E. T. O.

BOARD

OF

REVIEW

OPINIONS

CM ETO 4492

CM ETO 5414

VOLS. 13-14

HOLDINGS AND OPINIONS

BOARD OF REVIEW

CH OFFICE OF THE JUDGE ADVOCATE GENERAL

EUROPEAN THEATER OF OPERATIONS

VOLUME 14 B.R. (ETO)

CM ETO 4967 - CM ETO 5414

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

Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 14 B.R. (ETO)

including

CM ETO 4967 - CM ETO 5414

(1944-1945)

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Office of The Judge Advocate General

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Confidential

(1)

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

BOARD OF REVIEW NO. 1

9 DEC 1944

CM ETO 4967

U N I T E D S T A T E S	83D INFANTRY DIVISION
v.	Trial by GCM, convened at Audun le Roman, France, 8 October 1944.
Private First Class JUNIOR G. JONES (38474779), Company I, 331st Infantry	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. 1
RITER, SARGENT and STEVENS, Judge Advocates

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

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

CHARGE: Violation of the 75th Article of War.
Specification: In that Private First Class Junior G. Jones, Company I, 331st Infantry, did, at or near La Semallarie, France, on or about 10 July 1944, while before the enemy, shamefully ran away from his company, and did not return until apprehended by the military police.

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 21 days 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, 83d Infantry Division, approved the sentence

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but recommended that it be commuted to life imprisonment and forwarded the record of trial for action under Articles of War 48 and 50. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but due to unusual circumstances in the case and the recommendation of the appointing 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 Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½. The action of the confirming authority in commuting the sentence was taken under the provisions of Article of War 50.

3. Undisputed evidence for the prosecution established the following:

On 9 July 1944 Company I, 331st Infantry, led an attack against the enemy up to a crossroads near Sainteny and La Semallarie, France, which objective the company held under enemy fire on 10 July. During the night of 10-11 July, the enemy counter-attacked with tanks and drove the company back. Several attacks failed but finally the company succeeded in a flanking attack which "cleaned out the position" (R7-8,12,19). Accused was a rifleman in Company I and as such his proper position was in the front lines on and after 10 July. He was assigned no duty which would require his presence elsewhere (R6-7,8). A check of Company I by the company commander on 14 and 15 July showed that accused was absent, nor was he present on 20 July. The company was under enemy fire throughout the period 9-20 July (R20).

On 20 July the communications sergeant of Company I saw accused with another soldier on a road near the position of the 324th Field Artillery. Accused was headed toward the kitchen, was dressed in clean olive drabs and was cleanly shaven, in contrast to the muddy, unshaven appearance of soldiers on the front lines. He stated in reply to the sergeant's inquiry, however, that he had been up on the front line fighting. The sergeant directed him to take steps to return to the company "because we needed him", but although accused said that he would do so, he failed to return to the company that day (R9). He was not present with the company between 20 and 26 July (R9,12).

On 25 July a military policeman on straggle patrol met accused on the straggler line (R13) some distance behind the front lines. He was emerging from a narrow strip of woods with two other soldiers. One of the three volunteered the statement that "they were turning themselves in". There were three other soldiers about 30 yards behind them. The men, who were dirty in appearance, were taken into custody (R14-15). Accused was returned to his organization 25 or 26 July (R9).

On 29 July 1944, after the official investigating officer warned him of his rights, accused voluntarily executed the following statement, admitted in evidence as Prosecution Exhibit 1, without

objection by the defense (R16-17):

> "I am a member of Company 'I', 331st Infantry and on or about 10 July 1944, we were engaged in a fire fight with the enemy. That night the enemy counter-attacked with tanks and as my heart had been hurting, I went to the rear where I attached myself to a mortar squad of Company 'M'. Private Summer was with me. The next morning we went to the rear and stopped at the motor pool where we stayed for four or five days. We started back for the front but I couldn't force myself to go so I stopped at a firing position of the 324th Field Artillery, where I stayed for several days. I had started forward and had stopped for chow when picked up by the Military Police".

The division neuropsychiatrist in his testimony identified an official report of findings with respect to accused, of a sanity board, of which witness was president, appointed by the division commander and dated 5 August 1944. The portion of the report containing the conclusions of the board was admitted in evidence, the defense stating it had no objection, as Prosecution Exhibit 2 (R18), and reads as follows:

> "It is this board's opinion that:
>
> a. This soldier understood right from wrong, and with regard to the offense charged, he could adhere to the right; furthermore, he was at the time so far free from mental defect, disease or derangement as to be able, concerning the particular act charged, both to distinguish right from wrong and to adhere to the right.
>
> b. He is sane and mentally responsible for the offense committed.
>
> c. The accused is sufficiently sane to intelligently conduct or cooperate in his defense".

Upon cross-examination the witness complied with the request of the defense counsel to read to the court a further portion of the mentioned report, consisting of facts brought out from accused by questions of the board upon which they based their conclusion as to his sanity. The trial judge advocate pointed out that such portion was not offered in evidence for the prosecution (R18). The portion reads in pertinent part as follows:

> "MILITARY HISTORY
>
> According to the soldier, he was trained as an anti-tank gunner and driver; his infantry training was only while with this Division; formerly was

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a member of the 78th Division. He left his organization on about 10 July 1944, and before being returned by the Military Police on 25 July 1944, had been ordered by a noncommissioned officer to return to his organization - this he failed to do. He gave, as his reason for leaving, the fact that he had a heart ache; this is a complaint of more than one years duration; examination at the time of interview revealed no cardiac abnormality, with a blood pressure within normal limits. Also was quite nervous, but this subsided within a few days. He knew that leaving his organization, especially when they were in the line, was against military rules; his act was not premeditated. He could not make up his mind about the prospect of return to duty, even if the opportunity were given to him; no reasons were given for this indecision".

4. (a) For the defense, the division psychiatrist was recalled and testified in substance that before questioning a man the sanity board warned him of his rights under Article of War 24 and told him that any testimony he gave them was merely hearsay. They positively gave the men to understand that whatever they told the board might not be used against them (R22).

(b) After his rights were explained to him, accused elected to remain silent (R23).

5. The record is clear that while before the enemy, at the time and place alleged, accused ran away from his company. Both elements of the offense in violation of Article of War 75 were fully established (CM ETO 4005, Sumner, and authorities therein cited). The exact manner of the termination of accused's unauthorized absence, following his running away, does not clearly appear, nor is it material to his guilt (Cf: CM ETO 4820, Skovan, and authorities therein cited).

6. Major Norman P. Cowden, Assistant Adjutant General of the 83rd Infantry Division, who by command of the division commander referred the case for trial, was appointed and sat as a member of the court (R2). His act was purely administrative and in the absence of challenge (R3) and of indication of injury to any of accused's substantial rights, the irregularity may be regarded as harmless (CM ETO 4004, Best).

7. Any error in receiving in evidence that portion of the report of findings of the sanity board consisting of accused's statements concerning the alleged offense, was self-invited by the defense.

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In view of the fact that accused's voluntary statement, made upon the official investigation, admitted certain elements of the offense, such self-invited error may not be deemed to have injuriously affected any of accused's substantial rights. This is true even though the confession was induced by hope of benefit instilled by the president's statement that it was hearsay and might not be used against him (CM ETO 422, Green; CM ETO 438, H. A. Smith; CM ETO 1693, Allen; CM ETO 3197, Colson and Brown).

8. The charge sheet shows that accused is 20 years five months of age and was inducted 25 February 1943 at Tyler, Texas. No prior service is shown.

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

10. The penalty for misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 75). 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 Sep 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 9 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private First Class JUNIOR G. JONES (38474779), Company I, 331st 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 50½, you now have authority to order execution of such 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 4967. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4967).

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

(Sentence as commuted ordered executed. GCMO 145, ETO, 21 Dec 1944)

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

BOARD OF REVIEW NO. 2

3 JUL 1945

CM ETO 4979

U N I T E D S T A T E S v. Privates LEONARD J. ASHLEY (36836500), and KENNETH D. BUCHBERGER (36271317), both of 666th Medical Clearing Company	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Rennes, Brittany, France, 9 November 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

ASHLEY

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Leonard J. Ashley, 666th Medical Clearing Company APO 339, United States Army, did at Vezin, Ille et Vilaine, France, on or about 7th October 1944, unlawfully enter the dwelling of Monsieur Gilles Anger, with intent to commit a criminal offense, to wit, Larceny therein.

Specification 2: In that * * * did at Vezin, Ille et Vilaine, France, on or about 8th October 1944, unlawfully enter the dwelling and cafe of Monsieur Jean Touffet with intent to commit a criminal offense, to wit, larceny therein.

Specification 3: In that * * * did, at or near Vezin, Ille et Vilaine, France, on or about 7 October 1944, feloniously take, steal, and carry away about 15,000 francs, lawful money of France, value about $300.00, the property of Gilles Anger.

Specification 4: In that * * * did, at or near Vezin, Ille et Vilaine, France, on or about 8 October 1944, feloniously take, steal, and carry away two bottles of rum, and two bottles of wine, total value about $4.00, the property of Jean Touffet.

BUCHBERGER

Same Charge and specifications as above set forth except for appropriate transportation of the names of accused.

