3746 Sanders et al the aiders and abettors were charged with the substantive offense of aiding and abetting in violation of the 96th Article of War and not the 92nd Article of War. The conviction was sustained by the Board of Review. However, in CM ETO 5068 Rape and Holthus, the Board held that

"In view of the abolition of the distinction between principals and aiders and abettors provided in the Federal statute above mentioned [sec.332, Federal Criminal Code; 18USCA 550; 35 Stat.1152] the legal effect of a specification under Article of War 92 alleging the accused to be an aider and abettor of the crime of rape is exactly the same as that of a specification alleging the accused to be the principal in the offense. Either form may be used in the factual situation present in this case, and a finding of guilty of either specification is a finding of guilty of rape within the meaning of Article of War 92 (CM NATO 643, III Bull, JAG, sec.450, pp.61,62. See also Ruthenberg v. United States, 245 U.S. 480, 62 L.Ed.414). In either case, therefore, punishment must be either life imprisonment or death since the Article makes one or the other of these two punishments mandatory".

The Board of Review in CM ETO 4234, Lasker and Harrell and CM ETO 14615, Lewis and Jerro adopted and applied the doctrine of the Rape and Holthus holdings.

In view of the foregoing decisions it was mandatory upon the court, so long as it found accused guilty of a violation of Article of War 92, whether as principal or as an aider or abettor, to impose one of the mandatory sentences provided for in the article. It follows that its action of imposing the increased

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sentence of life imprisonment was authorized by Article of War 40 and that the sentence imposed upon Marshall as approved by the reviewing authority is legal.

6. The charge sheets show Gallahan is 24 and 9 months of age and that he was inducted at Charlottesville, Virginia, 6 November 1942; Marshall is 20 years and 9 months of age and that he was inducted at Louisville, Ky, 12 Aug 1943; and Perdomo is 21 years and 8 months of age, and that he enlisted at San Antonio, Texas, 3 December 1943.

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 to support the findings of guilty and the sentence.

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457, 567) Etc. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused Perdomo is proper (Cir.229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b). However, the place of confinement of accused, Marshall, should be changed to Federal Reformatory, Chillicothe, Ohio (Cir.229 WD, 8 June 1944, Sec. II par 3a as amended by Cir. 25, WD 22 June 1945).

(TEMPORARY DUTY) Judge Advocate

Earle Stephen Judge Advocate

Ronald Miller Judge Advocate

buildings, in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 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.

3. The evidence for the prosecution showed that accused's unit was situated at Heerte, Germany, on 17 April 1945 (R6). On the evening of that day, accused and an unidentified "Polish boy" went to the house of Mrs. Erna Walter in that town and demanded admittance for the avowed purpose of searching the house for weapons (R14). He was armed with a carbine and wore his helmet. The accused and the woman went from room to room in the house, but when they were in the nursery room he took hold of her hand and "wouldn't let (her) go out" (R14,15). She testified that "from the nursery room he went through the bedroom to another room. I wanted to open the closets but he didn't want to look at that at all" (R15).

Accused then threw her on the divan and lay on top of her there, but she screamed and struggled (R13,15). Her eight year old daughter, Irene, entered the room, and accused got off the divan, sent the daughter away and locked the door, returning to Mrs. Walter who in the meantime had "jumped up" (R13,15). He threw her back and tried to take off her underpants but she struggled, and he hit her legs with his carbine (R15). He unbuttoned his pants, and pushing her underpants aside and holding her legs, he forcibly had intercourse with her, effecting complete penetration (R15,16). The episode covered about fifteen minutes (R10). Afterwards, Mrs. Walter who was in her fifth month of pregnancy at that time, was found weeping by her neighbors (R9,10,16).

Nearby residents of Mrs. Walter testified that they recognized the accused as the colored soldier who on the day in question between 1700 and 1800 hours had gone to three other houses before he entered the Walter residence, that during that period they saw him enter the Walter house with the Polish man and depart therefrom, and that they heard Mrs. Walter scream and cry for help (R6-12). One woman added that when accused had been at her house, before going to the Walter residence, "he had tried to pull [her] into the bedroom" (R10). Mrs. Walter's daughter testified to having seen the accused "on top of [her] mother" (R13).

4. On being advised of his rights as a witness, accused elected to be sworn and testify (R20). He stated that, between 1700 and 1715 on the day in question he had gone into the town of Heerte with a Russian boy whom he knew, to secure a pistol which the Russian told him was in the possession of a German who lived there (R20,21). They went to the house

where the German was supposed to live but found no one there (R21). They then left the town, and he went back to his billet and took a nap (R21,22). It was about 1730 when he returned to his unit, and he was awakened by another soldier at 1800. When in the village, he did not stop at any other houses or see or talk to any civilians (R21).

Another soldier in accused's company testified that he found accused asleep shortly after 1800 and awaked him because he was sleeping in his (the soldier's) bed (R17-19). When awakened, accused had his shoes on (R19).

5. a. Rape is defined as the "unlawful carnal knowledge of a woman by force and without her consent" (MCM 1928, par. 148 p. p.165). The commission of that offense is clear from the testimony of the prosecutrix and strong supporting evidence (CM ETO 9083, Berger). Accused categorically denied any connection with the offense charged, but the court resolved the conflict of testimony against him, and there being substantial, competent evidence supporting its conclusion the same may not be disturbed by the Board of Review (CM ETO 5869, Williams; CM ETO 895, Davis).

b. Housebreaking is "unlawfully entering another's building with intent to commit a criminal offense therein" (MCM 1928, par. 149 e, p.169). The court was justified in finding that accused, armed with a carbine, demanded and obtained entrance to the Walter residence upon the pretext that he was making an official search for weapons, whereas his true purpose was to commit the act of rape which immediately followed. Accused's entrance was clearly unlawful; his prior conduct toward others in the same community and the commission of the rape are probative of his intent to commit that offense at the time of his unlawful entry (CM ETO 3679, Roehrborn; CM ETO 3707, Manning).

6. The charge sheet shows that accused is 23 years and two months of age. Without prior service, he was inducted 10 December 1942 at Shreveport, Louisiana.

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

8. The penalty for rape is death or life imprisonment as the court martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of the United

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States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars. 1b (4), 3b).

(TEMPORARY DUTY)

Judge Advocate

Earl Stephens

Judge Advocate

Ronald D Miller

Judge Advocate

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

20 SEP 1945

CM ETO 15137

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

3RD INFANTRY DIVISION

v.)

Trial by GCM, convened at
Salzburg, Austria, 10 May
1945. Sentence: Dishonorable
discharge, total forfeitures,
and confinement at hard labor
for life. Eastern Branch,
United States Disciplinary
Barracks, Greenhaven, New York.

Private First Class ERNEST
E. WHITE (32778770),
Company G, 7th Infantry)

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HEPBURN, and MILLER, 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 First Class Ernest E. White, Company "G" 7th Infantry did, near Anzio, Italy, on or about 23 May 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he came into military control on or about 8 June, 1944.

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

Specification: In that * * * having been duly placed in confinement in the 7th Infantry Stockade, on or about 23 February 1945, did at Dieulouard, France, on or about 25 February 1945, escape from said confinement before he was set at liberty by proper authority.

Accused pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the specifications and charges. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 23 May 1944 accused was a member of Company G, 7th Infantry, which from midnight of that day until 2 o'clock of the following afternoon acted as a reserve 500 to 700 yards behind the line of attack from Anzio to Cisterna, Italy. Mortar and artillery fire was coming in and several casualties were sustained (R8-9,17-18). Sometime between daylight and ten o'clock the company commander saw accused run from his position to a deep ditch in a direction away from the enemy. He called to the accused but he did not hear. He had no authority to leave (R18). On 24 May 1944 he was entered in the morning report as "Fr duty to AWOL as of 23 May 1944" (R7, Pros.Ex.A). Accused was returned to the company about 8 June 1944 (R19) and made a statement in substance that he was "Okay" until the shells started landing "all over", that he got up and ran to a stream; that he wasn't going to take off but he could not stand it any longer; that after he got away, he was afraid to come back and went to Naples (R20, Pros.Ex.B).

On 23 February 1945, accused was placed in confinement in the 7th Regimental Stockade at Dieulouard, France. On 25 February 1945, he was searched for and could not be found in the stockade and surrounding grounds. He did not have permission to absent himself (R11). The only possible exit for accused was through a hole in the roof when two shingles were broken (R13).

4. The accused, after being advised of his rights by the Law member, made an unsworn statement through his counsel relating his induction on March 1943 at the age of 18, his assignment to Company G, 7th Infantry, as a rifleman, the heavy fire which resulted in a great number of casualties while his company was taking a mountain, his landing at Anzio on D-day, and subsequent injury. He further stated that he was not afraid to fight, did not want a "DD", and he thought he could make good against the Japs if the court would give him a break (R22-23).

5. The absence without leave of accused as alleged is fully established by competent and undisputed evidence. The evidence is clear and

and uncontradicted that accused was present with his unit while it was under fire and suffering casualties. His own pretrial statement leaves no doubt that accused left his organization to avoid hazards and perils of combat. His unsworn statement tends to confirm the prosecution's evidence. The evidence clearly supports the conviction on Charge I. (CM ETO 7413, Gogel).

6. The undisputed evidence of the prosecution fully established that accused was confined and freed himself from the restraint before he was set at liberty by proper authority. All the elements of proof were satisfied to make out this conviction on Charge II (MCM 1928, par.139b, p.154).

7. The charge sheet shows that accused is 20 years and six months of age. Without prior service, he was inducted on 27 March 1943 at Newark, New Jersey.

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.

9. The penalty for desertion in time of war is death or such other punishment as the court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

(TEMPORARY DUTY)

Judge Advocate

Earle Stephens

Judge Advocate

Rowell D. Miller

Judge Advocate

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW No. 2

3 NOV 1945

CM ETO 15138

UNITED STATES)

3RD INFANTRY DIVISION

v.)

Private ROBERT E. LESLIE)
(36760378), Company A,)
7th Infantry.)

) Trial by GCM, convened at)
) Salzburg, Austria, 15 May)
) 1945. Sentence: Dishonor-)
) able discharge, total for-)
) feitures, and confinement)
) at hard labor for life.)
) Eastern Branch, United)
) States Disciplinary Barracks,)
) Greenhaven, New York.)

HOLDING BY BOARD OF REVIEW No. 2
HEPBURN, MILLER and COLLINS, Judge Advocates

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

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

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

Specification: In that Private Robert E. Leslie, Company A, 7th Infantry, did, at Belleville, France, on or about 13 March 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended at Nancy, France, on or about 17 March 1945.

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

Specification: In that * * *, did, without proper leave, absent himself from his organization, near Kayzersberg, France, from about 12 January 1945, to about 12 February 1945.

He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for forty minutes knowing he had been put on orders for transfer to port of embarkation in violation of the 96th Article of War. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. 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 $\frac{1}{2}$.

3. The prosecution's evidence as to Charge I and its Specification is summarized as follows:

On 13 March 1945, accused was a member of Company A, 7th Infantry (R10). The entire company had been taking training for an amphibious operation for about three weeks on a small lake near Belleville, France (R10,12). The instruction consisted of operations with storm boats, taking pillboxes, and training in the woods (R11). The accused was seen in the company several times during this period (R12). "Everyone" was talking about the operation and men in the company expected to cross the Rhine soon (R12). On 14 March 1945, the following entry pertaining to accused was made in the morning report of Company A, an extract copy of which was admitted in evidence, "Dy to AWOL 1400 hrs. 13 Mar. 45" (R9; Pros. Ex.C). On 19 March 1945, accused told a staff sergeant, on duty with the Military Police, that he "went AWOL and left his unit about 10th March" and had gone to Nancy where he remained until apprehended. He further stated that the reason he left his unit was that he was not fit for front line duty (R17). Company A, 7th Infantry, crossed the Rhine River on 26 March

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and suffered casualties (R15).

4. Charge II and its Specification involves absence without leave, a relatively minor offense compared to the desertion alleged in Charge I, and conviction of the latter authorizes the sentence imposed and place of confinement designated. The evidence pertinent to Charge II is not summarized or its legal sufficiency determined.

5. In defense, it was stipulated that, if called as a witness, a sergeant in accused's company would testify to the effect that accused had a good reputation as a combat soldier prior to the alleged offenses (R20,21).

The accused, after being advised of his rights as a witness by the law member, elected to testify but "to restrict cross-examination to the specification to which he testifies" (R21). The law member sustained an objection to cross-examination as to the Specification of Charge II (R28). His testimony was substantially as follows:

Accused attributes his present difficulties to physical and mental inability to do front line duty. He has a rheumatic condition which has spread to his lower limbs and a chronic condition of his chest which causes shortness of breath. He has bad feet which make it practically impossible to climb steep hills and keep up on long walks. He was allowed to see the medics only when he could no longer walk. He became very nervous and has a feeling of utter futility. He knows he has done wrong but he was in such a state of mental confusion that it seemed the only thing for him to do (R22-23). On cross examination, he admitted that he was picked up in Nancy, France; that he had three weeks training at Belleville in village fighting, arms, pillboxes, and "all kinds". He knew that his unit was about to leave Belleville when he went to Nancy, because there was "common knowledge going around" that the outfit was about to leave and the training had stopped. No one said they were going across the Rhine. He had no idea that they were getting ready to attack the Siegfried Line. He was in a state of mental confusion but not because of any thought that his company was going to attack the Siegfried Line. He gets confused because he can't take it; he was sick at the time. He left because "something might come along" and he had an idea of what was going on. He did not report to the medics during the three weeks training because he didn't have much faith in them (R23-26).