Each accused pleaded not guilty and each was found guilty of the Charge and specifications preferred against him. No evidence of previous convictions was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for 15 years. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence introduced by the prosecution was substantially as follows:

Gilles Anger and his daughter Germaine resided at Vezin, a village in the vicinity of Rennes, France (R9,11,20). At about midnight, 7 October 1944, a United States Army captain and the two accused, all three total strangers to the Angers, knocked loudly on the latter's door, at the same time calling out, "here mademoiselle, here mademoiselle". After waiting a few minutes, they forced the door open, entered the house and lighted the lamp (R10,11,15-17,20,21). The captain called accused Ashley and together they proceeded to search the room, opening cupboards and drawers. While doing this, the captain kept saying "Boche Boche" (R12). When they came to Anger's personal cupboard it was found locked and Ashley opened it with a false key which he took out of his own pocket (R11,12,21). Either the officer or Ashley opened the drawer which contained from 15,000 to 20,000 francs belonging to Gilles Anger. Ashley took some bank-notes out of the drawer and put them in his pocket. Anger immediately recovered them from Ashley's pocket and replaced them in the drawer (R12). The captain also took money from the drawer and placed it in his pocket. Anger succeeded in taking it back and concealing it (R27,28). While the captain and Ashley were engaged in searching the room and taking the money from the drawer, accused Buchberger was standing back talking with Germaine and doing nothing (R24). When the three left the house the captain took with him the drawer with money in it (R22,23). This drawer, containing some of Anger's personal papers and a 50 franc note, was found early the next morning in a ditch about 400 meters from the house (R44,45). On the same morning the commanding officer of accused searched Buchberger and found 4245 francs "wadded up and stuffed" in one of his shirt pockets (R47).

At about one o'clock in the morning of 8 October, after leaving Anger's house, the captain and both accused went to Jean Touffet's cafe and butcher shop situated in the same village. Touffet was in bed. They forced the door open, entered the cafe and put on the light. When Touffet came down into the cafe, the two accused laid hands on him to see if he was armed (R30,36). They remained there about an hour and "looked around the house". Touffet, unable to speak English and wishing to get rid of them went to Anger's house to find a woman called "Marie" who lived there and who could speak a little

English (R35). The captain remained in the cafe, but the two accused followed Touffet part of the way (R38). Both accused took with them three bottles of rum and three bottles of wine from the cafe without paying for them and without the consent of Touffet who was the owner. The wine and rum had a value respectively of 80 francs and about 60 francs per bottle (R34).

4. Accused, after their rights as witnesses were explained to them, elected to remain silent and no evidence was introduced in their behalf.

5. The record of trial in the case of the captain who participated in the incidents above related (CM ETO 4975, Baer) discloses that several charges, all arising out of the same transactions, were preferred against the captain. The first charged a violation of Article of War 93 and contained four specifications alleging two housebreakings and two robberies. This charge and the specifications thereunder were cancelled on the charge sheet and were not referred for trial. The captain was tried, however, on two specifications under Article of War 96, one alleging that he wrongfully drank intoxicating liquor with Ashley and Buchberger, and the other that he was drunk and disorderly in uniform in a public place, to wit, Touffet's cafe. He was tried three days before accused by a general court-martial appointed by the same authority who appointed the court in this case and who also acted as the reviewing authority in both cases.

The captain although apparently available, was not called as a witness in this case by either the prosecution or the court.

It is impossible to find any just reason for the disparity in the treatment of the officer and the enlisted men. Such gross inequality in the incidence of the law upon persons jointly involved in the same criminal transactions cannot be defended. Nevertheless, it is clear that the unjustified failure to prosecute one of several joint offenders does not as a matter of law affect the criminal liability of any of them.

6. Housebreaking is unlawfully entering another's building with intent to commit a criminal offense therein (MCM, 1928, par.149e, p.169). The unauthorized and forcible entries by accused into Anger's house and

Touffet's cafe in the middle of the night, and their unauthorized and unexplained conduct in searching both places and taking Anger's money and Touffet's bottles of wine and rum without their consent, warranted the inference that accused broke into each building with the intent to commit larceny therein. The evidence justified the conclusion that accused were acting jointly and were therefore in each instance equally guilty of housebreaking.

The evidence sustains findings that both accused acting jointly at the time and place alleged, committed larceny of French currency belonging to Gilles Anger, of a value undetermined, and that they also committed larceny of wine and rum belonging to Jean Touffet, of a value not exceeding $20.00. Every element of larceny was fully proved in each instance by uncontroverted evidence (MCM, 1928, par.149g, p.173).

The presence of the captain and his participation in the illegal activities in question do not relieve accused from criminal liability for their misconduct. It does not appear that they acted in obedience to his orders, and, in any event, what was done was so palpably illegal and so manifestly beyond the scope of the officer's authority that men of ordinary sense and understanding would have known such activity to be illegal (MCM, 1928, par.148a, p.163; Winthrop's Military Law and Precedents (Reprint, 1920), pp.296-297).

7. The charge sheet shows that accused Ashley is 31 years of age and was inducted 17 November 1943 at Fort Sheridan, Illinois, and that accused Buchberger is 37 years of age and was inducted 16 October 1942 at Fort Sheridan, Illinois. Neither had prior service.

8. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of 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 of the Charge against each accused and of Specifications 1, 2 and 4 thereunder, and only so much of the finding of guilty of Specification 3 of each Charge as involves a finding of guilty of larceny of an unkown quantity of francs of a value not exceeding $20, and legally sufficient to support the sentences.

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9. Confinement in a penitentiary is authorized 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, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

_____ Judge Advocate

(DISSENTS) Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 13 JUL 1945 TO: Commanding General, Normandy Base Section, Communications Zone, US Forces, European Theater, APO 562, U. S. Army.
(THRU: Commanding General, Communications Zone, United States Forces, European Theater).

1. In the case of Privates LEONARD J. ASHLEY (36836500) and KENNETH D. BUCHBERGER (36271317), both of the 666th Medical Clearing Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Charge against each accused and of Specifications 1, 2 and 4 thereunder and only so much of the finding of guilty of Specification 3 of each Charge as involves a finding of guilty of larceny of an unknown quantity of francs of a value not exceeding $20, and legally sufficient to support the sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. Both accused have previous good records and both have been in confinement since their conviction in November 1944. In view of these facts and especially of the other aspects of this case set forth in my letter to the Commanding General, Communications Zone, European Theater of Operations, dated 14 February 1945, it is recommended that the unexecuted portion of each sentence be remitted and that both accused be restored to duty.

3. The publication of the general court-martial order and the order of the execution of the sentences may be done by you as the successor in command to the Commanding General, Brittany Base Section, Communications Zone, European Theater of Operations, and as the officer commanding for the time being as provided by Article of War 46.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4979. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4979).

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

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

BOARD OF REVIEW NO. 1

12 DEC 1944

CM ETO 4986

U N I T E D S T A T E S	35TH INFANTRY DIVISION
v.	Trial by GCM, convened at Oriocourt, France, 17 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life, United States Disciplinary Barracks, Leavenworth, Kansas.
Private JULIUS A. RUBINO (31330567), Company G, 137th Infantry	

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

---

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Julius A. Rubino, Company "G", 137th Infantry, did, at Gremecey, France, on or about 3 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 was apprehended at or near Nancy, France, about 11 October 1944.

He pleaded guilty to the Specification except the words "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 "in desertion until he was apprehended", substituting therefor respectively the words "absent himself without proper leave from his organization" and "without leave until he surrendered himself", of

the excepted words not guilty, of the substituted words guilty, and not guilty of the Charge but guilty of a violation of Article of War 61. He was found guilty of the Specification with the foregoing exceptions and substitutions, and not guilty of the Charge but guilty of a violation of Article of War 61. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for life. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort (sic) Leavenworth, Kansas, 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:

On 3 October 1944 accused was a rifleman in Company G, 137th Infantry. The company was holding a defensive position in Gremecey, France, at a distance of 300 to 800 yards from the enemy and its mission was to watch outpost lines in Gremecey Forest (R7,10,14). Except for a small amount of intermittent artillery fire there was no action that day and no advance was made (R8,10). In compliance with orders, the leader and assistant leader of accused's squad at about 1700 hours established outposts for the security of the squad area that night (R10). The assistant squad leader notified accused and Private Kelly, who occupied the same foxhole, that they were to go on guard from 1900 to 2100 hours. He gave Kelly a watch so that they could awaken their relief (R13,15,17). A heavy machine gun, emplaced in that part of the area, was also to be guarded by them (R10). No fixed place was designated as the guard post since the elements of the squad were situated so close to one another that a guard could observe his post without leaving his foxhole. The squad leader saw accused in his foxhole that evening while it was still daylight (R13). The guard was not checked or inspected until 0430 hours the following morning, when it was discovered that both accused and Kelly were gone from their foxhole and were not anywhere in the squad area. They left none of their equipment behind them (R10-11). Accused had not been given permission to leave (R7,11). It was not known whether he performed his tour of guard duty or any part of it before leaving (R15, 17). The post remained unguarded after he and Kelly left, and the right flank of the squad was exposed (R17). He was alone when he returned to his organization on 11 October 1944 (R8,11). A certified extract copy of the company's morning report received in evidence contained entries to the effect that he was absent without leave from 3 to 11 October 1944 (R8; Pros.Ex.A).

Accused joined the company sometime in July 1944 (R11). The squad leader testified that he saw nothing wrong with him when under fire, and that he did his share of fighting in the squad (R12). He was a rifleman but was later given a Browning Automatic Rifle (R16).

During his absence the company did not engage in any action with the enemy, and at the time he returned it was in reserve (R8).

4. The defense offered no evidence. After his rights were explained to him accused elected to make the following unsworn statement through his counsel (R17-18):

> "The accused is nineteen years old. He was inducted into the army on 24 March 1943. He received his basic training with the 75th Infantry Division. He was with the 75th Division throughout basic training and for a short while thereafter. He was then put into a replacement outfit and landed overseas in June, 1944. On July 30th, he was assigned to the 137th Infantry and has been with that organization since that time. The accused states that he has taken care of his share of the Krauts; that he was in a certain foxhole with another soldier on the night of October 3rd. The accused further states that action against the enemy at this particular time was at a minimum; that no one in the organization had any particular reason to anticipate a counterattack and that the whole system of security preparation was more or less lax. They were maintaining some members of each squad awake at night, as is natural in combat. The accused was in this hole with his watch-buddy who had been given the watch and the responsibility of maintaining this post. This other soldier suggested that they could take this opportunity to go into town. The accused did not at first see the percentage in going into town that way, but after some pressing on the part of his comrade, he consented to go with him as the accused knew the way, and the other soldier had no idea of the route, while the accused had such knowledge. The other man and he made their way back to town and they stayed there that night, and the next day, accused wishes to return to his organization. The other soldier refused to accompany him, and the accused, rather than go back alone, stayed out with the other man. They were gone about a total of seven days. Finally, the accused decided he would have to go back to his organization. He had learned that the organization had not moved, and so he went to the MP he found along the road and asked that transportation be furnished to take

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him back to his organization. He was returned through Regimental Headquarters, and went down to his company. After talking with his platoon leader and sergeants - the platoon leader was new at that time; the sergeants were old - he was told that no charges would be preferred against him, but that further situations of this type would be punished by court-martial. He apologized for his behavior. However, a few days later, he was told to pack his things and move back to Regiment, where he was incarcerated and held until this date. That is the substance of the unsworn statement of the accused".

5. The plea of guilty to absence without leave for the period alleged was fully supported by the evidence. The circumstances under which he absented himself add to the gravity of his dereliction. It appears from the evidence, however, that there was an almost complete lack of supervision over the guards. In an area as compact as that occupied by the squad in this case it is difficult to see how the absence of accused from his post, and of the guards who were to relieve him, could have remained unnoticed from 1900 hours on 3 October until 0430 hours the following morning. This extreme relaxation of controls evolved from experience for the effective maintenance of security measures may have tended to minimize the importance of guard duty to a soldier as youthful as accused. It may explain in part the existence of the state of mind which permitted him to commit the offense under such aggravating circumstances as are disclosed by the evidence.

6. The charge sheet shows that accused is 19 years of age and was inducted 24 March 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 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 absence without leave from command is such punishment as a court-martial may direct (AW 61; EO 9267, 9 Nov 1942). The designation of a United States Disciplinary Barracks as the place of confinement is authorized (AW 42), but the designation of the United States Disciplinary Barracks, Leavenworth, Kansas, should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

4986

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 12 DEC 1944 TO: Commanding General, Headquarters 35th Infantry Division, APO 35, U. S. Army.

1. In the case of Private JULIUS A. RUBINO (31330567), Company G, 137th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Pursuant to pertinent directives of the War Department, the place of confinement should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, as amended by Cir.311, WD, 26 Nov 1943, sec.VI, and Cir.321, WD, 11 Dec 1943, sec.II, par.1). This may be done in the published order directing execution of the sentence.

3. There was no evidence of previous convictions of accused by court-martial and there is no indication that his character in civil life was bad. He was 19 years of age when he committed the offense. His squad leader testified that he saw nothing wrong with him when under fire and that, as far as he could see, accused "did his share of fighting in the squad". The Division psychiatrist states that this soldier reveals no abnormal psychiatric behavior. The laxity disclosed by the evidence in the observance by his unit of rules applicable to guard duty may well have contributed to this soldier's delinquency. The offense of which he was found guilty was not desertion but absence without leave. In view of these facts, it is believed that he should not be separated from military service and freed from the hazards and dangers of combat by incarceration, until all possibilities of salvaging his value as a soldier have been exhausted. The Government should preserve the right to use his services in a combat area. In view of the prevailing policy in this theater of conserving manpower, I recommend that consideration be given to a substantial reduction in the period of confinement, the designation of an appropriate disciplinary training center as the place of confinement, with suspension of the execution of the dishonorable discharge until the soldier's release from confinement. If this recommendation is followed, supplemental action should be forwarded to this office for attachment to the record of trial.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4986. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4986).

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

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

BOARD OF REVIEW NO. 1 17 JAN 1945

CM ETO 4987

U N I T E D S T A T E S	35TH INFANTRY DIVISION
v.	Trial by GCM, convened at Oriocourt, France, 17 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Disciplinary Barracks, Fort Leavenworth, Kansas.
Private First Class JOHN BRUCKER, JR. (42022397), Company B, 137th Infantry	

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

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

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

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

Specification: In that Private First Class John Brucker Jr, Company "B", 137th Infantry, did at Cereueil, France, on or about 17 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 was apprehended at or near Nancy, France, on or about 29 October 1944.

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

Specification: In that * ** having received a lawful order from Lieutenant Colonel Alfred K. Clark, Infantry, his superior officer, to report to the Commanding Officer, Company "B", 137th Infantry, for duty, did, at Alincourt, France, on or about 30 October 1944, willfully disobey the same.

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 Specification of Charge I, except the words "he was apprehended at or near Nancy, France," guilty of Charge I and guilty of Charge II and its 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 Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Charge I and Specification: The evidence for the prosecution was substantially as follows:

Accused joined the 137th Infantry as a replacement about 17 July 1944, and was assigned to Company B as an ammunition bearer. He was wounded and evacuated for a short time about 1 August 1944, and returned to duty about 5 or 6 September 1944 (R12). On 17 September, while acting as assistant gunner in the mortar section of the 4th platoon, Company B, 137th Infantry (R7,10) he left without authority while his organization was engaged in combat with the enemy, its mission being to take the village of Cereueil (R7). He was carried on the company morning report as "AWOL as of 17 Sept 44" (R9;"Gov" Ex.A) and was returned by military police to duty 30 October 1944 (R19). During his absence his company was engaged in combat with the enemy (R8,11). No evidence was adduced to indicate his absence was terminated by apprehension (R19).

4. Charge II and Specification: The evidence, as follows, was undisputed.

On 30 October 1944, at Alincourt, France, Lieutenant Colonel Alfred K. Clark, Regimental Executive Officer, 137th Infantry, ordered accused orally and by way of confirmation, in writing to report to

his Commanding Officer, Company B, 137th Infantry, without delay (R13-14;"Gov"Ex.B). There was no enemy activity at that time. Accused refused to obey the order, made no effort to obey it, and did not carry it out. He said "he couldn't" (R14) and that "he couldn't take it" or words to that effect (R15).

5. After his rights were explained to him, accused elected to make an unsworn statement through his counsel (R17-18). Defense counsel then made the following statement:

> "Accused states that he is nineteen years of age. He was inducted August 20th, 1943 and received his basic training with the 63rd Infantry Division. During basic training, he specialized in training with mortars and became, with the 63rd Division, a Private First Class. He was assigned to the 137th Infantry on the 13th of July, 1944, while the 35th Division was engaged in the battle of St. Lo. The accused satisfactorily performed his job of ammunition man in the battle north of St. Lo, until he was finally wounded by enemy shrapnel and evacuated to the hospital. He was in the hospital approximately a month with these wounds, and received the Purple Heart award eventually. The wound was in his right leg just above the knee. It took quite a little while to heal, and he was finally returned to his organization through replacement channels. At the time he was in the hospital, the accused saw many sights he had not seen in his short life before. Men were coming in with legs shot off, arms missing; men with eyes shot into blindness. The accused had a long time in the hospital to think. However, he returned to his organization willingly through replacement channels and was with his organization through several skirmishes with the enemy. However, each time that a shell would burst, the suffering he had seen in the hospital returned to him. On or about the 17th of September, the accused recalls leaving his organization. Just why he left he is not sure. But he did leave, and intended to be gone only a short time until he could recover his composure. The longer he stayed away, the

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harder it became to return. Finally, after an absence of some forty days, he got up courage in the company of another soldier, and turned himself into the military police. He did not know exactly what to expect when he got back to his organization. He knew, of course, that he would be punished for leaving. He also knew it would do him very little good to return to his organization since he had been unable to stay once before, but he did return to the military police, and through them, to the 137th Infantry Headquarters. There he was told he should return to his company, and he told them he could not do it. He was then placed under arrest and remained in arrest until the time of this trial. That is the accused's unsworn statement" (R18)

Accused personally added to the foregoing his own statement that he did not actually turn himself over to the police, but "went into Nancy with the intention of getting caught" (R18).

6. As regards Charge I and Specification, it has been held by the Board of Review that the commission of the offense charged is proved by establishing the existence of these four elements: (1) that accused absented himself from his organization without proper leave; (2) that the organization was under orders or anticipated orders involving hazardous duty; (3) that he received actual notice of such orders; and (4) that at the time he absented himself without leave he entertained the specific intent to avoid hazardous duty (CM ETO 2432, Durie; CM ETO 2473, Cantwell; CM ETO 2481, Newton). The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of the court (CM ETO 5555, Slovik and cases therein cited).

As regards Charge II and Specification, the evidence was not disputed that accused committed the offense charged at the time and place and in the manner alleged. The court's findings of guilty were fully warranted.

7. The charge sheet shows that accused is 19 years of age and was inducted 20 August 1943. No prior service is shown.

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

9. The designation of United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Brance Office of The Judge Advocate General with the European Theater of Operations. 17 JAN 1945 TO: Commanding General, 35th Infantry Division, APO 35, U.S. Army.

1. In the case of Private First Class JOHN BRUCKER, JR. (42022397), Company B, 137th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. Pursuant to the provisions of Circular 210, War Department, 14 September 1943, Section VI, as amended, the place of confinement should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. This may be done in the published court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4987. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4987).

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

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

BOARD OF REVIEW NO. 1 16 JAN 1945

CM ETO 4988

UNITED STATES	)	35TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Oriocourt, France, 17 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Disciplinary Barracks, Fort Leavenworth, Kansas.
Private EDWARD L. FULTON (38522125), Company I, 137th Infantry	)	

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

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

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

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

Specification: In that Private Edward L. Fulton, Company "I", 137th Infantry, did, at or near Neuviller, France, on or about 12 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 was apprehended at or near Nancy, France, on or about 29 October 1944.