6. The evidence of the prosecution, confirmed by the accused's testimony, clearly established the absence without leave as alleged in the Specification of Charge I. The evidence is clear that accused's organization was training for combat of a hazardous nature in the near future.

Accused participated in this training and was aware that something unusual was about to occur. He left when the training was completed. His unit did cross the Rhine on 15138

26 March and suffered casualties. Whether accused's actions were motivated by his fear or, as his testimony indicates, the fact that he believed himself unqualified for front line duty is not material. It is clear that he intended to avoid front line duty which was known to him to be hazardous (CM ETO 6626, Lipscomb).

7. The charge sheet shows that the accused is 28 years and seven months of age and inducted without prior service on 13 July 1943 at Chicago, Illinois.

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 of Charge I, and its Specification and the sentence.

9. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (Article of War 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (Article of War 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

(ON LEAVE)

Judge Advocate

Paul D. Miller

Judge Advocate

John J. Collins Jr.

Judge Advocate

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He pleaded not guilty to Charge II and its Specification, guilty to the Specification of Charge I with the exception of the words "APO 257, U.S. Army, on or about 15 December 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Liege, Belgium", substituting therefor the words "without proper leave absent himself from his organization at APO 257, U. S. Army from on or about 15 December to"; of the expected words not guilty, and of the substituted words guilty, and not guilty of Charge I, but guilty of a violation of the 61st Article of War. All of the members of the court present at the time the vote was taken concurring he was found guilty of both charges and specifications. Evidence was introduced of two previous convictions, one by special court-martial for absence without leave for 22 days in violation of Article of War 61, and one by summary court for violation of curfew regulations in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, "for life". The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

a. Specification of Charge I; The personnel officer of the 38th Armored Infantry Battalion identified and read in evidence entries from a duly authenticated extract copy of the morning report of Company B of said battalion. An entry for 15 December 1944 shows accused from duty to absent without leave. An entry for 20 April 1945 shows him from absent without leave to absent in the hands of military authorities at Liege, Belgium, as of 25 March 1945; and an entry for 30 April shows him from such status to duty (R13-14; Pros.Ex.B). Accused was arrested on or about 25 March 1945 in a cafe in Liege, Belgium, by a member of a military police patrol because he had an improper pass (R7; Pros.Ex.A). That night he was confined in jail by written order of the officer of the day (R8).

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The supply sergeant of accused's company testified that on 15 December 1944 because of a report made to the first sergeant and company commander, they at that time searched the company area for accused without finding him. The witness personally knew that accused was not present for duty with his company from 15 December 1944 until April 1945 (R14-16).

b. Specification of Charge II: On 10 April 1945 accused and two other prisoners were in confinement in a stockade in Maastricht, Holland. After breakfast each of the three prisoners, including accused, was placed in a separate cell. The cells were inspected by the jailer throughout the day and after supper, and were found to be "all right", accused's cell being in "perfect shape". At 2130 hours, however, another inspection by the jailer revealed that a reinforced glass over the doorway of accused's cell "was just about pushed through" from the inside. Further observation and inspection revealed that a colored soldier in a cell across the hall, about three feet from accused's cell, had torn an angle iron from his cell door and handed it to accused, who necessarily must have done the damage to the glass because he was alone in the cell. The reinforced glass consisted of two layers about 6 inches thick, 24 inches wide and 12 inches high, containing thin, inside reinforcing wires. The wires were torn out and there was a hole about one foot square which went about half through the glass from the inside. The outside of the glass was undamaged, but in another half hour accused would have been able to crawl through the hole into a corridor outside his cell, in a larger cell block. The cell walls were made of brick and plaster and there was no other opening or window in the cell except for some ventilators and a small opening in the door. Between accused's cell and the outside exit to the building there was a "locked door with iron bars on it", the key to which was carried by an armed civilian who stayed inside the door. This door was around a corner and about 75 feet from accused's cell. There was also a military police office between accused and the exit, in which stayed the jailer, another man and a reserve who acted as a guard and went on calls when necessary. There was no regular military police guard outside the door (R8-13).

4. The accused, after his rights as a witness were fully explained to him, elected to remain silent and no evidence was introduced in his behalf (R17-18).

5. a. Specification of Charge I: Substantial evidence and accused's plea of guilty show that he absented himself without leave from his organization from 15 December 1944 until he was apprehended in Liege, Belgium on or about 25 March 1945. From his unauthorized absence for a period of 100 days in an active theater of operations alone, the court was fully warranted in inferring that he intended, at the time he absented himself, or at some time during his absence, to remain away permanently (CM ETO 1629, O'Donnell; CM ETO 6093, Ingersoll; CM ETO 13018, Ostrowski).

b. Specification of Charge II: From the testimony of the jailer at the stockade in which accused was presumed to have been lawfully confined, it appears that accused, by using an iron instrument, from the inside of his cell, broke or chiseled a hole about one foot square about half way through a reinforced glass window over his cell door, through which, with another thirty minutes' work, he could have crawled from his cell into a corridor of a larger cell block inside the stockade. The court was clearly warranted in concluding from the circumstances (a) that accused committed an overt act, and (b) that he intended thereby to effect an escape from confinement. The Manual for Courts-Martial defines an attempt to commit a crime as

"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" (MCM, 1928, par.152c, p.190).

Defense counsel made a motion for a finding of not guilty upon the ground that the evidence showed that even if accused's actions had not been interrupted and he had escaped from his cell, he still could not have escaped from his confinement in the stockade because of the locked door and armed guards remaining between him and freedom, and he was therefore not guilty of an attempt. The argument is in effect that the evidence shows no apparent possibility of committing the offense in the manner indicated, and no corpus delicti of a criminal attempt, which has been said to be

" * * * 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" (CM 228955, II Bull.JAG 14).

It does not appear from the evidence that accused knew about, or could see the locked door and guard or guards, and for aught that appears he may have had a means of completing his escape which was unknown to the jailer. Speculation as to the probabilities of his final escape is unnecessary, since it is only required that there be apparent to him a mere possibility of escape. The determination of his guilt is made solely from the condition of his mind and his conduct at the time of the attempted consummation of his design (14 Am.Jur., sec.69, p.817). It was not inherently impossible for him to escape from his confinement; and conceding that, for some reason unknown to accused, it was actually impossible for him to have escaped from the stockade, such fact would not preclude the commission by him of the offense with which he is charged (see CM 228955, II Bull.JAG 14, supra; 1 Wharton's Criminal Law (12th Ed., 1932), sec.224, p.301). The act of accused in physically damaging a portion of the cell in which he was lawfully confined with intent to escape therefrom is of such a character as to constitute a substantial infringement of the law prohibiting such escape, and sufficiently establishes the corpus delicti of the crime alleged. The findings of guilty are supported by the evidence.

6. The charge sheet shows that accused is 22 years and 11 months of age and was inducted 26 February 1942 at Fort Oglethorpe, Georgia. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. 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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8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4),3b).

B.R. Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B.H. Hayes Jr Judge Advocate

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

20 AUG 1945

CM ETC 15154

UNITED STATES)

5TH ARMORED DIVISION

v.)

Trial by GCM, convened at St. Tonis,
Germany, 23 March 1945. Sentence:

First Lieutenant RICHARD H.)
SOHN (O-1554823), Headquarters)
Company, 127th Ordnance Main-)
tenance Battalion, 5th Armored)
Division)

Dismissal, total forfeitures, and
confinement at hard labor for life.
United States Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, 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.

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

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

Specification 1: In that First Lieutenant RICHARD H. SOHN, Headquarters Company, 127th Ordnance Maintenance Battalion, Fifth Armored Division, did, at Walheim, Germany, on or about 12 December 1944, desert the service of the United States, and did remain absent in desertion until he was apprehended at Paris, France, on or about 30 December 1944.

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Specification 2: In that * * * did at Paris, France, on or about 30 December 1944, desert the service of the United States, and did remain absent in desertion until he was apprehended at Paris, France, on or about 7 February 1945.

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

Specification: In that * * * in conjunction with Private William H. Ramey, Headquarters Company, then Headquarters, 127th Ordnance Maintenance Battalion, Fifth Armored Division, did, at Walheim, Germany, on or about 12 December 1944, wrongfully and willfully apply to his own use and benefit, a Government vehicle, to wit: a one-quarter ton Command and Reconnaissance Truck, United States Army Number 20357852, of the value of about One Thousand Dollars (\$1,000.00), property of the United States Government, furnished and intended for the military service thereof.

CHARGE III: Violation of the 95th Article of War.
(Withdrawn by direction of the Appointing Authority)

Specification: (Withdrawn by direction of the Appointing Authority)

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

Specification 1: In that * * * did at Camp Ogbourne St. George, England, on or about 17 April 1944, feloniously embezzle, by fraudulently converting to his own use monies of the value of Nine Hundred Seventy-Five Dollars (\$975.00), the property of Private Dee H. Pritt, Company "B", 127th Ordnance Maintenance Battalion, Fifth Armored Division, entrusted to him by the said Private Dee H. Pritt.

Specification 2: In that * * * at Camp Ogbourne St. George, England, on or about 15 March 1944, feloniously embezzle, by fraudulently converting to his own use, monies of the value of One Hundred Fifty Dollars (\$150.00), the property of Technician Fifth Grade John B. Sypult, Company "A", 127th Ordnance Maintenance Battalion, Fifth Armored Division, entrusted to him by First Lieutenant ERNEST E. HIATT, Company "A", 127th Ordnance Maintenance Battalion, Fifth Armored Division, for the said Technician Fifth Grade John B. Sypult.

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Specification 3: In that * * * did, at Puisieux, France, on or about 6 September 1944, feloniously embezzle, by fraudulently converting to his own use, monies of the value of Ninety Dollars (\$90.00), the property of Technician Fourth Grade John Bizjak, Company "B", 127th Ordnance Maintenance Battalion, Fifth Armored Division, entrusted to him by First Lieutenant FRANK D. TAYLOR, Company "B", 127th Ordnance Maintenance Battalion, Fifth Armored Division, for the said Technician Fourth Grade John Bizjak.

Specification 4: In that * * * did at Weimes, Belgium, on or about 5 October 1944, feloniously embezzle, by fraudulently converting to his own use, monies of the value of One Hundred Dollars (\$100.00), the property of Technician Fourth Grade Irving Elkins, Company "B", 127th Ordnance Maintenance Battalion, Fifth Armored Division, entrusted to him by First Lieutenant FRANK D. TAYLOR, Company "B", 127th Ordnance Maintenance Battalion, Fifth Armored Division, for the said Technician Fourth Grade Irving Elkins.

Specification 5: (Finding of not guilty)

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

Specification 1: In that * * * did, at Paris, France, on or about 23 December 1944, make a claim against the United States by presenting to Lt. Colonel W. J. FABRITIUS, FD, Finance Officer at Paris, France, an officer of the United States duly authorized to pay such claims, his pay and allowance account in the amount of Two Hundred Dollars (\$200.00) for pay and allowances, which claim was false and fraudulent, in that the United States was not indebted to the accused, and was then known by the said accused to be false and fraudulent.

Specification 2: In that * * * did, at Paris, France, on or about 26 December 1944, make a claim against the United States, by presenting to Lt. Colonel W. J. FABRITIUS, FD, Finance Officer at Paris, France, an officer of the United States duly authorized to pay such claims, his pay and allowance account in the amount of Three Hundred Dollars (\$300.00) for pay and allowances, which claim was false and fraudulent, in that the United States was not indebted to the accused, and was then known by the said accused to be false and fraudulent.

Specification 3: In that * * * did, at Paris, France, on or about 29 December 1944, make a claim against the United States by presenting to Lt. Colonel W. J. FABRITIUS, FD, Finance Office at Paris, France, an Officer of the United States duly authorized to pay such claims, his pay and allowance account in the amount of Four Hundred Dollars (\$400.00) for pay and allowances, which claim was false and fraudulent, in that the United States was not indebted to the accused, and was then known by the said accused to be false and fraudulent.

Specification 4: In that * * * did, at Paris, France, on or about 3 February 1945, make a claim against the United States by presenting to Lt. Colonel W. J. Fabritius, FD, Finance Office at Paris, France, an Officer of the United States duly authorized to pay such claims, his pay and allowance account in the amount of Three Hundred Dollars (\$300.00) for pay and allowances, which claim was false and fraudulent in that the United States was not indebted to the accused, and was then known by the said accused to be false and fraudulent.

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

Specification 1: In that * * * with intent to defraud the United States did, at Paris, France, on or about 23 December 1944, unlawfully pretend to Lt. Colonel W. J. FABRITIUS, FD, Finance Officer at Paris, France, that he was entitled to pay and allowances in the amount of Two Hundred Dollars (\$200.00), well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said United States, through Lt. Colonel W. J. FABRITIUS, FD, its lawfully authorized Finance Officer, the sum of Two Hundred Dollars (\$200.00).