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

Specification: In that * * * having received

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a lawful command from Lieutenant Colonel Alfred K. Clark, Infantry, his superior officer, to report to the Commanding Officer, Company "I", 137th Infantry for duty, did, at Alincourt, France, on or about 30 October 1944, willfully disobey the same.

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 Specification of Charge I, except the words "was apprehended", substituting therefor the words "surrendered himself"; of the excepted words not guilty, of the substituted words guilty, guilty of Charge I and guilty of Charge II and its 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 Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. A copy of the charges was served upon accused the day before the trial. Charges should normally be served at least five days before the date of trial. In this instance, since accused stated specifically to the court just prior to his arraignment that he did not object to being then brought to trial and the record of trial showed that his defense was not prejudiced thereby, the Board of Review is of the opinion that no substantial right of accused was thus injuriously affected (United States ex rel Innes v. Crystal 131 Fed (2nd) 576, cert. denied 319 U.S. 755, 87 L.Ed. 1708, Rehearing denied 319 U.S. 783, 87 L. Ed. 1727; CM ETO 3937, Bigrow; CM ETO 4095, Delre).

4. Charge I and Specification: The evidence for the prosecution was substantially as follows:

On 11 September 1944, Company I, 137th Infantry, was assigned the mission of establishing a beach head on the eastern bank of the Moselle River at Neuviller, France (R7,10). Accused, a member of this company, was with his squad at the beginning of the operation on that day, but after his company crossed the river he was absent (R10,12) and his status was described in the company morning report as "AWOL as of 12 Sept 1944" (R9; "Gov." Ex.A). He was not with his organization until 30 October 1944 when he was seen by Lieutenant Colonel Alfred K. Clark, Regimental Executive Officer,

137th Infantry, at the regimental command post (R13), where accused arrived under military police escort (R14).. During the interim between 11 September and 30 October 1944 accused's company was in action with the enemy (R8,11).

5. Charge II and Specification: The evidence, as follows, was undisputed:

On 30 October 1944, at Alincourt, Lieutenant Colonel Clark, above described, ordered accused orally and by way of confirmation in writing to report to his commanding officer, Company I, 137th Infantry, without delay (R13-14; "Gov." Ex.B). There was no enemy action at that time. Accused refused to obey the order and did not carry it out (R14).

6. After his rights were explained to him, accused elected to make an unsworn statement through his counsel (R15). Defense counsel asserted that in the confusion incident to the crossing of the Moselle River, accused jumped into one of the last assault boats to leave the shore and

> "about midway in the stream, the artillery which had been falling heavily about, punctured the boat in several places so that it capsized and all the men were thrown into the river. Some swam to the east bank, some to the west bank, and those who could not swim, drowned".

Accused reached the side from which he had originally set out, was treated at the medical aid station and was returning to the river when enemy artillery forced him to lose control of himself. He did not return to the river, but wandered about from one military installation to another,

> "getting food wherever he could. He at no time travelled a great distance from the vicinity of the river",

although he was, during this period, in the vicinity of the city of Nancy. Eventually accused turned himself in and was returned to his organization (R15-16).

7. As regards Charge I and Specification, it has been held by the Board of Review that the commission of the offense charged is proved by establishing the existence of these four elements: (1) that accused absented himself from his organization without proper leave; (2) that the organization was under orders or anticipated orders involving hazardous duty; (3) that accused received actual

notice of such orders; and (4) that at the time he absented himself without leave accused entertained the specific intent to avoid hazardous duty (CM ETO 2432, Durie; CM ETO 2473, Cantwell; CM ETO 2481, Newton). The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of the court (CM ETO 5293, Killen, CM ETO 4743, Gotschall).

As regards Charge II and Specification, the evidence was not disputed that accused committed the offense charged at the time and place and in the manner alleged. The court's findings of guilty were fully warranted.

8. The charge sheet shows that accused is 23 years of age and was inducted 25 October 1943. 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 designation of United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

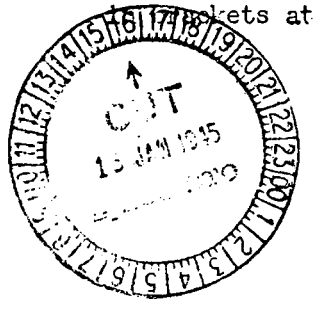
1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 13 JAN 1945 TO: Commanding General, 35th Infantry Division, APO 35, U.S. Army.

1. In the case of Private EDWARD L. FULTON (38522125), Company I, 137th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Pursuant to the provisions of Circular 210, War Department, 14 September 1943, section VI, as amended, the place of confinement should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. This may be done in the published court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4988. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4988).



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

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

BOARD OF REVIEW NO. 1 15 DEC 1944

CM ETO 4993

U N I T E D S T A T E S	36TH INFANTRY DIVISION
v.	Trial by GCM, convened at Headquarters 36th Infantry Division, APO 36, U.S. Army, (France), 10 November 1944, Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio
Private WILEY KEY (7009540), Cannon Company, 142d Infantry	

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

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

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

CHARGE: Violation of the 92d Article of War.
Specification: In that Private WILEY (NMI) KEY, Cannon Company, 142d Infantry, APO 36, U. S. Army did, near TENDON, FRANCE, on or about 26 October 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private RALPH F. FERGUSON, Headquarters Battery, 132nd Field Artillery Battalion, a human being by shooting him in the abdomen with a pistol, U. S. Caliber 45.

He pleaded not guilty, and was found guilty of the Specification, except the words "with malice aforethought, willfully, deliberately, and with premeditation", and not guilty of the Charge but guilty of a violation of the 93rd Article of War. No evidence of pre-

vious convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution showed clearly that accused shot the deceased in the abdomen with a pistol at the time and place alleged, that the deceased died as a result of such shooting and that the act was without justification.

4. After being advised of his rights, accused elected to be sworn and to testify in his own behalf. His testimony, not disputed by any of the prosecution's evidence, disclosed that at the time of the shooting he was extremely drunk, as was also his victim, that he had never had any trouble with deceased, nor any reason to shoot him and did not remember doing so (R23-26).

5. By the words excepted in its findings, the court found that accused, at the time and place described in the Specification, did "feloniously, unlawfully" kill the deceased. The proper allegation for voluntary manslaughter contains also the word "willfully" (See MCM, 1928, Form 88, App.4, p.249). The sentence of ten years' confinement imposed by the court indicates that it intended to find accused guilty of voluntary manslaughter, as such period is the maximum authorized for that offense (MCM, 1928, par.104c, p.99).

Title 18, United States Code Annotated, section 556, page 14, 1943 Cumulative Pocket Part, contains the following:

> "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant * * *".

The foregoing is one of the civil law counterparts of the 37th Article of War (CM ETO 3740, Sanders et al).

It is the general rule that it is not necessary to charge that an offense was committed willfully, unless the

statute defining the same makes willfulness an element thereof (Howenstine v. United States (CCA Cal.1920), 263 Fed. 1). And while it is the general rule that the term "willfully" cannot be omitted from an indictment when the term is part of the statutory definition of the offense, where the facts alleged necessarily import willfulness, failure to use the word is not fatal to the indictment (Rumely v. United States (CCA N.Y. 1923), 293 Fed. 532, certiorari denied (1924) 44 Sup.Ct. 38, 263 U.S. 713, 68 L.Ed. 520; Howenstine v. United States (CCA Cal. 1920), 263 Fed.1). Words which import an exercise of the will, such as "feloniously" and "unlawfully", will supply the place of the word "willfully" in an indictment (Howenstine v. United States (CCA Cal. 1920), 263 Fed. 1; Hensberg v. United States (CCA Mo. 1923), 288 Fed. 370). Under state statutes the word "feloniously" alone is regarded as sufficient to express a felonious intent and must generally be employed (31 CJ, sec.249, p.700, and cases there cited; Edwards v. State, 25 Ark. 444; People v. Thomas (Cal. App.), 208 Pac. 343; Hocker v. Commonwealth, 111 SW 676, 33 Ky. L. 944). In accordance with the foregoing authorities, the Board of Review is of the opinion that the findings of the court, especially when considered in connection with its sentence, sufficiently describe the offense of voluntary manslaughter and that no substantial right of accused has been injuriously prejudiced by the omission therefrom of the word "willfully".

6. The evidence shows that accused was drunk but sufficiently understood the consequences of his act to inquire, soon after the shooting, an officer who accompanied him to the hospital for a blood test, "Is that the place they carried the kid I just shot" (R14).

> "Manslaughter is defined to be the unlawful and felonious killing of another, without malice aforethought, either express or implied and is either voluntary or involuntary homicide, depending upon the fact whether there was an intention to kill or not" (1 Wharton's Criminal Law, 12th Ed., sec.422, pp.637-640).
>
> "Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought" (Ibid., sec.423, p.640).
>
> "Deadly weapon used by accused, the provocation must have been very great in order to reduce the crime in a homicide to that of voluntary manslaughter. Mere use of a deadly weapon does not of itself raise a presumption of malice on the part of the accused; but where such a

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weapon is used in a manner likely to, and does, cause death, the law presumes malice from the act" (Ibid., sec.426, pp.652-655).

The testimony of accused showed he was exceedingly drunk at the time of the shooting. The determination of the question whether his drunkenness fell short of that sufficient to affect mental capacity to entertain the necessary intent was the peculiar prerogative of the court, which question it resolved against accused (CM ETO 3937, Bigrow, and cases therein cited). The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty of voluntary manslaughter, which offense is included in murder (MCM, 1928, par.148a, p.162; CM ETO 3937, Bigrow; CM ETO 3957, Barneclo; CM 165268 (1925), Dig. Ops. JAG, 1912-1940, sec.450(2), p.310).

7. The charge sheet shows that accused is 25 years of age and enlisted 19 January 1940 in the Army of the United States for a period of three years. His period of service is governed by the Service Extention Act of 1941.

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

9. Confinement in a penitentiary is authorized upon a conviction of voluntary manslaughter by Article of War 42 and section 275, Federal Criminal Code (18 USCA 454). However, as prisoners under 31 years of age and with sentences of not more than ten years will be confined in a Federal correctional institution or reformatory, the designation of the Federal Reformatory, Chillicothe, Ohio, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1) and 3a).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 15 DEC 1944 TO: Commanding General, 36th Infantry Division, APO 36, U.S. Army.

1. In the case of Private WILEY KEY (7009540), Cannon Company, 142d Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4993. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4993).

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

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

BOARD OF REVIEW NO. 2 14 MAR 1945

CM ETO 4995

U N I T E D S T A T E S	36TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 36, U.S. Army, 6 November 1944. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 20 years. Loire Disciplinary Training Center, Le Mans, France.
Private First Class ALBERT L. VINSON (34608749), Company I, 143rd Infantry	

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

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings in part. The record 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 75th Article of War.

Specification: In that Private First Class Albert L. Vinson, Company I, 143rd Infantry, being present with his company while it was engaged with the enemy, did, in the vicinity of Xamontarupt, France, on or about 30 September 1944, shamefully abandon the said company and seek safety in the rear.

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

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Charge and Specification. No evidence of previous convictions was introduced. Four-fifths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfiet 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 fifty years. The reviewing authority approved the sentence but reduced the period of confinement to twenty years, suspended the dishonorable discharge until the soldier's release from confinement and designated the Seine Disciplinary Training Center (Paris, France) as the place of confinement.

The proceedings were published in General Court-Martial Orders Number 123, Headquarters 36th Infantry Division, APO 36, U.S. Army, 9 November 1944.

3. The only witness for the prosecution, First Lieutenant Raymond E. Bernberg, testified that on 30 September 1944, Company I, 143rd Infantry, was located in the vicinity of Xamontarupt, France and was tactically before and engaged with the enemy; that he was personnel officer of this organization, having been duly designated by competent authority, and as such he was official custodian of the morning reports of the 143rd Infantry. He identified an extract copy of the "actual" morning reports of this company for the 4th, 23rd and 25th of October 1944, which instrument, WD AGO Form 44, bearing the signature of witness, was received in evidence, without objection of the defense, as Prosecution's Exhibit 1 (R6,7; Pros.Ex.I). The following entries appear thereon:

"4 October 1944. Vinson, Albert L. Pfc 34608749, Fr. Dy to MIA as of 30 Sep/44

23 October 1944. Vinson, Albert L. Pfc 34608749, Fr. MIA to AWOL as of 30 Sep/44

25 October 1944. Vinson, Albert L., Pfc 34608749, Fr AWOL to Abs in conf 36th Inf Div Stockade as of 24 Oct/44".

The defense counsel declined to cross-examine (R7).

4. Accused elected to remain silent (R7). A psychiatric report of examination by Major (then Captain) Walter L. Ford, Medical Corps, Division Psychiatrist (Def.Ex.A) made 3 November 1944, was received in evidence without objection, which contains the following statement:

"On examination, 3 November 1944, I found the following:

'This soldier joined the division on Dec. 23, 1943. During the fighting on the Rapido he

had to go to the aid station for 2 days because of his nerves. He was in the CIs /casual/ company for a few days with exhaustion during the fighting around Velletri. He made the invasion of S. France and got along fairly well until the latter part of Sept. He tells that he then became very nervous and went A.W.O.L. He has a mental age of 10 yrs. (Kent Emergency test). In my opinion he is suffering from: * * * psychoneurosis, anxiety, mild— This is an emotional condition which makes it difficult for this soldier to control his behavior in combat'" (R7; Def.Ex.A).

5. The gravamen of accused's offense was contained in the following, "that he, being present with his company while it was engaged with the enemy, did, * * * on or about 30 September 1944, shamefully abandon the said company and seek safety in the rear", in violation of Article of War 75. The only evidence of the tactical situation of the company is found in the answers of two questions by the sole witness for the prosecution.

"Q. Lt. Bernberg, on or about 30 September 1944 was Company I of the 143rd Infantry engaged with the enemy?
A. They were.

Q. Was the 143rd Infantry tactically before the enemy on or about the 30th of September?
A. They were".

These questions were objectionable because they were leading and, because they incorporated a conclusion which called for an opinion (MCM, 1928, 112b, p.111). His answers left entirely to speculation, the details, circumstances and other essential facts, from which the court could reasonably form its own conclusion of the tactical situation, a question for its sole determination. The evidence fails to prove the duty of the accused, that he neglected to perform his work, that he was with his company, that he shamefully abandoned his organization, that he sought safety in the rear or any overt act or acts of a specific form of misbehavior before the enemy. The testimony of the only witness at the trial fails to identify accused or to indicate his rank, organization, relation to his organization or duty status. The highly important fact that accused was present with his company while it was engaged with the enemy and that he did shamefully abandon the said company and seek safety in the rear is absent from the evidence.

Since there is no evidence in the record of trial showing where the accused was at the time he was alleged to have shamefully abandoned his company and sought safety in the

rear, and since it was not proved that the accused was present with his company while it was engaged with the enemy, and did seek safety in the rear, the finding of guilty of a violation of Article of War 75 cannot be sustained.

6. The allegation that accused, being present with his company while it was engaged with the enemy, shamefully abandoned the company and sought safety in the rear necessarily implies that accused absented himself from his company without leave. In such a case absence without leave under Article of War 61 may be a lesser included offense of an alleged violation of Article of War 75 (CM ETO 5114, Acers; CM ETO 4564, Woods).

The only evidence introduced to prove accused absented himself from his company without leave was the extract copy of the morning report of Company I, 143rd Infantry (Pros.Ex.1) signed by the personnel officer. He identified it as a true extract copy of the actual morning reports and testified that he was designated by competent authority as their official custodian (R6). The personnel officer is authorized to authenticate such extracts and they were properly received in evidence (CM ETO 5437, Rosenberg). The entries were relevant and material and proved his absence without leave on 30 September 1944. The Specification in the instant case does not allege a continuing absence as in CM ETO 4691 Knorr where the Specification alleged that accused "did run away from his company * * * and did not return thereto". The principle of the Knorr case, therefore does not apply, and this accused can be held for absence without leave for only one day. The Board of Review is of the opinion that the record of trial is legally sufficient to sustain a finding of guilty of the lesser included offense of absence without leave on 30 September 1944 in violation of Article of War 61, and legally sufficient to support the sentence.

7. The charge sheet shows that accused is 19 years of age. He was inducted without prior service, at Camp Croft, South Carolina, 9 March 1943.

8. The court was legally constituted. Except as noted above, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons herein stated, the Board of Review is of the opinion that the record is legally insufficient to support the finding of guilty of violation of Article of War 75, but legally sufficient to support a finding that accused absented himself without proper leave from his organization on 30 September 1944 in violation of Article of War 61 and legally sufficient to support the sentence.

9. Confinement in a disciplinary Training center is proper for the offense of absence without leave (AW 42; CM ETO 2432, Durie; CM ETO 2481, Newton). However, the Seine Disciplinary Training Center, Paris, France, as designated in the action, is no longer authorized. The correct place of confinement is the Loire Disciplinary Training Center, Le Mans, France (Ltr., Hq, European Theater of Operations, AW 252, Op TPM, 19 Dec. 1944, par. 3).

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private First Class ALBERT L. VINSON (34608749), Company I, 143rd Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of the Charge and Specification, except so much thereof as involves findings of guilty of absence without leave on September 30, 1944, in violation of Article of War 61, be vacated, and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings, viz: conviction of misbehavior before the enemy in violation of Article of War 75, so vacated, be restored.

3. The legal insufficiency of the record to support the findings, except so much thereof as involves absence without leave, was apparently due to the failure of the prosecution to produce the necessary testimony rather than the unavailability of such evidence. A few appropriately worded questions by the trial judge advocate with reference to the tactical situation, the extent of enemy fire, the location of accused's organization in relation to the enemy and the conduct of the accused, directed to a witness who had knowledge thereof, would very probably have elicited enough evidence to support the court's findings. As there is now no way to remedy the defect in the record, the action taken by the Board of Review and myself is necessary.

4. In view of the reduction in the grade of the offense and the proven offense of absence without leave for one day only, the term of confinement should be reduced to a term appropriate to that offense. The Loire Disciplinary Training Center, Le Mans, France, should be designated as the place of confinement.

5. Inclosed is a form of action designated to carry into effect the recommendation hereinbefore made. Also enclosed is

a draft GCMO for use in promulgating the proposed action. Please return the record of trial with required copies of GCMO.

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

3 Incl:
Incl. 1 - Record of Trial
Incl. 2 - Form of action
Incl. 3 - Draft GCMO

(Findings disapproved in part in accordance with recommendation of Assistant Judge Advocate General. GCMO 118, ETO, 15 Apr 1945)

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

BOARD OF REVIEW NO. 1

15 DEC 1944

CM ETO 5004

U N I T E D S T A T E S	36TH INFANTRY DIVISION
v.	Trial by GCM, convened at Headquarters 36 Infantry Division, APO 36, U.S. Army, 13 November 1944.
Private STANLEY A. SCHECK (11007882), Company K, 141st Infantry	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. 1
RITER, SARGENT and STEVENS, Judge Advocates

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

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

CHARGE: Violation of the 75th Article of War.
Specification: In that Private Stanley A. Scheck, Company K, 141st Infantry, did, in the vicinity of Xamonrupt, France, on or about 7 November 1944, misbehave himself before the enemy by refusing to return to duty with his company which was then engaged with the enemy.