Specifications 2, 3 and 4 are identical with Specification 1 except as to date and amount. These differences are as follows:

Specification 2	26 December 1944	\$300.00
Specification 3	29 December 1944	\$400.00
Specification 4	3 February 1945	\$300.00

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He pleaded not guilty, and was found not guilty of Specification 5 of Additional Charge I and guilty of all of the charges and of the remaining 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 the remainder of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

3. Evidence for the prosecution:

a. Charges I and II and their respective specifications:

On 12 December 1944 accused was an officer of the 127th Ordnance Maintenance Battalion, then stationed at Walheim, Germany. On that day he was ordered to convoy some trucks to Ondenval, Belgium, to evacuate material left there and to return to Walheim (R35-39). He had no authority to go to any other place nor to be absent from his organization except for the length of time necessary to perform this duty (R39). Accompanied by Private William H. Ramey as driver, accused left in a 1/4 ton truck, United States Army number W-20357852 (R45,65), valued at \$1100.00 (\$58), provided by the Battalion Headquarters (R36), and arrived at Ondenval. There he ordered a sergeant to have the trucks loaded the following morning, and after having several drinks (R45) and without mentioning any destination, he and Private Ramey drove off in the truck (R42). They drove to Verviers and then to Luxembourg (R45-46). There accused spent his time drinking in cafes (R47). He was sober during the day but drunk "almost every night". On 18 December they started back for the Division. They reached Bastogne and were informed that the road was closed because of the German breakthrough. They took the only open road, which led back to Luxembourg (R48), after they had been fired upon by Germans. Accused said he would stay several days and then get in touch with the Division. On 22 December they drove to Paris (R49). While in Paris accused spent his time visiting with a girl, going to the Post Exchange, shows, cafes, and upon several occasions he went to the Finance Office (R50). He ate at the casual mess (R56). On 30 December accused and Private Ramey were "picked up" by the military police and taken to Headquarters and there given a written order to return to their organization (R51; Pros.Ex.J). Notwithstanding the order he remained in Paris (R52). Accused again spent his time drinking and going out with a girl (R53). On several occasions he said he was going to return to the Division but never did (R56). On 7 February he was again apprehended by the military police (R50,55-56). An authenticated extract copy of the

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morning report of Headquarters, 127th Ordnance Battalion was admitted in evidence, showing that accused was absent without leave on 12 December 1944 (R37; Pros.Ex.I).

b. Additional Charge I and its specifications: From 7 March until 9 December 1944 accused was Personnel Officer of the battalion (R14,16,38). At Ogbourne St. George, England, on 17 April 1944, Private Dee H. Pritt delivered to accused \$975.00 with which to purchase United States War Bonds. Accused gave Pritt an unsigned receipt for the money (R22,23; Pros.Ex.E). Pritt did not receive any notice from the United States Treasury that the money had been received (R24) and, on several occasions, mentioned the matter to accused. Accused told him he would put a tracer on it (R23).

Also in England, during the latter part of March 1944 Technician Fifth Grade John B. Sypult delivered to Lieutenant Ernest E. Hiatt \$150.00 with which to purchase United States War Bonds (R17, 19-20). Sypult's mother was to be the beneficiary. Lieutenant Hiatt turned this money over to accused as Personnel Officer, but received no receipt. Two months thereafter, when Sypult complained that his mother had not received the bonds, Lieutenant Hiatt inquired of the accused, who merely asked of and received from Lieutenant Hiatt the information about the bonds the lieutenant had previously given him (R20).

About 1 December 1944 Lieutenant Colonel Robert M. Toney, Division Inspector General of the Fifth Armored Division, made an investigation concerning irregularities in the handling of money in the battalion (R76). No record could be found of the \$975.00 paid by Pritt, nor of the \$150.00 paid by Sypult for war bonds (R80-81). On that date Colonel Toney questioned the accused concerning these shortages. Accused admitted responsibility for the shortages but at that time the cause of the shortages was not determined (R78). Subsequently, accused admitted during a pre-trial interview with Colonel Toney that he received and retained both sums of money for his own use (R95; Pros.Ex. N; R97; Pros.Ex.O).

About 1 September 1944, Technician Fourth Grade John Bizjak delivered to Lieutenant Frank D. Taylor \$90.00 in cash to be deposited in his Soldier's Deposit Account (R25). On 5 October 1944, Technician Fourth Grade Irving Elkins delivered to the same officer \$100.00 to be deposited in his Soldier's Deposit Account (R30). The lieutenant immediately turned these sums over to accused to be deposited in their accounts and received from the accused a receipt for both sums (R32-33; Pros.Ex.H). The \$90.00 was never entered in Bizjak's

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account (R25,26; Pros.Ex.F) and the \$100.00 was never entered in Elkin's account (R30,31; Pros.Ex.G). After receiving complaints from the two enlisted men, Lieutenant Taylor spoke to accused about these deposits. At first accused stated the deposits would be included in the next month's entries. At a subsequent date he said he did not know where the money was, that he would try to locate it in his desk or in his truck. He promised to make up the loss if the money was not found (R34). Accused in his pre-trial statement admitted he kept both sums for his own use (R95; Pros.Ex.N; R97; Pros.Ex.O).

c. Additional Charges II and III and their specifications: (Presenting false claims against the United States and obtaining money by false pretenses). On 12 December 1944 the status of the accused's pay account with the United States was that he was then indebted to it in the sum of \$2.92 (R27-28). Photostatic copies of four documents similar in form (W.D. Finance Form No.12) and at the top of which appeared in type "Officer's Partial Pay Voucher" were introduced in evidence without objection (R12-14; Pros.Ex.A,E,C,D). Typed lines were drawn through the printed words "Voucher for Commutation of Rations and Liquid Coffee Money". There then followed the following pertinent words in print, "We the subscribers severally certify in signing our respective accounts stated below, that they are correct; and we severally acknowledge to have received of W. J. Fabritius, Lt. Col. F.D. Disbursing Finance Officer, in cash where so noted, the sums set after our respective names * * *". Among the names of the officers thereafter appearing on the lines below on each exhibit was that of the accused indicating that he had received the sums of \$200 (Ex.A); \$300 (Ex.B); \$400 (Ex.C); and \$300 (Ex.D). On the same line on each exhibit appeared the signature of the accused (R15-16). In a pre-trial interview the accused admitted that in Paris, France, during December 1944 and on 3 February 1945 he drew from the Army Finance Office altogether about \$1100 or \$1200 as partial payments (R84; Pros.Ex.L).

d. General: There was introduced in evidence without objection a typewritten record of questions put to the accused and his answers, relating to the charges, voluntarily made to Colonel Toney when he questioned the accused on several occasions during February 1945 (R69-71,73,75; Pros.Ex.L,M,N,O,P). In substance, with reference to Charge I and II, the accused stated that he convoyed the trucks to Ondeval on 12 December 1944 as instructed. He then went to Verviers and "got to drinking" and "blew up". He had his driver take him to Luxembourg that night where he remained until about 21 December and then after an unsuccessful attempt to join the division through Bastogne which was blocked by the Germans (R91), he returned to Luxembourg and continued to Paris where he stayed at civilian hotels continuously until

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7 February 1945. He ate his meals at the casual mess at Bienvue. During this time he drew several partial payments at the Army Finance Office totalling about \$1100 or \$1200. During these travels he used the quarter ton truck (R82-84). About the last day of December he was stopped by the military police and ordered to return to his unit. He was intoxicated at the time and put the order in his pocket and went to sleep in his hotel (R85).

With reference to Additional Charge I, he at first denied making personal use of the enlisted men's money, but later in subsequent interviews particularly that of 21 February 1945, he specifically admitted that he appropriated to his own use the various sums turned over to him as alleged in the specifications (R97; Pros.Ex.O).

6. Evidence for the Defense:

Accused, fully advised of his rights as a witness, elected to take the stand and testify on his own behalf (R101). His testimony on direct examination related solely to Charge I and its specifications. He reiterated in substance the facts contained in his pre-trial statement, summarized above, with reference to this Charge. He added that in Paris for a while he stayed in a number of civilian hotels, and then later stayed with a girl in her apartment. He purchased no civilian clothing. He went about the streets of Paris openly and went up to army headquarters. A number of times he told Ramey that they would go back to the Division in 3 or 4 days. He was drinking every night (R104). When he was required to identify Private Ramey at the military police station two days before he was apprehended he gave his correct name and serial number (R105).

Without objection from defense counsel accused was cross-examined on the other charges and testified that he received the sum of \$975.00 from Private Pritt about 17 April 1944 and used the money for his own purposes (R105); that he received from Lieutenant Hiatt the sum of \$150.00 which he knew belonged to Sypult and that he kept it for his own use (R105-106); that on or about 6 September 1944 he received from Lieutenant Taylor the sum of \$90.00 belonging to Bizjak, which sum he kept; that on or about 23 December 1944 he signed a pay voucher (Pros.Ex.A) in the office of Lieutenant Colonel Fabritius in Paris and received \$200.00 on the strength of that signature. He further admitted that on 26 December 1944 he signed another voucher (Pros.Ex.B) and as a result, received \$300.00; that on or about 29 December 1944 he signed another voucher (Pros.Ex.C) as a result of which he received \$400.00 and that on or about 5 February 1945 he signed another voucher (Pros.Ex.D) in Paris, France (R106) as a result of

which he received \$300.00 (R106-107). Accused admitted that when he signed the vouchers he knew he was not entitled to these amounts (R107). He further admitted that without permission he used the 1/4 ton command and reconnaissance truck, number W-20357852 for his own use; that he could not recall why or how long he wanted to stay in Paris; that he was sober in Paris in the morning (R109); that he was not "totally drunk" when he went the few times to the Finance Office nor when he went to the Officers' Clothing Exchange; that he intended to drive back to the Division on 7 February (R110); that he did not eat at the officers' mess in Paris because "Officers were eating at the Casual Mess"; and that he was apprehended by the Military Police in Paris when he went to Transient Parking lot to get his vehicle (R111).

7. Discussion:

a. Charge I and its specifications (Desertion). Desertion is defined as absence without leave, accompanied by the intention not to return. It is immaterial whether the intent not to return to his place of duty exists at the inception of or at some time during the absence (MCM, 1928, par.130a, p.142). The absence without leave with reference to the alleged desertion of 12 December 1944 was established by the morning report, the witnesses for the prosecution and the admissions under oath of the accused. The intent not to return may properly be inferred from the accumulation of (1) the inexcusable absence from his place of duty for 18 days in an active theater of operations, (2) at a considerable distance from his organization, (3) occurring shortly after an investigation had commenced which accused must have known would eventually lead to the preferring of charges against him for embezzlement, and (4) the termination of that absence by apprehension (CM ETO 1629 O'Donnell; MCM, 1928, 130a, p.142). Although accused may testify that he intended to return, such testimony is not compelling as the court may believe or reject the testimony of any witness in whole or in part (Ibid). The fact that he wore his uniform during his absence and mingled freely with military personnel carried very little probative weight in his favor. In a foreign country under the circumstances of this case he was safer from inquiry by the police if in uniform rather than in civilian clothes and could thereby escape detection more easily. The evidence therefor amply supports the finding of guilty of Specification 1 of Charge I. And so, too, with reference to Specification 2 of the same charge. The proof of the intent not to return was supported by the same and other similar evidence. The absence was longer and, was again terminated by apprehension. The initial absence without leave was clearly established by the testimony of Private Ramey who stated that he and the accused were physically

taken into military control on 30 December 1944, then released with a written order to report to their organization and the accused again absented himself without leave by failing to report to his place of duty (MCM, 1928, par.132, p.146). The accused himself admitted his continued absence until 7 February 1945. The written order (Pros.Ex.J) clearly established the accused's return to military control at the termination of the first period of unauthorized absence. The possible variance between the proof and the allegations in the Specifications as to the place of the desertion is immaterial (CM 199270, Dig.Op.JAG, 1912-40, sec.416(10),p.270).

b. Charge II and its Specification: (Wrongful application of motor vehicle). The evidence for the prosecution clearly established that the accused did on 12 December 1944 wrongfully and willfully apply to his own use the motor vehicle described in the Specification when he caused that vehicle to convey him from Ondenval to Luxembourg for his own personal purposes instead of returning to Walheim, Germany. It was shown that the vehicle was worth more than \$1000.00 at that time. The court could legally infer from the circumstances concerning the description of the vehicle, its markings, and the manner in which it was issued to the accused, that it was the property of the United States and intended for the military use thereof (MCM, 1928, par.150i, p.185). The variance between the allegation that the offense occurred at Walheim and the proof that it occurred at Ondenval is immaterial. The accused was not misled by this variance. He had possession of the vehicle for almost two months and must have known by the remaining portion of the Specification, the vehicle and the offense intended. All of the elements of proof of the offense charged were amply and legally supported by the evidence (CM ETO 11936, Thorpe, et al; MCM, 1928, par.150i, p.185).

c. Additional Charge I and its specifications: (Embezzlement).

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. The gist of the offense is a breach of trust. * * *

Proof.-

(a) That the accused was intrusted with certain money or property of a certain value by or for a certain other person, as alleged; (b) that he fraudulently converted or appropriated such money or property; and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent" (MCM, 1928, par.149h, p.173).

The evidence of the prosecution supplemented by the pretrial admissions of the accused clearly showed that the enlisted men named in the various specifications either directly or indirectly through other officers entrusted the accused, who was then acting as Personnel Officer of the Battalion, with monies at the times and in the amounts alleged for the purpose of purchasing government bonds (Specifications 1 and 2) or to deposit in the Soldier's Deposit Account (Specifications 3 and 4). In breach of this trust the accused admittedly used the monies for his own purposes. Government records showed that none of it was received by those who would in the ordinary course of events have received it if the accused had carried out the terms of his trust. The record clearly supports the findings of guilty (CM ETO 1302, Splain).

d. Additional Charges II and III and their specifications. (Presenting false claims against the United States and obtaining money under false pretenses). The evidence for the prosecution clearly established that the accused during his unauthorized absence in Paris went to the government finance office upon four different occasions and by representing that his pay account warranted it he drew on each occasion from the Finance Officer various amounts totalling \$1200.00. He certified in writing that his account was "correct". Only one meaning could be inferred from that, namely, that there was due him at least the amount he thus obtained. He also acknowledged in writing the receipt of the money. It was shown without contradiction that on 12 December 1944, the day he absented himself without leave, that there was nothing due him for pay or allowances by the government. Having been absent without leave continuously thereafter during the period of time for which he drew the partial payments he was not entitled to any pay or allowances (AR 35-1420, par.3a). It necessarily follows that he was not entitled to any of the money that he drew from the finance officer in Paris. In order to obtain the money he must necessarily make a claim for it. This he did by presenting himself at that office and requesting payment. The exhibits introduced in evidence show that Lieutenant Colonel W. J. Fabritius, the Finance Officer in Paris had the authority to pay such claims. This conclusion is also supported by the fact that the accused was actually paid. In view of the true status of the accused's account on 12 December 1944 he must have known that his claims were false. Officers may not draw any pay in excess of that which has accrued in their favor at the time of payment (AR 35-1360, par.7a, 11 April 1944). The foregoing evidence is sufficient alone legally to support the findings of guilty of Charge II and its Specifications. The responsibility for the correctness of the voucher rests upon the officer submitting it (CM ETO 2506, Gibney).

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By virtue of the same reasoning the record is legally sufficient to sustain the findings of guilty of Charge III and its specifications. Not only did the accused make a false claim on the four occasions enumerated but he did also actually obtain the money that he claimed. The essential elements of this offense are (a) the false pretense, (b) the intent to defraud some particular person or entity, (c) and the commission of the fraud by obtaining the money or other thing of value. (Underhill's Criminal Evidence (4th Ed: 1935), sec.696, p.1305). The evidence for the prosecution clearly established without contradiction that the accused did on the occasions described actually obtain the various sums alleged by falsely representing his pay account to be such that there was at that time at least that much due him. As he knew this to be false the intent to defraud may be inferred. The findings are therefore supported by the evidence for the prosecution alone.

The testimony given by the accused wherein he admitted in court that he obtained the various partial payments from the Finance Officer in Paris at the times alleged in the Specifications and that he was not then entitled to be paid has not been used in this opinion to support the findings for the reason that this testimony resulted from improper questioning by the prosecution. The accused elected to testify after he was given the usual advice by the Law Member of his rights. He testified on direct examination with reference only to Charge I and made no attempt to testify in defense of the charges under discussion. MCM, 1928, par.121b, p.127 states:

"Where an accused is on trial for a number of offenses and on direct examination has testified about only a part of them, his cross-examination must be confined to questions of credibility and matters having a bearing upon the offense about which he has testified" (Under-scoring supplied).

The error, however, is not prejudicial to the substantial rights of the accused in view of the compelling nature of the competent evidence otherwise to support the findings beyond any reasonable doubt (CM ETO 1693, Allen, Dig.Op ETO, p.333).

The accused was charged in four specifications with presenting false claims against the United States and in four other specifications with fraudulently obtaining money on the same claims. While all of the eight offenses were proven, it appears that the provision against multiplicity of charges in the MCM, 1928, par.27, p.17, may have been disregarded. Any irregularity resulting from this multiplication of charges is not prejudicial since it could only affect the quantity of the sentence which, in this case, is less than the legal maximum for the offense of desertion, an offense to which these multiple charges do not relate (CM 261341, III Bull.JAG 418).

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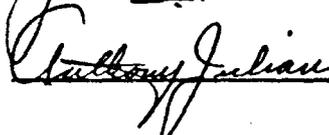
7. The charge sheet shows that accused is 25 years, three months of age and was appointed a second lieutenant 27 March 1943. He enlisted 16 November 1940 at Denver, Colorado, and served in Honolulu, Hawaii from 25 December 1940 to 9 December 1942.

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. Penitentiary confinement is authorized for desertion in time of war (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

 Judge Advocate

 Judge Advocate

 Judge Advocate

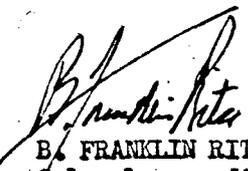
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War Department, Branch Office of The Judge Advocate General with the
European Theater. ^{29 AUG 1945} TO: Commanding
General, United States Forces, European Theater (Main) APO 757,
U. S. Army.

1. In the case of First Lieutenant RICHARD H. SOHN, (O-1554823) Headquarters Company, 127th Ordnance Maintenance Battalion, 5th Armored Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 CM ETO 15154. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 15154).


B. FRANKLIN RITTER,
Colonel, JAGD

Acting Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 389, USFET, 6 Sept 1945).

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3

18 AUG 1945

GM RTO 15181

UNITED STATES)

80TH INFANTRY DIVISION

v.)

Trial by GCM, convened at APO 80,
20 May 1945. Sentence: Dismissal,
total forfeitures and confinement
at hard labor for 20 years.
Eastern Branch, United States;
Disciplinary Barracks, Greenhaven,
New York.

First Lieutenant BERNARD C.
HOLLON (O-1290071), Company
D, 318th Infantry)

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, 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.

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

CHARGE: Violation of the 64th Article of War.

Specification: In that First Lieutenant BERNARD C. HOLLON, 318th Infantry, having received a lawful command from Major CHARLES F. GAKING, his superior officer, to lead a platoon in Company "D", 318th Infantry, did, near Biesdorf, Germany, on or about 16 February 1945, wilfully disobey the same.

He pleaded not guilty to and was found guilty of the Specification and the Charge. 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

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the reviewing authority may direct, for 40 years. The reviewing authority, the Commanding General, 80th Infantry Division, approved the sentence but reduced the period of confinement to 20 years, and forwarded the record of trial for action pursuant to the provisions of Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, but withheld the order directing the execution of the sentence pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. Accused was charged with willful disobedience of "a lawful command of Major Charles F. Gaking, his superior officer to lead a platoon in Company D, 318th Infantry," in violation of Article of War 64. The uncontradicted evidence shows that, at the time and place alleged, at the battalion command post, approximately 800 yards from the front lines, from which the German forces were separated by not more than 400 or 500 yards, Major Gaking, who was accused's battalion commander, gave him a direct order "to take over the command of the machine gun platoon" of said company and that accused deliberately refused to do so.

"The willful disobedience contemplated by Article of War 64/ is such as shows an intentional defiance of authority, as where a soldier is given an order by an officer to do * * * a particular thing at once and refuses * * * to do what is ordered. * * * The order must relate to military duty and be one with the superior officer is authorized under the circumstances to give the accused. * * * an order requiring the performance of a military duty or act is disobeyed at the peril of the subordinate" (MCM 1928, par.134b, pp.148-149).

The proof prescribed consists in showing

"(a) That accused received a certain command from a certain officer as alleged; (b) that such officer was the accused's superior officer; and (c) that the accused willfully disobeyed such command. A command of a superior officer is presumed to be a lawful command" (ibid., p.149).

Thus, all the elements of the offense alleged are proved (CM ETO 2469, Tibi; MCM, 1928, par.134b, p.149). Accused's assertion of incapacity by reason of lack of adequate training to qualify him to command a machine gun platoon, stated no defense (CM ETO 4622, Tripi; Winthrop's Military

Law and Precedents, (Reprint, 1920), p.572). For further particulars, the Board adopts the statement of evidence set forth in paragraphs 5 and 6 of the review by the staff judge advocate of the confirming authority.

4. The charge sheet shows that accused is 25 years eight months of age; that he served as an enlisted man from 12 August 1941 to 12 August 1942 and was commissioned 13 August 1942. No prior service is shown.

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

6. Dismissal and confinement at hard labor are authorized upon conviction under Article of War 64.

B.R. Sleight Judge Advocate

(On leave) Judge Advocate

B.H. King Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. **18 AUG 1945** TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of First Lieutenant BERNARD C. HOLLON (O-1290071), Company D, 318th 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 CM ETO 15181. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15181).

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

(Sentence ordered executed. GCMO 373, USFET, 1 Sept 1945).

RESTRICTED

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3

12 SEP 1945

CM ETO 15184

UNITED STATES

v.

Private WILLIAM K. NEWLAND
(33269775), 204th Replacement
Company, 52nd Replacement Battalion,
Ground Forces Reinforcement
Command

) UNITED KINGDOM BASE, COMMUNICATIONS
) ZONE, UNITED STATES FORCES,
) EUROPEAN THEATER

) Trial by GCM, convened at Tidworth,
) Wiltshire, England, 2 May 1945.
) Sentence: Dishonorable discharge,
) total forfeitures and confinement
) at hard labor for life. United
) States Penitentiary, Lewisburg,
) Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEMEY, 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.

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

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

Specification: In that Private William K. Newland, 204th Replacement Company, 52nd Replacement Battalion, Ground Force Reinforcement Command, then of the 227th Replacement Company, Detachment 80, Ground Force Replacement System, did at Tidworth Park, Shipton Bellinger, Hampshire, England, on or about 7 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England on or about 28 November 1944.

Specification 2: In that * * * did, at Tidworth Wiltshire, England on or about 5 December 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 4 April 1945.

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

Specification: In that * * * having been duly placed in confinement in the 52nd Replacement Battalion's Stockade on or about 1 December 1944, did at Tidworth, Wilts, England on or about 5 December 1944 escape from said confinement before he was set at liberty by proper authority.

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

(Finding of guilty disapproved by Reviewing Authority).

Specification: (Finding of guilty disapproved by Reviewing Authority).

To Specifications 1 and 2, Charge I, he pleaded guilty, except the words "desert" and "in desertion" substituting therefor respectively the words "absent himself" and "absent himself without leave", of the excepted words not guilty and of the substituted words guilty; to Charge I, not guilty but guilty of a violation of the 61st Article of War; to all remaining charges and specifications, not guilty. All members of the court present at the time the votes were taken concurring, he was found guilty of all charges and specifications. Evidence was introduced of three previous convictions by special court-martial, for absence without leave for 35, 15, and 13 days respectively, in violation of Article of War 61. All members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, approved only so much of the findings of guilty of Specification 1, Charge I, as involves a finding of guilty of absence without leave from 7 October 1944 to 28 November 1944 in violation of Article of War 61, disapproved the findings of guilty of the Specification and Charge III, approved the sentence and forwarded the record of trial for action pursuant to the provisions of Article of War 48, but recommended commutation to life. The confirming authority, the Commanding General, United States Forces, European Theater, 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 of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to the provisions of Article of War 50¹/₂.

3. The absences without leave involved in the desertion charges were admitted by the pleas of guilty to violation of Article of War 61. With reference to Specification 2, Charge I, the evidence shows that the un-

authorized absence from 5 December 1944 to 4 April 1945 was initiated by escape from confinement and terminated by apprehension; further, that when apprehended, accused presented a pass issued in the name of another soldier and was found in possession of 12 passes and two sets of dog tags, at least one of which was not his own. These circumstances furnish a competent basis for an inference of intent not to return (MCM 1928, Par.130a, p.142). The escape from confinement was shown by evidence competent to sustain the findings of guilty of Charge II and its Specification. For further details, the Board adopts the statement of evidence set forth in paragraphs 5 and 6 of the review by the staff judge advocate of the confirming authority.

4. The charge sheet shows that accused is 30 years 11 months of age and that, with no prior service, he was inducted 12 June 1942.

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

6. Penitentiary confinement is authorized for desertion in time of war (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

BRSleeper Judge Advocate

Walter C. Sherman Judge Advocate

B. L. Haver Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater
General, United States Forces, European Theater (Main), APO 757,
U. S. Army

12 SEP 1945

TO: Commanding

ETO 15184 NEWLAND, WILLIAM K,

1. In the case of Private WILLIAM K. NEWLAND (33269775), 204th Replacement Company, 52nd Replacement Battalion, Ground Forces Reinforcement 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 as approved and the sentence as committed, 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 CM ETO 15184. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15184).



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

(Sentence as committed ordered executed. GCMO 444, USFET, 2 Oct 1945).

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3

28 SEP 1945

CM ETO 15194

UNITED STATES)

v.)

Private JAKE STEVE ROLING)
(18168411), 42nd Depot)
Repair Squadron, 42nd Air)
Depot Group, European)
Theater of Operations)

SEINE SECTION, COMMUNICATIONS ZONE,
EUROPEAN THEATER OF OPERATIONS.

Trial by GCM, convened at Paris, France,
27 March and 5 April 1945. Sentence:
Dishonorable discharge, total for-
feitures and confinement at hard labor
for life. United States Penitentiary,
Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, 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.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Jake Steve ROLING, 42nd Depot Repair Squadron, European Theater of Operations, United States Army, did, at his organization on or about 28 September 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 28 December 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction

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by special court-martial for absence without leave for 76 days in violation of Article of War 61. All of the members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Seine Section, Communications Zone, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48, recommending that the sentence be commuted. The confirming authority, the Commanding General, United States Forces, European Theater, 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 of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

3. For the prosecution, a duly authenticated extract copy of the morning report of the 42nd Depot Repair Squadron, 42nd Air Depot Group, was admitted in evidence without objection (R5) showing that accused absented himself without leave from his organization on 28 September 1944 (Pros.Ex.A). It was stipulated that the accused returned to military control by apprehension by agents of the Criminal Investigation Division on 28 December 1944, at Paris, France. This stipulation was supplemented by the testimony of one of the agents to the effect that on 28 December 1944, he arrested the accused in the Hotel Suez where he was living with a French girl (R13).

On 2 January 1945, the accused, voluntarily gave the same agent a signed statement (R9,12,13; Pros.Ex.B) in which he admitted that he absented himself without leave from his organization at Versailles on 27 September 1944 and remained absent until 28 December 1944. During his absence he stayed in Paris living with a girl named Jacky. Part of his support was provided by this girl, part by meals obtained at the Casual Mess Hall, and part by the proceeds from the sale of coffee which he helped steal from the mess (Pros.Ex.B). Accused's association with the girl, Jacqueline Canard, was corroborated by her testimony at the trial (R14,15).