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 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 consisted solely of the testimony of Captain Gregory A. Comnes, Commanding Officer of the Service Company, 141st Infantry. He testified that on 7 November 1944, the 141st Infantry was tactically before the enemy; the 1st and 2nd battalions were on the line and the 3rd in regimental reserve. The Service Company, located near Xamontarupt, France, was serving the fighting troops of the regiment at the time. Witness was in charge of kitchen trains and rear trains of the regiment and of returning men to duty (R6). Accused was one of a group of seven men returned by division military policemen to witness' installation. On 7 November Captain Comnes gave the following order to the group:

> "You will be outfitted here and you will return to your organization" (R7).

Neither accused nor any other member of the group returned to his organization. One member of the group stepped forward and told witness he was not going forward because he was not an infantryman but a chemical mortar man. Witness thereupon said directly to the whole group:

> "any of you men going forward to your organization step over here. * * * I asked them to step forward and come over here to one side" (R7,8)

whereupon the entire group "instead of stepping forward took a step backward". Witness interpreted this action as meaning that they refused to go (R7-8).

4. After he was advised of his rights, accused elected to remain silent. The defense introduced no evidence (R8).

5. The evidence shows a deliberate refusal by accused at the time and place alleged to return to his organization as ordered. The testimony in the case fails to show accused's name, rank or organization. However, his pleas to the general issue admitted his identity (Winthrop's Military Law and Precedents - Reprint, p.276; Cf: MCM, 1928, par.64a, p.51), and the charge sheet, which is part of the record of trial and may be considered upon appellate review (CM ETO 1704, Renfrow, and authorities therein cited), together with the statement in the record describing accused at the opening of the trial (R3), supplied the deficiencies, showing that his organization at the relevant time

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was Company K, 141st Infantry. The testimony showed that the entire regiment, inferentially including Company K, was engaged with the enemy at the time. It thus appears that accused's refusal to return to his organization from the regimental service company which was in support thereof constituted misbehavior before the enemy as alleged in violation of Article of War 75 (CM ETO 3828, Carpenter; CM ETO 4820, Skovan, and authorities therein cited).

6. (a) The record shows (R2) that the trial took place at 11:25 am on the day after the charges were served on accused and only six days after the commission of the offense. Neither accused nor his counsel made any objection to trial at this time. In the absence of indication that any of accused's substantial rights were prejudiced, the irregularity may be regarded as harmless (CM ETO 5179, Hamlin; CM ETO 4004, Best, and authorities therein cited; CM ETO 3937, Bigrow).

(b) First Lieutenant Raymond E. Bernberg, Personnel Officer of the 143rd Infantry who subscribed the affidavit to the Charge and Specification, was appointed and sat as a member of the court (R2). His act was purely administrative and his presence on the court may not be regarded as having injuriously affected accused's substantial rights (Cf: CM ETO 4004, Best).

7. Although the Board of Review is constrained to hold that the record of trial is technically legally sufficient to support the findings of guilty and the sentence, it is noted that the record is far from satisfactory in content and completeness. Its deficiencies in these respects are particularly deplorable in view of the gravity of accused's dereliction, for which the court saw fit to sentence him to life imprisonment. The testimony of the only witness at the trial fails to identify accused in any respect or to indicate his rank, organization, relation to his organization, or duty status. The highly important fact that accused was himself before the enemy is left to be inferred from evidence of his presence with a unit which was "serving" the remainder of the regiment on the line. Likewise, the highly important fact that his company was then engaged with the enemy as alleged, is not adverted to but left entirely to inference from the evidence that the regiment as a whole was so engaged. There is no evidence in the record as to accused's physical and mental condition or as to possible reasons for his refusal to go forward to his organization. The defense asked no questions of the one witness and introduced no evidence. A soldier accused of the very serious offense of misbehavior before the enemy is entitled to have all the available evidence for and against him duly presented to the court so that it may impose a just sentence and so that appropriate authorities will be furnished a basis for the exercise of clemency, if warranted. It is hoped that more serious attention will be accorded these matters in the future.

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8. The charge sheet shows that accused is 25 years of age and states that he was inducted at Boston, Massachusetts, 29 August 1940. (His service period is governed by the Service Extension Act of 1941). No prior service is shown.

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

10. The penalty for misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 15 DEC 1944 TO: Commanding General, 36th Infantry Division, APO 36, U.S. Army.

1. In the case of Private STANLEY A. SCHECK (11007882), Company K, 141st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Particular attention is invited to the comments of the Board in paragraph 7 of its holding with regard to the unsatisfactory state of the record of trial herein. I concur in said comments and urge that serious attention be given to the matters therein mentioned to the end that records of trial, particularly in capital cases, be made as complete as practicable.

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 5004. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5004).

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

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

BOARD OF REVIEW NO. 1

30 JAN 1945

CM ETO 5009

UNITED STATES v. Privates EDWARD W. SLEDGE (34229579) and JOHN L. SANDERS (38423561), both of 570th Ordnance Ammunition Company	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Cherbourg, Manche, Normandy, France, 3 October 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private John L. Sanders and Private Edward W. Sledge, both of the 570th Ordnance Ammunition Company, did, at or near Le Valdecie, France, on or about 1 August 1944, acting jointly and in pursuance of a common intent, forcibly and feloniously, against her will have carnal knowledge of Mrs. Jeanne Renaud, a French woman.

Each accused pleaded not guilty and, all members of the court present at the time the votes were taken concurring, each accused was found guilty of the Charge and Specification. No evidence of previous convictions of accused Sledge was introduced. Evidence was introduced of one

previous conviction by special court-martial of accused Sanders for disobedience of a lawful order of a noncommissioned officer in violation of Article of War 65. All members of the court present at the time the votes were taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding Officer, Normandy Base Section, Communications Zone, European Theater of Operations, approved each of the sentences and forwarded the record of trial for action under Article of War 48, with the recommendation that, since the convictions depended solely upon the testimony of the woman against that of accused and since there was no evidence of actual physical violence, the sentences be commuted to life imprisonment. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as to each accused but, owing to special circumstances in the case and the recommendation of the convening authority, commuted the sentence as to each accused 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 sentences pursuant to Article of War 50½.

3. The following evidence was presented by the prosecution:

Between 1400 and 1500 hours (R10) on 1 August 1944, First Lieutenant Douglas R. O'Hair, commanding officer of 570th Ordnance Ammunition Company, left his organization's bivouac area in the vicinity of Bricquebec, France, to go by jeep to the finance office for the payroll (R7,12). He was accompanied by a driver and his charge of quarters, Staff Sergeant Edward T. Washington (R7,11-12). After they had proceeded about a mile (R12) they met both accused carrying arms (R9) and Private James R. Rascoe, all members of the 570th Ordnance Ammunition Company. O'Hair asked the men what they were doing out of camp and ordered them to return and report to First Lieutenant Gerrit L. Keane, one of his company officers, who was directing the bivouac area (R7-8, 10). O'Hair saw them start towards camp (R9) and continued on his errand (R7).

At about 1600 hours accused arrived at the home of Madame Jeanne Renaud in Le Valdecie, France (R19), a distance of six to ten miles from the place where they were ordered by O'Hair to return to camp (R8-9). They were armed with rifles (R19,20). She was alone and refused their request for cider. When they asked for water, she "gave them the bucket, they helped themselves at the door". She described their subsequent conduct as follows:

> "At that moment the tallest, the worst came into the house asking me if there was any mademoiselles. I replied; 'No, there is none'. They asked me how many kilometers to Cherbourg, I replied saying

twenty-eight. At that moment they offered me ten francs which I refused, at that moment they pushed me in the house. The tallest closed the door. The tallest handed his rifle to his comrade. He took me by the waist and threw me on the bed. They put me on the bed and made use of me, both of them" (R19).

She identified the "tallest" as Sanders, who first had sexual intercourse with her while Sledge pointed the rifle at her mouth (R20). She took the ten francs "under the fear" and did not resist Sanders because she was afraid of the rifle (R21). Sledge then "did the same thing and then he took off my panties" (R20). She tried to scream "but they blocked my mouth with their hands". The "big one" (Sanders) had sexual relations with her twice and the "little one" (Sledge) "once, but * * * nevertheless he has been twice on top of me". While each accused was having intercourse with her the other "was on the side of the bed with his rifle under my nose" and "he had, all the time, the rifle under the nose" (R23). "After that they buttoned up their trousers" which were unbuttoned before and "the little one" (Sledge) made her sit on a chair. Both accused went outside. She closed the door and went outside where "the tallest", holding his rifle in a "port arms" position, said, "'Come here, come here'". He then "sent his comrade to get ahead of me and to give me ten francs". At that moment "two young fellows arrived and this is how I was liberated" (R20), because both accused then "went across the fields running" after having been at her house and in her yard "a good half hour" (R22). The "young fellows" referred to were neighbors who lived not far away (R23).

Around 1630 or 1700 hours Privates Freeman Sanders and Allen W. Pennix, both of the 570th Ordnance Ammunition Company, left their bivouac area in a truck to get water. At a place about five or six miles from the area they met both accused (R15,16,17) who were armed with "a carbine or 03" (R17). Accused joined them and rode to the watering place and back to camp where Freeman Sanders, who was driving, "left them off a block before I got to the company" (R17), at which time most of the company were at mess (R18), which had commenced at 1800 hours (R14).