4. After being advised of his rights as a witness accused elected to take the stand and testified under oath (R15,16). He said that he had enlisted in the Air Corps when 19 years of age to serve at his trade as a sheet metal worker. Despite three years of good service he received no promotions. He came from a good home, his father having served in the last war and his wife having recently joined the service. He admitted and regretted his participation in the theft of the coffee (R17). Although he had been twice stopped by the military police,

he had not turned himself in and had not been picked up because he was using another's pass (R18). He admitted he was absent without leave but denied any intent to desert. He pleaded for another chance to "soldier" (R17).

It was stipulated that if three witnesses were present they would testify as follows: His Squadron Commander, that accused's character and efficiency were excellent; a prison officer, that while confined at the Paris Detention Barracks he was willing, efficient, and responsible worker; a technical sergeant in his squadron, that on 2 October 1944, the accused declared his intention of returning to his organization (R4-5).

5. Accused was found guilty of desertion. The uncontradicted evidence shows that he was absent without leave for a period of three months, as alleged, terminated by apprehension, under circumstances legally competent to support an inference of the existence, at some time during his absence, of an intent not to return to "the service of the United States" (MCM, 1928, par.130a, pp.143-144). In his testimony admitting these circumstances, accused denied such intent.

"Although accused may testify that he intended to return, such testimony is not compelling, as the court may believe or reject the testimony of any witness in whole or in part" (Ibid, p.144).

The findings of guilty are therefore sustained.

6. The charge sheet shows that accused is 21 years eight months of age and has been in the military service since 31 October 1942. No prior service is shown.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement

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in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

W. R. Steyer Judge Advocate

Malcolm A. Sherman Judge Advocate

B. H. Lewis Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater. **28 SEP 1945** TO: Commanding
General, United States Forces, European Theater (Main), APO 757,
U. S. Army.

1. In the case of Private JAKE STEVE ROLING (18168411), 42nd
Depot Repair Squadron, 42nd Air Depot Group, European Theater of
Operations, attention is invited to the foregoing holding by the
Board of Review that the record of trial is legally sufficient to
support the findings of guilty and the sentence as commuted, which
holding is hereby approved. Under the provisions of Article of War
50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. When copies of the published orders are forwarded to this
office, they should be accompanied by the foregoing holding and this
indorsement. The file number of the record in this office is CM ETO
15194. For convenience of reference, please place that number in
brackets at the end of the order: (CM ETO 15194).

[Handwritten signature and stamp]
E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence as commuted ordered executed. GCMO 514, USFET, 26 Oct 1945).

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

25 AUG 1945

CM ETO 15195

UNITED STATES)

v.)

Private ERNEST W. EVELY)
(33199096), 20th Reinforce-)
ment Control Depot, Squadron)
B (Avn).)

SEINE SECTION, COMMUNICA-)
TIONS ZONE, EUROPEAN)
THEATER OF OPERATIONS)

) Trial by GCM convened at
) Paris, France, 27 April
) 1945. Sentence: Dishon-
) orable discharge, total
) forfeitures and confinement
) at hard labor for life.
) United States Penitentiary,
) Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2

VAN BENSCHOTEN, HEPBURN and MILLER, 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.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private ERNEST W. EVELY, 20th Reinforcement Control Depot, European Theater of Operations, United States Army, did, at Paris, France on or about 29 September 1944, desert the service of the United States and did remain absent in desertion until he came under military control at Clichy, France on or about 22 March 1945.

RESTRICTED

He pleaded not guilty and all of the members present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by special court-martial, one for using without authority and negligently damaging a vehicle in violation of Articles of War 96 and 83, and one for negligent care of and wrongfully discharging a rifle in violation of Article of War 96. All the members present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Seine Section, Communications Zone, approved the sentence, recommended that the sentence be commuted, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in this case and the recommendation of the reviewing authority, confirmed the sentence, commuted the sentence 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 of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution.

It was stipulated and accused admitted that he was in the military service of the United States (R3a). Extract copy of the morning report of Squadron B, 20th Replacement Control Depot, for 30 September 1944 shows "33199096 Evely, Ernest W...Pvt. fr dy to AWOL as of 0645 29th" (R4; Pros. Ex.A).

In Paris, France, on 22 March 1945, the accused was apprehended while dressed in civilian clothes and carrying a suitcase containing his uniform. He said he was about to go to Belgium (R5-7,9-10,11-12).

4. The accused, after his rights as a witness were fully explained to him, elected to remain silent and no evidence was introduced in his behalf.

5. The evidence clearly established that the accused absented himself from his organization in time of war in an active theater of operations and remained away for a period of five months and 23 days. The intent to remain away permanently may be inferred from the length of his unexplained absence, its termination by apprehension, that he was in close proximity to many military posts

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where he could have surrendered, the fact that he was then wearing civilian clothes, and the other surrounding circumstances. The necessary elements of the offense of desertion in violation of Article of War 58 were therefore supported by the evidence (MCM, 1928, par.130a, p.143-144). The evidence did not show Paris to be the place where the desertion took place as alleged. Such variance was immaterial and did not injuriously affect the substantial rights of the accused (CM 199270, Dig.Op. JAG 1912-40, secs.416(10)(14), pp.270-271).

6. The charge sheet shows the accused to be 31 years of age and that he was inducted 2 April 1942 at Baltimore, Maryland.

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

8. Penitentiary confinement is authorized for desertion in time of war (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars.1b(4),3b).

Robert Burchett Judge Advocate
Paul Hepburn Judge Advocate
James Miller Judge Advocate

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~~RESTRICTED~~

1st Ind.

War Department, Branch Office of The Judge Advocate
General with the European Theater.

25 AUG 1945

TO: Commanding General, United States Forces, European
Theater (Main) APO 757, U. S. Army.

1. In the case of Private ERNEST W. EVELY,
(33199096), 20th Reinforcement Control Depot, Squadron
B, European Theater of Operations, United States Army,
attention is invited to the foregoing holding by the
Board of Review that the record of trial is legally
sufficient to support the findings of guilty and the
sentence as commuted, which holding is hereby approved.
Under the provisions of Article of War 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 CM ETO 15195. For convenience
of reference, please place that number in brackets at
the end of the order: (CM ETO 15195).



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

(Sentence as commuted ordered executed. GCMO 399, USFET, 10 Sept 1945).

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

8 SEP 1945

CM ETO 15196

UNITED STATES)

v.)

Private LAWRENCE NICHOLAS)
(31117727), 350th Reinforcement)
Company, 67th Reinforcement Bat-)
talion, 19th Reinforcement Depot)

SEINE SECTION, COMMUNICATIONS ZONE,
EUROPEAN THEATER OF OPERATIONS

Trial by GCM, convened at Paris,
France, 8 March 1945. Sentence:
Dishonorable discharge, total
forfeitures and confinement at
hard labor for life. United States
Penitentiary, Lewisburg, Pennsylvania

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, 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.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Lawrence NICHOLAS, 19th Reinforcement Depot, European Theater of Operations, United States Army, did, at his organization, on or about 28 December 1944, desert the service of the United States and did remain absent in desertion until he came under military control at Paris, France, on or about 7 February 1945.

He pleaded not guilty, and all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the

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record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater, confirmed the sentence but, owing to special circumstances in the case, 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 of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows substantially the following: The accused absented himself from his organization without authority 28 December 1944 (Pros.Ex.A) and was apprehended and returned to military control 7 February 1945. At the time of his apprehension he was staying at the Hotel Moderne, Paris, France, and was wearing civilian clothes. After his apprehension he was interrogated by a Criminal Investigation Division agent, to whom he gave a written statement which was admitted in evidence (R6-7). This statement (Pros.Ex.C) states that accused left his station about 23 December 1944 and remained at various hotels until he was arrested 7 February 1945; that he lived with a woman at the Hotel Moderne, who supplied him with money and paid for his meals; that he procured civilian clothes on or about 2 or 3 February and wore them until apprehended.

4. Testimony for the defense showed substantially the following: Accused stayed at the Hotel Moderne for a time, and sent his clothes out to be cleaned; after they had been taken to the cleaner accused wore civilian clothes around inside the hotel, but never went out on the street wearing them. He stated to witnesses that he wanted to return to his unit as soon as he got his uniform, but this was delayed "because on account of present circumstances, the shop was closed for the time. There was no gas or electricity" (R8-13). The accused, having been fully advised of his rights, elected to remain silent (RM-15).

5. a. The agent who took the written statement of accused read Article of War 24 to him, and told him "it would be better if he came clean, told the truth and it would be better all the way around" (R6-7). Although the written statement does not amount to a confession of the crime of desertion, it is a confession of the lesser included offense under Article of War 61 and the rules of evidence regarding admissibility of confessions apply (CM ETO 12271, Cuomo). The agent's statement does not make the document inadmissible under MCM 1928, par.114a,p.116, since not of a character "to induce a substantial hope of favor or fear of punishment" (Winthrop's Military Law and Precedents (Reprint,1920),p.329); mere adjurations to speak the truth are not sufficient to render statements made in response thereto involuntary (CM ETO 72, Jacobs and Farley; CM ETO 7869, Adams and Harris). The court also received a confinement request (Pros. Ex.B), after testimony of the requesting officer that he signed same. The document is probative of nothing, it not appearing that the witness ever saw accused or that he was confined on the request, but no rights of accused were affected by its improper admission, in view of the evidence of accused's apprehension.

b. The beginning of accused's period of unauthorized absence on 28 December 1944 is established by a duly authenticated extract copy of the morning report of his organization (Pros.Ex.A). The termination of this period by apprehension is inferentially established by the testimony of a prosecution witness and concretely by accused's written statement as 7 February 1945. The lesser offense of a violation of Article of War 61 was clearly established, and it was only necessary for the court to make a further determination as to accused's intent from the evidence before it. This evidence was that he remained away for a period of 41 days, wore civilian clothes at least a part of the time, and was returned to military control by apprehension. Judicial notice will be taken of the fact that this occurred in a theater of very active operations (MCM 1928, par.125, p.135). Findings of guilty of desertion have been upheld in cases involving shorter periods of absence, where the accused has voluntarily returned and has not been in civilian clothes (CM ETO 1629, O'Donnell; CM ETO 4490, Brothers). The finding that accused had the intent to desert is based upon substantial evidence.

6. The charge sheet shows that accused is 27 years of age and was inducted 10 July 1942 at Fort Devens, Massachusetts.

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 sentence as commuted.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sbc.II, pars.1b(4), 3b).

Wm. F. Swann Judge Advocate

Edward L. Stearns Judge Advocate

Donald H. Carroll Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the
European Theater
General, United States Forces, European Theater (MAIN), APO 757, U.S. Army.

8 SEP 1945

TO: Commanding

1. In the case of Private LAWRENCE NICHOLAS (31117727), 350th Reinforcement Company, 67th Reinforcement Battalion, 19th Reinforcement 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 commuted, 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 CM ETO 15196. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15196).



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

(Sentence as commuted ordered executed, GCMO 430, USFET, 21 Sept 1945).

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

15 SEP 1945

CM ETO 15197

UNITED STATES)

v.)

Private First Class JAMES
CLYDE BLACKBURN (15082471),
390th Fighter Bomber Squadron,
366th Fighter Bomber Group,
9th Air Force)

SEINE SECTION, COMMUNICATIONS ZONE,
EUROPEAN THEATER OF OPERATIONS

Trial by GCM, convened at Paris, France,
13 January 1945. Sentence: Dishonorable
discharge, total forfeitures, and confine-
ment at hard labor for life. United
States Penitentiary, Lewisburg, Pennsyl-
vania.

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, 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.

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

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

Specification: In that Private First Class James C. Blackburn, 390th Fighter Squadron, 366th Fighter Group, Ninth Air Force, European Theater of Operations, United States Army, did, at APO 595, on or about 12 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 28 October 1944.

CHARGE II: Violation of the 93rd Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification 1: (Finding of guilty disapproved by Reviewing Authority)

Specification 2: In that * * * did at Paris, France, on or about 28 October 1944, knowingly and wrongfully attempt to sell eighteen (18) drums and nine hundred and ninety (990) gallons of gasoline, property of the United States, furnished and intended for the military service thereof, thereby diverting it from military operations in a theater of war.

Specification 3: In that * * * in the execution of a conspiracy previously entered into with Private Austin C. Dookie, Private First Class James E. Dugger, Private Woodrow W. Crockett, Private Jeff Jackson, Staff Sergeant John D. Carter, Private First Class Walter B. Deason, all members of the United States Army, did, at Paris, France, between 12 September 1944 and 28 October 1944, wrongfully and knowingly traffic in the unlawful sale to French civilians of gasoline, military property of the United States, thereby diverting it from military operations in a theater of war.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found not guilty of Charge II and its Specification, and guilty of the remaining charges and specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, disapproved the findings of guilty of Specification 1 of Charge III, approved only so much of the findings of guilty of Specification 3, Charge III as involves a finding of guilty of wrongfully and knowingly trafficking in the unlawful sale to French civilians of gasoline, military property of the United States, thereby diverting it from military operations in a theater of war, between 12 September 1944 and 28 October 1944, in the execution of a conspiracy previously entered into with Private First Class Walter B. Deason. He approved the sentence, recommended that pursuant to Article of War 50 it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, and that the United States Penitentiary, Lewisburg, Pennsylvania be designated as the place of confinement, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed

the sentence, but owing to special circumstances in the case and the recommendation of the reviewing authority, 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 of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

3. Competent and substantial evidence establishes that accused absented himself without leave from his organization on 12 September 1944 (Pros.Ex.A) and remained absent without leave until apprehended in Paris, France on 28 October 1944 (R28). During the period of his absence he frequently appeared in civilian clothes and engaged in black market activities. In his extra-judicial confession which was properly admitted in evidence after the corpus delicti had been proved (CM ETO 14040, McCreary), accused admitted his absence. We have repeatedly held that the above facts form a substantial basis for inferring an intent to desert (CM ETO 952, Mosser; CM ETO 1036, Harris; CM ETO 1629, O'Donnell). The record is legally sufficient to support the finding of guilty of Charge I and Specification.

4. Specification 2, Charge III alleges that accused wrongfully attempted to sell 18 drums of gasoline, property of the United States, furnished and intended for the military service, thereby diverting the gasoline from military operations in a theater of war. The evidence shows that Monsieur Louis Gahagnon, a cafe owner, was approached by a Frenchman who represented himself as being in the transportation business and solicited Gahagnon's aid in procuring gasoline. This Frenchman, known only as Mr. Jean, had been a patron of his cafe for a long time. Gahagnon then asked accused to get some gasoline and accused agreed. Gahagnon was to receive 10 francs per litre from accused and five francs per litre from Jean as a commission. On 28 October, accused notified Gahagnon that he had obtained the gasoline and the latter in turn notified Mr. Jean. Jean met accused and Gahagnon and told accused to bring the gasoline to a garage on Rue Vanneau (R10-16).

On 28 October agents of the Criminal Investigation Division received orders to go to a garage on Rue Vanneau from a Major Edler of the Theater Provost Marshal's Office to investigate a proposed sale of gasoline. They arrived at the garage about 2:00 pm. About 5:00 pm accused drove an American 6x6 truck into the garage. The truck was loaded with 18 drums of gasoline, each drum containing 55 gallons. Accused and a "French civilian" entered into negotiations about the sale of the gasoline. Accused was then apprehended (R28,36). Mr. Jean then introduced himself to Gahagnon as an Intelligence Officer in the French Army. He remonstrated with Gahagnon for participating in black market activities. According to the latter, he seemed to be very well acquainted with an American major who was present (R14). At any rate, he was permitted to depart in his own automobile. The agents of the Criminal Investigation Division did not take his name or search him.

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They were given no instructions as to the arrest of French civilians who might be involved in the deal. To their knowledge, the French Police were not notified of this possibility. They did not know the source of the information that enabled them to apprehend accused (R32-37).

Accused in his extra-judicial confession admitted that he procured 18 drums of gasoline, each containing 55 gallons of gasoline from a United States Army dump by means of a false requisition; that a bartender named "Louie" procured a customer for the gasoline and that on 28 October he was arrested when in a garage while trying to consummate the sale (R30; Pros.Ex.E).

The accused raised the defense of entrapment. It is possible that an agent of the Government instigated the particular offense with which accused was charged. There is little doubt that accused was already engaged in the sale of black market gasoline on a wholesale scale prior to this deal. It is only when the agents implant in the mind of an innocent person a design to commit an offense that entrapment may be successfully pleaded as a defense (Sorrells v. United States, 287 U.S. 435, 77 L.Ed. 413 (1932); CM ETO 8619, Lippie, et al; CM ETO 11681, Henning; CM ETO 13406, Weiskopf). As was said in G. M. Spring Drug Co., et al v. United States (CCA 8th 1926), 12 F(2nd) 852, 856:

"It is well settled by the decisions of the Supreme Court of the United States, we think now universally followed in the several circuits, that, where the government, through its agents, has reasonable cause to believe that the law is being violated by the defendant, they may legally entrap the defendant by decoy letters or by pretended purchases".

That applies in its entirety to this case.

Nor does the fact that the government was attempting to purchase its own property constitute a defense. What was in effect charged here was an attempt to violate the 9th paragraph of Article of War 94, despite the existence of an allegation to the effect that accused diverted gasoline from military operations since, as will be presently pointed out, that allegation is mere surplusage. This paragraph of Article of War 94 punishes any person subject to military law who "knowingly sells" the type of property described therein. Manifestly, the word "sell" as used therein is not intended to describe a sale as that word is used in the Uniform Sales Act. Since ex hypothesi the government owns the property in question passage of title is impossible. To hold, then, that the word "sell" as used in Article of War 94 means a sale under the Uniform Sales Act would effectively emasculate that part of the Act. Congress scarcely could have intended that. What it did intend to punish was an act or series of acts which would result in a sale if the purported vendor had title (Cf: CM ETO 9288, Mills). It consequently is immaterial that no true sale could

have been effected here and there is no logical difficulty involved in finding accused guilty of the attempt as charged. In this respect the case is governed by CM ETO 8619, Lippie.

The Specification states nothing more than an attempt to violate the 9th paragraph of Article of War 94. The allegation that accused diverted gasoline from "military operations in a theater of war" is surplusage and we so treat it. (Cf: CM ETO 6226, Ealy; CM ETO 7506, Hardin; CM ETO 7609, Reed and Pawinski). It follows that the record is legally sufficient to support the finding of guilty of Specification 2 of Charge III.

The accused was thus found guilty of attempting to sell property of the United States furnished and intended for the military service. The maximum punishment for this offense is limited by analogy to the maximum punishment for the offense denounced by the 9th paragraph of Article of War 94. The value of the property under the 9th paragraph of Article of War 94 is not an element of the offense (CM ETO 9643, Haymer; CM ETO 5539, Hufendick). For the purpose of determining punishments, however, the court (and the Board of Review upon appellate review) can take judicial notice of prices of articles as published in official price lists. The table of maximum punishments (MCM, 1928, par.104c, p.100) provides that the maximum punishment for wrongful sale in violation of Article of War 94 in those cases where the amount involved is more than \$50 is dishonorable discharge, total forfeitures, and confinement at hard labor for five years. The maximum punishment for an attempt to sell such property is the same (MCM, supra, p.96). Reference to the quarter-annual report based on the "Lend-Lease Act" (Act March 11, 1941, c.11; 55 Stat.31; 22 USCA 411-419) of the Quartermaster, European Theater of Operations to the Quartermaster General for the period 1 October to 31 December 1944 establishes that the value of 990 gallons of gasoline is well in excess of \$50. The maximum punishment that may be imposed for this offense is, then, dishonorable discharge, total forfeitures, and confinement at hard labor for five years (CM ETO 9288, Mills).

5. Specification 3 of Charge III, although not drawn with the nicety required in a common-law indictment, alleges, in our opinion, a conspiracy and overt acts in execution thereof in violation of section 37 of the Federal Criminal Code (18 USCA, sec.88). While it contains the allegation that the conspiracy was "previously entered into", we think that a reading of the entire specification makes it sufficiently clear that it also alleges the continuance of the conspiracy during the performance of the overt acts, (Cf: 7 Op. Atty. Gen. 604; CM ETO 13319, Beets and Nanney; CM ETO 9643, Haymer; CM ETO 11076, Wade). Private Walter B. Deason testified that he and accused decided to sell gasoline and divide the proceeds of their sales (R43). He further testified that accused sold gasoline and gave him a share of the proceeds (R20); that he in turn divided the proceeds of a sale with accused (R21); and that he procured the gasoline he sold from a gasoline dump at Rambouillet. The corpus delicti of the conspiracy was thus established. The corpus delicti of a conspiracy is "the unlawful combination, confederacy and agreement

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between two or more persons" (Tingle v. United States (CCA 8th 1930), 38 F(2nd) 573,575; CM ETO 8234, Young et al, and cases cited). Accused's extra-judicial confession was thus properly admitted in evidence. There is no necessity for reciting its details here. It reveals that accused engaged in black market activities with Deason and others, and that this gasoline was obtained from United States Army supply dumps. Since, as we have said above, the allegations that accused by his conduct diverted gasoline from "military operations in a theater of war" is surplusage, all elements of the offense were thus established (CM ETO 8234, Young). Neither the offense of conspiracy nor any closely related offense is listed in the table of maximum punishments (MCM, 1928, par.104c, pp.96-102). When such is the case the offense remains "punishable as authorized by statute or by the custom of the service" (MCM, 1928, par.104c, p.96). The custom of the service where no limit is prescribed by the Executive Order is to follow Congressional expressions as to appropriate punishment (CM 199369, Davis, 4 B.R. 37,42, 1932); Section 37 of the Federal Criminal Code (18 USCA 88) prescribes the punishment for the offense of conspiracy as imprisonment for two years. Accordingly, that is the maximum confinement imposable on accused for his conviction under Specification 3 of Charge III (CM ETO 8234, Young et al).

6. The charge sheet shows that accused is 21 years three months of age and that he enlisted on 4 November 1941 at Vincennes, Indiana. His period of service is governed by the Service Extension Act of 1941. No prior service is shown.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized upon conviction by Article of War 42, and upon conviction of conspiracy by Article of War 42 and section 37 Federal Criminal Code (18 USCA 88). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Wm. F. Brown Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald K. Conlee Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with
the European Theater. **15 SEP 1945** TO: Commanding
General, United States Forces, European Theater (Main), APO 757,
U.S. Army.

ETO 15197 BLACKBURN, JAMES CLYDE

1. In the case of Private First Class JAMES CLYDE BLACKBURN (15082471), 390th Fighter Bomber Squadron, 366th Fighter Bomber Group, 9th Air Force, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty, as approved, and the sentence, as commuted, 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 CM ETO 15197. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15197).



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

(Sentence as commuted ordered executed. GCMO 447, USFET, 3 Oct 1945)•

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

15 NOV 1945

CM ETO 15199

UNITED STATES)

SEINE SECTION, COMMUNICATIONS ZONE,
EUROPEAN THEATER OF OPERATIONS

v.)

Private ANTHONY F. SANSONE
(32828763), 12th Infantry.)Trial by GCM, convened at Paris, France,
26 March 1945. Sentence: Dishonorable
discharge, total forfeitures and con-
finement at hard labor for life. United
States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
HEPBURN, HALL and COLLINS, 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.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Anthony F. Sansone, 12th Infantry Regiment, 4th Division, European Theater of Operations, United States Army, did, at his organization, on or about 3 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France, on or about 2 January 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death by musketry. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence

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and forwarded the record of trial for action under Article of War 48 with the recommendation that the sentence be commuted pursuant to Article of War 50. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case and the recommendation of the reviewing authority, 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 of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution, admitted without objection, consisted of two exhibits: (1) A stipulation by and between accused, defense counsel and trial judge advocate that accused "was returned to military control United States Army by apprehension of Military Police in Paris, France on 2 January 1945", and that he was in the military service (R5; Pros. Ex A). (2) An extract copy of the morning report of Company "K", 12th Infantry, certified to by the regimental personnel officer, reading in its entirety as follows:

"Period ending	13 September 1944
32828763	Sansone Pvt
Dy to AFOL	0700 3 Sept 44" (R5; Pros. Ex B).

4. No evidence was presented on behalf of the defense. Defense counsel stated that accused's rights had been explained to him and that he wished to make an unsworn statement through counsel. The law member, nevertheless, properly explained accused's rights to him, "so there [would] be no misunderstanding", and then instructed him to consult his counsel, who thereafter made the following unsworn statement on behalf of the accused:

"The accused desires that his defense counsel say the following things in his behalf. First, that just prior to coming overseas he was offered a medical discharge. He refused this medical discharge, preferring to stay in the military service. Second, the accused desires his defense counsel to say that he served with the 12th Infantry, 4th Division and fought with them from the middle of July to around the 1st of September. During that time the 4th Division was engaged in combat. However, accused desires to say that he had no intention of deserting the service of the United States or had no desire to desert his organization.

On the other hand he admits that he knew he was doing wrong in being absent without leave and he requests a chance to get back. He requests a chance to make amends for his wrong-doing. He would further like to say that he was never involved in black market dealings or misappropriation of government property. The defense rests."

5. The accused has been convicted of deserting the service of the United States. The type of desertion charged is defined as absence without leave accompanied by the intention not to return (MCM 1928, par. 130, p. 142). That he absented himself without leave from his organization on the date alleged, 3 September 1944, was shown by the entry in the morning report of his organization and inferentially by his own admission in open court. It was stipulated that this unauthorized absence was terminated by apprehension in Paris, France, on 2 January 1945. The accused offered no explanation or excuse for his absence but more or less threw himself upon the mercy of the court with his unsworn statement concerning his combat service and his contention that he had no intention to desert the service. In the absence of any reasonable explanation it was within the exclusive province of the court under the circumstances to determine the fact of whether he intended to remain away from the service. The court was legally justified in concluding from the duration of the unauthorized absence, which occurred at a critical time of the war with the enemy, and the character of its termination (by apprehension) that accused did not intend to return and was therefore guilty of desertion in violation of Article of War 58 (CM ETO 16880, Ferraro). Its findings, based upon substantial evidence, may not be disturbed on review.

6. The charge sheet shows that the accused is 20 years of age and was inducted into the service on 9 March 1943. No prior service was shown.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. 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 in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

Zorle Stephens Judge Advocate

Clarence W. Hall Judge Advocate

John J. Collins, Jr. Judge Advocate

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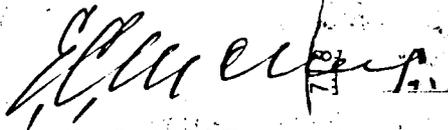
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War Department, Branch Office of The Judge Advocate General with the
European Theater. 15 NOV 1945 TO: Commanding
General, United States Forces. European Theater (Main), APO 757, U.S. Army.

1. In the case of Private ANTHONY F. SANSONE (32828763), 12th 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. In view of the youth of the accused it is recommended that the place of confinement be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15199. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 15199).



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

(Sentence as committed ordered executed. GCMO 613, USFET, 1 Dec 1945).

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

7 SEP 1945

CM ETO 15200

UNITED STATES

) III CORPS

v.