When O'Hair and Washington returned to camp at about 1730 hours, accused and Rascoe had not returned (R7-8) and had not reported to Keane (R10). Washington made a check of the company area and examined the tents in which they slept without finding them (R12-13) Both accused were seen later by First Sergeant Gerald T. Howell who met them in the company area as they were coming toward the mess hall "to six o'clock chow" (R14).

Later O'Hair received a report that a "Madame Renaud" claimed to have been raped. She came to the camp and, after many "line-ups"

were made in which they "mixed the men up in the company", she positively identified both accused as the men concerned (R8,21). The evening following the attack upon her by accused, she went to a doctor under whose care she remained at the time of the trial but would be "finished this week". As to her condition, she stated, "It's alright now, sir, but I have been hurt" (R20-21).

4. The following evidence was presented on behalf of the defense:

Sergeant Major Frank Bannister, 570th Ordnance Ammunition Company, saw both accused "before supper" the first day that they "moved into the area", but could not say whether it was one, two, or three hours before supper and was not positive whether it was "the 31st /of July/ or 1st /of August/" (P24-26). Staff Sergeant James Alonzo, 570th Ordnance Ammunition Company, saw both accused "and some more fellows lying around" in the new bivouac area on 1 August 1944 but was uncertain whether it was in the midafternoon, late afternoon, or early afternoon (R26-27). Private Jackie Moore, 570th Ordnance Ammunition Company, was engaged in pitching tents and different details with both accused all day on 1 August 1944 and saw accused Sanders "between dinner time and supper time quite often" (R28). During the afternoon Moore left Sanders, who was in front of his tent reading, and went to another tent where he read "Strange Fruit". When Sergeant Washington came around looking for Sledge and Sanders, Moore told him "to look in their tent". He saw "both of them quite often that afternoon" and between five o'clock and five-thirty asked Sanders "wasn't he going for chow". Sanders, who was then "laying in the tent" and "was half asleep and half awake", answered, "No" (R28-30,31).

After being advised of their rights, each accused elected to make a sworn statement (R32-33).

Sanders testified that, on 1 August 1944, in the afternoon he left the company area with Sledge and "Roscoe". They walked a mile or two and were stopped by their company commander, Lieutenant O'Hair, who told them they "better beat him back to the area". They turned around and "doubled timed to the top of this hill" where they met the water truck, in which were Freeman Sanders and Pennix. They went along with the truck to the water point and got back to the company area with the truck at about four-thirty or quarter of five (R33-34), where he

> "got in the tent with Private Jackie Moore, I pitched tent with him. I told him don't wake me up for supper because I wasn't hungry" (R34).

He saw Madame Renaud on one occasion near his "old bivouac area", but did not see her on 1 August 1944 and never had intercourse with her (R35)

Cross-examined by the prosecution, he stated that the move to the new bivouac area was made on 31 July 1944 (R35). On the afternoon of 1 August 1944 he was armed with a carbine. Sledge had a weapon, but what kind he did not know. He was in Sledge's company all afternoon until they returned to camp (R36).

Examined by the court, he gave the time of their leaving camp as about two-thirty or three o'clock and the time they got back on the water truck as about four-thirty to quarter of five (R36-37).

Sledge testified that they left their old bivouac area for the new one on 31 July 1944 (R37). On the afternoon of the day following at about two-thirty or three o'clock he went for a walk with "Roscoe" and Sanders. After going about two miles they were stopped by Lieutenant O'Hair who "told us to report back on the double". "Roscoe" went on ahead of them, and when the water truck came along he and Sanders went with it to the "water point" and arrived back at camp at four-thirty or quarter to five (R38).

Cross-examined, he stated he was armed with a carbine that afternoon and that it was "two or three o'clock" when they met Lieutenant O'Hair (R40,43). The following questions and answers are relevant:

"Q. The truck went down the paved road, didn't it?
A. Yes, sir.

Q. It went by the home where this woman lives?
A. No, sir, I don't even know where the place is.

Q. It went by your old bivouac area?
A. I don't know, sir, I don't know where it was.

Q. You know where you were camped before you moved to this new place, don't you?
A. No, sir.

Q. You don't remember where you were camping before?
A. No, sir.

Q. Do you remember changing camps?
A. I remember when I left, I don't know where the old bivouac area was now, because it was along time after we moved.

Q. You remember when your outfit changed camps about the 1st of August?
A. Yes, sir.

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Q. And when you left camp on that afternoon you left from the new camp didn't you, you just moved into this camp you went out?
A. Yes, sir.

Q. How long had you been at this camp you went out of?
A. We had been there all day, a day. We had been there from the time we moved there late until the next day.

Q. Now, you remember where your old camp was?
A. Nc, sir.

Q. You have no idea about that?
A. No, sir.

Q. So you don't know whether you went by your old camp or not in the truck?
A. No, sir" (R40).

He remembered he talked with "the men that investigated this case", but did not tell them he never got in the truck. There was "a mistake somebody changed the statement or something". Handed "Pros.Ex.A" and asked if that was the statement he made at the time this case was investigated, he replied, "No, sir, someone changed the statement" (R40). Questioned further, he indicated that he made the mistake, giving the following unintelligible explanation:

> "I made a mistake because I told Defense Counsel, the Captain there that the other statement from the time Sergeant Pennix picked us up",

and

> "told another, I made another statement and the Defense Counsel and write a statement about it because I want to get it straight" (R41).

These questions and answers followed:

"Q. During the whole time you and Sanders were together?
A. Yes, sir, Private Sanders together.

Q. What time did you get back to camp?
A. It was pretty late when we got back.

Q. How late?
A. Let's see, it was long about four-thirty or quarter to five.

Q. What were you doing all the time from the time you met the Lieutenant until about four-thirty or quarter to five?
A. We caught the water truck and about the time was so messed up and none of us had a watch. I'd say about that time but I don't know exactly.

Q. Were you on the water truck a couple hours?
A. We went back to camp and laid down.

Q. I just asked if you were on the water truck a couple of hours?
A. A pretty good while. I couldn't state exactly when we got on and got off, sir."

He agreed that Lieutenant O'Hair told him to report to Lieutenant Keane, but he did not report to him - "We just didn't report * * *"(R42-43). On redirect examination, he stated that the truck picked him up about three o'clock, that he did not have intercourse with Madame Renaud that afternoon or any previous afternoon, that he had seen her before when she was "watering the calves" at the old bivouac area, and that on 1 August 1944 he did not see her (R44).

5. Rebuttal evidence, as follows, was then introduced by the prosecution:

First Lieutenant William F. Redmon, Transportation Corps, Headquarters Normandy Base Section, appointed investigating officer in this case, interviewed Sledge at the provost station tent called "DTC Number 5", situated about eight miles from Cherbourg, and fully explained to him his rights (R44). He showed him a copy of a statement he had previously made. Sledge said he remembered making it, but did not then read it, and Redmon did not know whether he could read or not. Redmon identified "Pros.Ex.A" as the copy referred to. It was offered in evidence, but the defense's objection thereto was sustained and, at the request of the defense, the law member stated regarding the statement and all reference thereto:

> "It's going to be difficult to erase that from the minds of the court. However, it is ordered that they be stricken and not considered by the court" (R45).

6. Pennix was recalled by the court and further testified that he first came in contact with accused when he

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"saw Sanders and Sledge and I told them the company had moved out. They better get back immediately. I picked them up, went to get water, filled my tank and came back. They got off about a block before I got to the company".

They remained with him from the time he picked them up in the "early afternoon" until he let them off the truck and they were "at least an hour and a half with me". The place where he picked them up was "in the valley there when you go over to the dirt road" and "between five and six miles" from camp (R46-47). It was also "between a mile and a half and two miles from the old bivouac area down to the point I picked them up". He answered questions as follows:

"Q. They were going from your new bivouac area, they were beyond the old bivouac area?
A. That's right, sir.

Q. Do you remember, now, what time you left the camp to go after water?
A. No, sir, I don't. I know they were serving chow when I went after water.

Q. You mean noon chow or supper?
A. Supper. We took a move from our old area that noon. We had dinner at our old area, we had one meal in our new area.

Q. Then you picked them up after supper, not before supper?
A. Yes, sir, in other words the rest of the boys were eating.

Q. Then you went down the road and picked them up?
A. Yes, sir.

Q. As I understand it, Private Pennix, it's about seven miles from your new bivouac area to the water point?
A. Between five and six, sir.

Q. If they were eating supper when you left to go after water how long do you think it would take you to drive that five miles?
A. I'd say to drive a trailer, I'd say about a half hour. See a whole lot of convoys are on the road and they're ammunition trucks, see.

Q. So the time you waited an hour and a half for water and drove back another half hour it was quite late when you had supper yourself, wasn't it?
A. Yes, sir, and I didn't see Sanders no more when I got back. Sergeant backed my trailer up to supply, that's when I saw Sanders again.

Q. You picked these two soldiers up near your old bivouac or far away?
A. It's near my bivouac. In other words when I come out of the old bivouac you make a turn to the left and a turn to the right and go out that dirt road.

Q. They were near your old bivouac area?
A. Yes, sir" (R47-48).

7. Further evidence was then presented by the prosecution, by the defense, and at the request of the court, as follows:

For the prosecution, Keane described the manner in which Madame Renaud picked out Sledge, "Roscoe", and Sanders from an inspection parade of 15 to 25 men "lined up", which took place five to seven days after the alleged offense was committed (R48). Called by the court,"Roscoe" testified he was walking with accused on 1 August 1944, left them for a while, and did not ride in the water truck. He did not remember what time it was when his company commander ordered them back to camp. While he was in their company "nothing took place" (R49-50).

For the defense, Howell stated that the water truck made two trips on 1 August 1944 (R50), one early in the day and one "sometime before supper in the late afternoon". He met accused in the company area at about 1800 hours (R51).