)
)
) Private CLYDE M. BOBO (37386348),
) 162nd Chemical Smoke Generator
) Company

)
) Trial by GCM, convened at APO
) 303, U. S. Army, 19 May 1945.
) Sentence: To be hanged by the
) neck until dead.

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, 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.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Clyde M. Bobo, 162nd Chemical Smoke Generator Company, did, at Fitting, Bavaria, Germany, on or about 4 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Edward D. Cunningham, a human being by shooting him with a rifle.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, III Corps, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50 $\frac{1}{2}$.

3. The prosecution's evidence established substantially the following material facts:

Between 8 and 9 pm on the evening of 4 May 1945 (R8,14,22), accused, reputedly a good soldier (colored) (R11,17,25,39), and a fine fellow (R25) although hot-tempered (R17,25), given to over-indulgence in alcohol (for which he had been reduced from sergeant (R39-40)) and at the time under the influence of alcohol but not drunk (R11,18,25,27), was participating in a dice game in quarters located in Eitting, Bavaria (Germany) (R21,39) occupied by a section of his company of which his good friend, Sergeant Edward D. Cunningham, another participant, was leader (R8-9,11,14-15,18,22,26). Among the participants in the game were several other soldiers, including Private First Class Claude Schoemaker (R8,13). During the course of the game, accused lost two side-bets to deceased (R9), who on at least one occasion threw the money involved in the principal game to the winner (R15) and picked up certain money which accused claimed was his. A dispute with respect to the money arose between deceased and accused, who threatened to shoot him with his rifle, which he "threw" across the table at deceased, - he "drew it on Cunningham". The latter then walked to accused and told him to shoot him, whereupon accused said he would not as the war was too nearly over and he wished to go home. The game was resumed (R9,15,22). Deceased won another side-bet from accused and asked him if he might pick up the money. The latter, whose losses were mounting, then inquired of deceased "Do you signify?", meaning "agitate" or tease (R9,18,22,26). Accused thereupon proceeded out through the door, which opened inward, and with his carbine either at his shoulder or under his arm, turned and faced back toward the room, loaded the rifle by operating the bolt, pointed it directly at deceased, and shot him in the left side of the head, after which accused went outside the door (R10,15-16,18,20,23-24,29-30,43;Pros.Ex.1). When accused loaded the weapon, Schoemaker warned him not to shoot, endeavored to close the door with his foot, but was too late and fell back out of the line of fire (R16,18-21;Pros.Ex.1). The company commander was summoned, arrived a few minutes after the shooting, and called for accused, who thereupon came into the room and "said he was sorry" (R10,16,23-24,41). Deceased was immediately taken to a military hospital where he died about ten minutes thereafter as a result of the bullet, which entered the left side of his face and caused a compound skull fracture and laceration of brain tissue (R29-30,40). One witness testified he did not believe accused would shoot deceased (R26).

4. For the defense, testimony of a soldier who was in the dice game was introduced to the effect that after accused threatened to shoot deceased, the latter walked around to accused, who smiled, patted him on the shoulder, and said "he didn't mean it" and "was only kidding" (R30-32).

After an explanation of his rights, accused elected to take the stand as a witness in his own behalf and testified in material substance as follows: During his two years and eight months in the Army, he was never in trouble. He drank about a quart and a half of wine and a large glass of beer on the day in question (R34,36), commencing about 9 am (R35). He gambled in the evening, won at first and then lost all his money. Deceased paid him \$7 he owed him, with which accused won again. Deceased, whose money was exhausted, then sat by (R33) and "padded over" money involved in a side bet between accused and another gambler. Accused reproached deceased, words were exchanged between them, accused threatened him with his rifle, and subsequent events related were substantially in accord with the prosecution's evidence until the time accused left. He testified he picked up his rifle, which was against the wall, and carried it under his right arm pit (R34), pointing over his left arm into the room to his rear, as he went out (R35). He loaded it "in order to go to where I lived" and when he pulled the bolt, the rifle went off and shot deceased (R34). So far as he noticed, his hand was not on the trigger (R38). The only thing in his mind at the time was to go to his quarters and he had "no intention at all of shooting anyone" (R34).

"Sergeant Cunningham and I was real good friends. We never had no arguments at all, always was good friends since we came to the company. Never had no intention; if I had wanted to, I'd have done it at first when I came, when he came around the table" (R34).

He denied: turning around when he went out the door; that he saw Schoemaker, heard him say anything or knew where he was when he loaded the weapon (R35); that he knew where deceased was standing until he fell; that he knew he had hit anyone (R36,37). He admitted: that deceased was teasing him because he was winning all the money (R34); that it was strange the shot hit deceased, with whom he had been talking, and not Schoemaker whom he saw standing by the table and that he wondered why it did not hit Schoemaker; that he continued outside about 12 feet; that he walked back into the house because he could not see to find his way (R35,36,38), but did not return to the room until the company commander arrived (R38); that his rifle never went off before in loading (R37).

5. Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par.148a, pp.162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (1 Wharton's Criminal Law (12th Ed., 1932), sec.426, pp.654-655), and an intent to kill may be inferred from an act of accused which manifests a reckless disregard

of human life (40 CJS, sec.44, p.905, sec.79b, pp.943-944). Accused, as shown by prosecution's evidence and by his own admission, shot deceased following an altercation, a threat by accused to shoot him, and a further altercation, during all of which he was losing money to deceased. Finally, just before the shooting, deceased teased accused by sarcastically demanding if he might pick up money he won from accused. After the shooting accused left the scene and when he returned said he was sorry. There was no mutual combat involved and the provocation was clearly insufficient to constitute the homicide voluntary manslaughter rather than murder. Mere anger (CM ETO 422, Green), particularly where occasioned by mere words, is not enough (CM ETO 8533, Batiste; CM ETO 9810, Teamer Johnson). Therefore the only issue is whether or not the killing was accidental as claimed by accused or intentional and with malice as indicated by prosecution's evidence. This issue was clearly for the determination of the court, whose determination thereof against accused in its findings of guilty of murder may not here be disturbed upon appellate review, in view of the evidence (CM ETO 3042, Guy, Jr.). The evidence shows a deliberate, malicious, negro "crap game" murder. Accused's claim of accident, in view of all the circumstances to which even he himself testified, is singularly unconvincing. The issue of intoxication was not acutely raised, as the most the testimony showed was that accused was under the influence of liquor rather than drunk. The court was justified in determining that mental capacity consistent with the intent necessary to murder was not destroyed (CM ETO 10002, Brewster; CM ETO 14141, Pycko). The Board of Review is of the opinion that the findings of guilty are sustained by convincing evidence (CM ETO 739, Maxwell; CM ETO 8533, Batiste, supra).

6. The charge sheet shows that the accused is 35 years of age and was inducted 19 September 1942 to serve for the duration of the war plus six months. He had no prior service.

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

8. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92).

Wm. F. Burrow Judge Advocate

Edward L. Stevens Jr. Judge Advocate

Donald D. Carroll Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the
 European Theater
 General, United States Forces, European Theater (Main), APO 757,
 U. S. Army.

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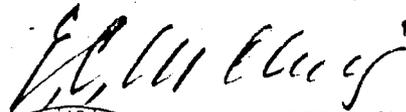
TO: Commanding

1. In the case of Private CLYDE M. BOBO (37386348), 162nd Chemical Smoke Generator 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. The accused is legally convicted of murder. His prior service has been good and without court-martial. He was a sergeant but was reduced for drinking. The killing was of a pattern which is a frequent outcome of gambling games among colored soldiers. There had been words and threats by the accused directed at the deceased, but just prior to the shooting they had talked together and were apparently on friendly terms. The two had been friends and no animosity or prior trouble between them is shown. Accused turned and shot as he was leaving the room. Such action had not been anticipated by the others present. No question of irresponsibility from drink or heat of passion is present. The Board of Review believes commutation of the sentence should be considered.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement, and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 15200. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15200).

4. Should the sentence as imposed by the court and confirmed by you 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 confirmed but after reconsideration commuted to dishonorable discharge, total forfeitures, and confinement for life. Pursuant to par. 87b MCM 1928, so much of previous action dated 18 July 1945 as inconsistent with this action recalled. Sentence as commuted ordered executed. GCMO 478, USFET, 10 Oct. 1945).

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

1 OCT 1945

CM ETO 15206

UNITED STATES

v.

Private CHARLES R. BURTON
(13065504), Medical Detach-
ment, 11th Infantry

) 5TH INFANTRY DIVISION

) Trial by GCM, convened at Vilshofen,
) Germany, 18 June 1945. Sentence:
) Dishonorable discharge (suspended),
) total forfeitures and confinement at
) hard labor for 15 years. Delta
) Disciplinary Training Center, Les
) Milles, Bouche du Rhone, France.

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, 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 and there found legally insufficient to support the findings in part. The record of trial has now been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Charles R. Burton, Medical Detachment, 11th Infantry, did, at or near Lauterbach, Germany, on or about 11 December 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Reims, France, on or about 29 January 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by special court-martial, one for absence without leave for one day in violation of Article of War 61, and one for larceny of 394 francs in violation of Article of War 93. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dis-

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honorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 50 years. The reviewing authority approved "only so much of the findings of guilty of the Specification of the Charge as involves finding that accused did, at the time specified, desert the service of the United States, and remained absent in desertion for an undetermined period of time", approved the sentence but reduced the period of confinement to 15 years and as thus modified, ordered the sentence duly executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement. He designated the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement. The proceedings were published in General Court-martial Orders Number 158, Headquarters 5th Infantry Division, APO 5, U. S. Army, 11 July 1945.

3. An extract copy of the accused's medical detachment morning report established his initial absence without leave 11 December 1944, and showed him from absent without leave to return to military control in the hands of "Military Authorities" on 29 January 1945, and to confinement 5th Infantry Division guard house 8 February 1945. The defense announced that there was "no objection" to its admission in evidence (R9;Pros.Ex.1). On 10 December 1944 during a recess in his trial by special court-martial for another offense, his co-defendant stated:

"If they find me guilty and take my money away from me, I am not going back to the front for nothing".

Accused replied:

"Hell neither am I" (R5).

The next day, he was reported missing from his duties as a litter bearer, and was not found after search (R8).

4. The accused after his rights as a witness were fully explained to him elected to be sworn and testify. He stated that when he returned to the regiment, he was not immediately placed in confinement, but performed duties at the aid station until two and a half weeks before the trial (R11).

5. The initial absence, having been shown to have been unauthorized, was presumed to have continued until shown terminated (MCM, 1928, par. 130a, p.143). It was properly shown terminated by the morning report as of 29 January (CM 199641, Davis, 4 B.R. 145 (1932)). From the long absence of 49 days in an active theater of operations, together with the accused's statements of intent on 10 December, the court could properly infer that he intended permanently to leave the service of the United States (CM ETO 8519, Briguglio; CM ETO 9843, McClain; CM ETO 13303, Sweezy). It is the

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opinion of the Board of Review that the action (unusual on this evidence) of the reviewing authority in not approving the court's finding as to the date of the termination of the absence did not vitiate the finding of the court of desertion upon the substantial evidence properly before it. The desertion was committed when the status of unauthorized absence coincided with the intent to desert, and the length of the absence thereafter was but an evidentiary matter bearing on intent. The court's finding of the intent to desert, based on competent evidence, was not disapproved by the reviewing authority nor in our opinion did he intend to disapprove the finding as to such guilty intent. His action was not a disapproval of evidence. In CM ETO 9665, Hamilton and McCormick, a specification alleged desertion terminated "at a time, place and manner unknown". The Board of Review held the record legally sufficient to support findings of guilty of an unauthorized absence terminated by apprehension at a certain place on a date over two months after its inception. So here, the Board of Review is not limited by the reviewing authority's characterization, not the essential part of his action, of the period of desertion as "undetermined". The word "undetermined" is not here a word of limitation, just as the word "unknown" was not in the Hamilton and McCormick case. Accused was convicted of a cowardly offense against his country, and he should not be allowed to escape a just punishment on the grounds of sterile technicality in the absence of any prejudice to his rights.

6. The charge sheet shows that accused is 20 years nine months of age and was inducted 16 July 1942 to serve for the duration of the war plus six months. He had no prior service.

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

8. The penalty for desertion in time of war is death or such other punishment as the court-martial may direct (AW 58). The designation of the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement is authorized (Ltr., Hq. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 August 1945).

Wm. F. Brown

Judge Advocate

Edward L. Stevens, Jr.

Judge Advocate

(DISSENT)

Judge Advocate

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

1 OCT 1945

CM ETO 15206

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

v.

Private CHARLES R. BURTON
(13065504), Medical Detach-
ment, 11th Infantry

) 5TH INFANTRY DIVISION

) Trial by GCM, convened at Vilshofen,
) Germany, 18 June 1945. Sentence:
) Dishonorable discharge (suspended),
) total forfeitures and confinement
) at hard labor for 15 years. Delta
) Disciplinary Training Center, Les
) Milles, Bouche du Rhone, France.

DISSENTING OPINION by CARROLL, Judge Advocate

I am of the opinion that, in view of the finding as approved by the reviewing authority, the record is legally sufficient to support only a finding that accused absented himself without leave on 11 December 1944 and remained absent without leave for an undetermined period of time. The length of absence is the decisive factor on the question of desertion of the service in this case, and I do not see how we can determine the period of absence in the face of the reviewing authority's approval of only an undetermined period. While this may be a technicality, I think we are foreclosed by the action of the reviewing authority.

Donald K. Carroll

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

28 SEP 1945

CM ETO 15212

UNITED STATES

v.

Private First Class EARL E.
HOVIS (35099142), Medical
Detachment, 11th Infantry

5TH INFANTRY DIVISION

Trial by GCM, convened at Freyung,
Germany, 8 June 1945. Sentence:
Dishonorable discharge (suspended),
total forfeitures and confinement
at hard labor for 20 years. Delta
Disciplinary Training Center,
Les Milles, Bouche du Rhone, France.

OPINION by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, 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 and there found legally insufficient to support the findings and the sentence. The record of trial has now been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Earl E. Hovis, Medical Detachment, 11th Infantry, did, at or near Echternach, Luxembourg, on or about 6 February 1945, desert the service of the United States by absenting himself without proper leave from Company F, 11th Infantry to which he was attached, with intent to avoid hazardous duty, to wit, serving as a litter bearer in action against the enemy, and did remain absent in desertion until he was apprehended at Echternach, Luxembourg, on or about 5 March 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge

and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, but reduced the period of confinement to 20 years, ordered the sentence as modified executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Center, Les Milles, Bouche du Rhone, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 164, Headquarters 5th Infantry Division, APO 5, U. S. Army, 12 July 1945.

3. The prosecution produced fragmentary evidence tending to sustain the Charge and Specification. No determination on the point is here made but it may be noted that the evidence is of doubtful sufficiency.

4. The accused, having been fully advised of his rights, elected to remain silent and no evidence was presented on his behalf.

5. a. The case was tried at 1120 hours on the day following the service of charge sheet on the accused. Upon the reading of the Charge and Specification, the following proceedings were had (R3-4):

"Defense: Prior to pleading in this case, the defense requests a continuance in view of the recommendation of the Division Psychiatrist in this case. In order to bring this before the court, the accused, defense counsel, and prosecution have agreed on the following stipulation: 'It is hereby stipulated by and between the accused, his counsel and the prosecution that if Major Harry D. Nesmith, 5th Division Psychiatrist, were present he would testify in substance as follows:

'Tentative diagnosis: Psychoneurosis reactive depression - moderately severe. Rule out: Psychosis. The behavior of this individual during the interview is cause of some doubt regarding actual mental condition. Recommend that this soldier be examined at a general hospital before final diagnosis is made'.

Prosecution: It is the view of the Staff Judge Advocate that if this case is now delayed, the necessary witnesses will subsequently be unavailable. He therefore recommends trial at this time and if the accused is found guilty he can be given further observation in a general hospital or other appropriate facility. Suspension, reduction, or revision of the sentence can then be had if the findings of the medical authorities warrant it.

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President: There will be a short recess.

The court then at 1130 hours took a recess until 1134 hours, at which time the members of the court, personnel of the prosecution, and defense, and the accused and the reporter resumed their seats.

President: The court will come to order.

The President then read to the court from the Manual for Courts-Martial, US Army, 1928, the following matter, paragraph 64, page 50, sentence near bottom of page, as follows: 'To the extent that the court and reviewing authority differ as to a question which is merely one of law, such as a question as to the jurisdiction of the court, the court will accede to the views of the reviewing authority; and the court may properly defer to such views in any case'. In view of this rule, the motion for continuance is denied. The court will proceed with the trial".

The situation is identical with that presented by the record in CM ETO 15216, Miller, in which the same court, reviewing authority, staff judge advocate, trial judge advocate, defense counsel and psychiatrist functioned as herein. An identical request for continuance was made based on a similar psychiatric recommendation, opposed by a similar argument by the prosecution quoting the staff judge advocate (with here an additional statement as to availability of witnesses, hereinafter discussed), and there too the continuance was denied. The only differentiating factor of importance is that in the Miller case the service of the charge sheet on accused preceded the trial by three days (while here service was made the day before the trial). Relying on the reasoning in the exhaustive opinion in the case of CM ETO 4564, Woods, it was held that the refusal to grant the continuance was an abuse of discretion and that accused was thereby deprived of due process of law in violation of Article of War 70 and the Fifth Amendment to the Federal Constitution. Reference is made to the opinion in the Miller case, all of which applies to the present situation. Here again it is unconscionable that a man be compelled to go on trial for his life without an opportunity to submit what might be an absolute defense. In opposing the continuance the prosecution stated it to be "the view of the staff judge advocate" that if trial were delayed the witnesses would be unavailable. Such lack of availability is not stated to be a fact nor is it in any way explained. The only witnesses were an officer (whose half page of testimony is entirely formal) and an enlisted man, who were members of the Division. It does not appear why they could not be called at any time. No valid ground for refusing the continuance is shown by this argument.

b. In the Miller case the trial judge advocate quoted a sentence from the manual (MCM, 1928, par. 64a, p.50), to the effect that the court will accede to the views of the reviewing authority on a question which is merely one of law. This provision prescribes the procedure when a review-

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ing authority returns a record to a court disagreeing on its action on a special plea, or similar objection and the Miller case held it inapplicable to the situation there (and hence it is inapplicable here also), but the sentence quoted was not there shown to be the basis for the court's ruling. In this case, however, it will be noted that the President himself read this same provision, and announced it to be the basis for the court's ruling. This goes further than constituting a mistake of law and establishing that the court acted on a false premise; it conclusively shows that the court was not, in making its ruling, exercising independent judgment but was accepting the mandate of the appointing authority on what should have remained an exclusively judicial function.

c. Also, as in the Miller case, the sudden need for speed developed only after service of the charge sheet. In spite of the provision that he will make service "immediately on receipt of the charge sheet" (MCM, 1928, par. 41e, p.32), the trial judge advocate in the present case made service 12 days after indorsement to him, and then forced accused to trial the following morning. That an opportunity to prepare a defense was not afforded is a fair inference from the fact that only 31 minutes elapsed between opening the court and adjournment, with accused sentenced to confinement at hard labor for life.

6. The charge sheet shows that accused is 19 years six months of age and was inducted 17 March 1943 to serve for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. Error injuriously affecting the substantial rights of accused was committed at the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence as approved.

Wm. F. Brown Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald J. Carroll Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the
European Theater. 28 SEP 1945 TO: Commanding
General, United States Forces, European Theater (Main), APO 757,
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 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private First Class EARL E. HOVIS (35099142), Medical Detachment, 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 and the sentence as approved be vacated, and that all rights, privileges and property of which he has been deprived by virtue of said 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. McNeill
1945

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

..
(Findings of Guilty and sentence as approved vacated. GCMO 510, USFET,
16 Oct 1945).

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Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

28 SEP 1945

CM ETO 15216

UNITED STATES)

5TH INFANTRY DIVISION)

v.)

) Trial by GCM, convened at Freyung,
) Germany, 18 June 1945. Sentence:
) Dishonorable discharge (suspended),
) total forfeitures and confinement
) at hard labor for 25 years. Delta
) Disciplinary Training Center, Les
) Milles, Bouche du Rhone, France.

Private (formerly Private
First Class) CHARLES R.
MILLER (33802375), Company F,
11th Infantry

OPINION by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, 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 and there found legally insufficient to support the findings and the sentence. The record of trial has now been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE I: Violation of the 75th Article of War.

Specification: In that Private Charles R. Miller, Company "F", 11th Infantry, then Private First Class, being present with his organization while it was engaged with the enemy, did, at or near Echternach, Luxembourg, on or about 9 February 1945, shamefully abandon the said organization and did not return thereto until 16 February 1945.

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

Specification: In that * * * did, without proper leave, absent himself from his organization at Godbrange, Luxembourg, from about 21 February 1945, to about 22 February 1945.

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

Specification: In that * * * did, at or near Frankfurt, Germany, on or about 27 March 1945, desert the service of the United States by quitting his organization, with intent to avoid hazardous duty, to wit, action against the enemy, and did remain absent in desertion until he surrendered himself at Frankfurt, Germany, on or about 3 April 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by a special court-martial for absence without leave for 17 days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, but reduced the confinement to 25 years, ordered the sentence as modified, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 136, Headquarters 5th Infantry Division, 9 July 1945.

3. The evidence of the prosecution tended to support the charges and specifications, but a detailed review thereof is not essential to this opinion. For the present purposes it need not be decided whether competent substantial evidence was adduced to support the findings.

4. Accused, having been fully advised of his rights, elected to remain silent and no evidence was presented in his behalf.

5. a. The case came to trial three days after the service of the charge sheet on accused (R2). Following the reading of the charges and specifications the following appears (R3-4):

"Prosecution: Does the accused have any special pleas in this case?

Defense: At this time we have evidence for some grounds for a continuance if the court so decides. The prosecution and myself have discussed it and it is the report of the Division Psychiatrist which we would like to read, his recommendations at this time.

President: All right.

Defense: 'Diagnosis: Psychoneurosis, anxiety state - reactive depression - manifested by uncontrollable fear and depression.

'Recommendations: This patient seems so depressed that it could not all be caused only by guilt complex and impending General Court-Martial. I feel that he should be given further observation before being tried by General Court-Martial.' Pending the decision of the court whether or not that should be grounds to continue with the case until that report is on hand.

Prosecution: If the court please, I would like to present the opinion of the Staff Judge Advocate on this case as follows: 'The accused was given a neuropsychiatric examination by Major Nesmith, Division Psychiatrist, who recommends that he be given further observation. It is felt that in the interests of military discipline, the accused should be tried. The accused may then be submitted to such further observation as may be deemed necessary and expedient.' I would like to submit that decision. Section 64 of page 50 of the Manual, sentence near the bottom of the page, 'To the extent that the court and reviewing authority differ as to a question which is merely one of law, such as a question as to the jurisdiction of the court, the court will accede to the views of the reviewing authority; and the court may properly defer to such views in any case.' And on the basis of that to proceed with the trial.

President: The court will be closed.

The court was closed, and the personnel of the prosecution, the defense, and the accused and the reporter withdrew from the courtroom. The court was opened and the personnel of the prosecution, the defense, and the accused and the reporter resumed their seats.

President: The court will go ahead with the trial."

The question is thus presented whether the court's refusal to grant a continuance was an abuse of discretion, and if so, whether such abuse deprived the accused of due process of law. Trial of accused

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on two capital charges, after an indication of possible want of mental capacity, on the third day after service of the charge sheet, creates a situation warranting close scrutiny of the action of the court in peremptorily ordering trial over accused's objection. Trial at this time was not shown to be required by or even desirable for reasons of military necessity or for any other cause.

Article of War 70 concludes with this sentence:

"In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him."

(In this connection it will be noted that although the United States was at war in other parts of the world, the trial was held more than a month after the German surrender; thus the situation comes within at least the spirit of the Article). The Manual for Courts-Martial provides that "ample opportunity will be given [the defense counsel] and the accused properly to prepare for trial * * *" (MCM, 1928, par.45b, p.35). In a letter to officers exercising general court-martial jurisdiction, The Judge Advocate General stated (Ltr. TJAG, Subject: Time Element in Trial by General Courts-Martial, 14 February 1944):

"It is by reason of military necessity alone that this provision [of AW 70 quoted above] does not apply in time of war. The exception does not mean, however, that even during time of war, an accused may be deprived of the right to prepare his defense. It means rather that during time of war he may be tried as soon after service of charges as he has had reasonable time to consult with counsel and prepare his defense."

The problem presented by this record has been discussed exhaustively in CM ETO 4564, Woods. That case reviews a great number of opinions of both Boards of Review and Federal Courts, and concludes that failure to afford adequate time for the preparation of a defense prior to trial by court-martial is a deprivation of due process of law in violation of the Fifth Amendment to the Federal Constitution and Article of War 70, notwithstanding the "in time of peace" clause of the latter. In the Woods case no objection was made to the time of trial and it did not affirmatively appear what nature of defense might have been perfected had additional time been afforded; there was not even an indication that any defense was available to the accused. In spite of these facts it was there concluded on sound reasoning that as an American soldier, accused was entitled to a period for consideration before facing a general court-martial whether he desired it or not. In the present case, the accused not only desired such a period but presented evidence indicating that had it been afforded he

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might have presented a valid defense to charges which placed him on trial for his life.

b. Additional considerations tending to support this conclusion are present in the record. The charges were referred for trial to the trial judge advocate on 2 June, and although it is provided that "immediately on receipt of charges referred to him for trial he will serve a copy of the charge sheet * * * on the accused" (MCM, 1928, par.41e, p.32), such service was not made until 15 June. It thus becomes obvious that expedition was not required by military necessity - the sole reason for modification of the five-day rule during time of war (Ltr., TJAG, supra). The trial judge advocate, in opposing the request for continuance, quoted the staff judge advocate (as speaking for the commanding general) urging trial in spite of the neuropsychiatric examination. This may well have been considered by the court as a command, in which event it constituted a usurpation of their judicial function. In his supporting argument the trial judge advocate quoted a sentence from the Manual (MCM, 1928, par.64a, p.50) to the effect that the court will accede to the views of the reviewing authority on a question which is merely one of law. This provision prescribes the procedure when a reviewing authority has returned a record to the court disagreeing on its action on a special plea or similar objection and has no application to the situation presented by this record, and its wrongful citation to the court could well have been misleading.

6. The charge sheet shows that accused is 20 years three months of age and was inducted 16 October 1943 to serve for the duration of the way plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and the offenses. Error injuriously affecting the substantial rights of accused was committed at the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence as approved.

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald J. Crowell Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the European Theater.

28 SEP 1945

TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat.724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private (formerly Private First Class) CHARLES R. MILLER (33802375), Company F, 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 and the sentence as approved be vacated and that all rights, privileges and property of which he has been deprived by virtue of said 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.

OCT 1945
[Handwritten signature]

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

(Findings of guilty and sentence as approved vacated. GCMO 509, 16 Oct 1945).

REGRADED UNCLASSIFIED

BY AUTHORITY OF TJAG

BY CARL E. WILLIAMSON, LT. COL.

JAGC, ASST EXEC ON 20 MAY 54

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