For the prosecution, Pennix could not fix the time definitely when he got back with accused, saying, "I'm up there where it's a whole lot of heat, I don't know. Anybody's liable to forget". After being shown a written statement which he had previously made regarding the matter (R52), he fixed the time as 6:30 pm when he returned to camp, was loading supplies, and again saw accused (R53).

8. The crime of rape is defined as the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not. Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference

may be drawn that she did in fact consent (MCM, 1928, par.148b, p.165). But where the female yields through fear of death or great bodily harm, there is constructive force and the consummated act is rape, even in the absence of actual physical force and actual physical resistance (52 CJ, sec.32, p.1024; 1 Wharton's Criminal Law, 12th Ed., sec.701, pp.942-943). Madame Renaud positively identified both accused at the trial as the two colored American soldiers who came to her house on the afternoon in question and asked for cider. Her description of the rape committed upon her person by each accused in turn while the other held a rifle to her head discloses a pattern of conduct noted in other cases in which rape succeeded almost immediately an uninvited or unlawful entrance into the home of the victim (CM ETO 5363, Skinner, and authorities therein cited; CM ETO 4234, Lasker and Harrell). The following language in CM ETO 3933, Ferguson and Rorie (pp.10-11) governs the instant case:

> "The evidence in this case presents a pattern which has made its unwelcome appearance with increasing frequency since the invasion of the continent of Europe by American military forces in cases wherein colored American soldiers are charged with the heinous crime of rape of French female citizens. Cases of this type show the victim in an apparently passive, non-resistant attitude at the time of the actual intercourse or at least exhibiting only a minimum of resistance. However, such non-inculpatory evidence is but one small facet of the complete evidentiary matrix, which cogently reveals that the woman has been reduced to a state of submission by accused's threatening and menacing use of firearms and other lethal weapons, has often suffered personal violence and physical injury and has been placed in fear of her life or great bodily harm. Under such influences she has submitted to intercourse (CM ETO 3141, Whitfield; CM ETO 3709, Martin; CM ETO 3740, Sanders et al; CM ETO 3859, Watson and Wimberly; CM ETO 4017, Pennyfeather; CM ETO 4194, Scott). Of such situation the Board of Review has commented thus:
>
> > 'It is apparent from the foregoing that an accused may be guilty of accomplishing rape by mere threats of bodily harm as distinguished from rape by means of actual force and violence. In each instance the offense must be consummated without the voluntary consent of the victim. Rape accomplished through force

and violence ordinarily requires proof that the victim exercised all of her powers of resistance, consistent with the surrounding circumstances. Such offense assumes that the victim does resist and her opposition is overcome by physical force of her assailant. Rape accomplished by threats of bodily harm assumes that she does not resist but upon the contrary that she is prevented from doing so through fear caused by the assailant's threats to inflict upon her great bodily harm (People v. Battilana, ---Cal.App. (2nd) ---, 128 Pac.(2nd) 923) (CM ETO 3740, Sanders et al)'".

In this instance it was not material that the victim's physician did not testify regarding his examination of her genitals following the alleged attack (CM ETO 4661, Ducote, and authorities therein cited).

The evidence indicates that on 1 August 1944 at 3:00 pm at the latest accused were about one mile from their bivouac area when they were ordered to return by Lieutenant O'Hair. At about 4:00 pm they were at Madame Renaud's home three to seven miles away asking for cider. At about 4:30 pm, each having accomplished her rape, they left on the run as young men of the neighborhood approached. At about 5:00 to 5:30 pm they were two miles from her home where they were picked up by the water truck, which had left the bivouac area at 4:30 to 5:00 pm, according to its driver and his assistant (R15-17). Accused returned to camp with the truck. The testimony of each accused disclosed that he had seen Madame Renaud before and knew where she lived near the bivouac area from which their organization moved the day before the crimes were committed. The weakness of the alibi of each accused arises from its failure to explain how they both happened to be picked up by the water truck at about 5:00 to 5:30 pm at a place about five or six miles from their bivouac area and significantly within two miles of Madame Renaud's home after they had started back for camp, as ordered by their company commander at 3:00 pm when only one mile from camp. Both accused testified with surprising definiteness as to the time they left camp, 2:30 to 3:00 pm (R36,38) and the time they returned to camp with the water truck, 4:30 to 4:45 pm (R33-34,36,38), but as to all other references to time that afternoon they were vague and uncertain. As Sledge expressed it, the time "was messed up and none of us had a watch" (R42). Accuseds' identity as the culprits was established by substantial evidence (CM ETO 3200, Price; CM ETO 3837, Bernard Smith). In accordance with the foregoing authorities, the court was fully warranted in finding accused guilty as charged.

9. The charge sheet shows the following concerning the service of accused:

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Sledge is 23 years of age and was inducted 19 August 1942 at Fort Benning, Georgia.

Sanders is 22 years of age and was inducted 5 December 1942 at Dallas, Texas.

Each accused was inducted to serve for the duration of the war plus six months. Neither had prior service.

10. 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 sentence as confirmed and commuted.

11. 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). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 Jun 1944, sec.II, pars.1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 30 JAN 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Privates EDWARD W. SLEDGE (34229579) and JOHN L. SANDERS (38423561), both of 570th Ordnance Ammunition Company, 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 as confirmed and commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have the 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 5009. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5009).

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

(Sentences as commuted ordered executed. GCMO 38, ETO, 6 Feb 1945)

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

BOARD OF REVIEW NO. 2

12 DEC 1944

CM ETO 5010

U N I T E D S T A T E S	)	IX AIR FORCE SERVICE COMMAND
	)	
v.	)	Trial by GCM, convened at Langford Lodge, Ireland, 9 August 1944. Sentence: Dismissal and total forfeitures.
	)	
Captain JOHN V. GLOVER (O-664567), 13th Replacement Control Depot, formerly 313th Air Transport Squadron, 31st Transport Group	)	

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

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: In that Capt. JOHN V. GLOVER, 13th RCD, formerly 313th Air Transport Squadron, 31st Transport Group, AAF Station 519, IX Air Force Service Command, did at AAF Station 236, on or about 29 May 1944, attempt to take off an aircraft for AAF Station 519, without securing a proper clearance thereof in violation of Flying Bulletin No. 11, Hq., USAAF UK dated 8 December 1943.

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(68)

Specification 3: In that * * * did, at and in the vicinity of Antrim, North Ireland, on or about 29 May 1944, drink intoxicating liquor with Technical Sergeant James H. Connor, an enlisted man in the Army of the United States.

CHARGE II: Violation of the 85th Article of War.

Specification: In that * * * was at AAF Station 236, on or about 29 May 1944, found drunk while on duty as pilot of an aircraft.

CHARGE III: Violation of the 69th Article of War. (Finding of not guilty)
Specification: (Finding of not guilty)

CHARGE IV: Violation of the 64th Article of War. (Finding of guilty of Violation of Article of War 96. Disapproved by reviewing authority)

Specification: (Finding of guilty by exceptions and substitution - disapproved by reviewing authority)

He pleaded not guilty and was found not guilty of Specification 1, Charge I, and of Charge III and its Specification; guilty of Specifications 2 and 3, Charge I, and of Charge I; guilty of Charge II and its Specification; and guilty of the Specification, Charge IV, except the words "willfully disobey the same", substituting therefor the words "failed to obey", of the excepted words not guilty, of the substituted words guilty, and of Charge IV not guilty, but guilty of violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, IX Air Force Service Command, approved the sentence, recommended that the dismissal be suspended and the forfeitures be reduced to $100.00 per month for six months, and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, disapproved the substitued findings of guilty of Charge IV and its Specification, confirmed the sentence, and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The prosecution showed that accused is a Captain, Air Corps, United States Army, and that on 29 May 1944 he was assigned to the 313th Air Transport Squadron, 31st Transport Group, Army Air Force Station 519 (R11; Stipulation). On that date accused flew, as pilot, a plane, "a C-53 Number 878", from Station 519 to Station 236 (Toome, Ireland). He arrived at his destination at approximately noon.

With him, as co-pilot on this trip, was Technical Sergeant Connor, a qualified pilot with eight months' service in the American Air Force and two and one-half years in the Canadian Air Force (R10,13, 43,44,49). After lunch, accused met Connor by prearrangement at Antrim, a town about 12 to 15 miles distant from the station. In this town, the two visited "several pubs" where accused, according to Connor, drank beer and whiskey. Connor said that he drank "at the same time that Captain Glover had something", and that "we were standing at the bar". They visited three "pubs" and accused had more than two drinks, Connor believed. Accused had something to drink at each place (R44,45). They left that town about six o'clock and returned to the station (Station 236) (R45). Later, sometime between 7:30 and 8:30 o'clock, that evening, accused went to the control tower, at Station 236, "for a clearance" of his plane to fly to his home station (R8; Pros.Ex.1). Flying Bulletin No. 11, Headquarters, United States Army Air Force, United Kingdom, 8 December 1943, of which the court took judicial notice (R21), requires that Form No. 1-E, attached thereto, be completed, in duplicate, before an aircraft be allowed to take off on a training, service or other nonoperational cross-country mission (flight) from any station in the United Kingdom. This aircraft clearance form requires the signature of the flight control officer before it is completed (R8-9; Pros.Ex.1). Staff Sergeant Justin McCarthy, 3rd Combat Replacement Center, was on duty in the control tower. First Lieutenant Benjamin F. Gregory, 34th Station Complement Squadron, was on duty as flying control officer and was, "the one to have authority to sign the clearance" (R9,10,12,21,23). He was at supper at the time (R8,11). McCarthy assisted accused by partially completing the clearance form. He was close to accused and smelled liquor, "not bad, but you could smell it", on his breath. He said further, with respect to accused:

> "His appearance was all right, the appearance of an officer and he did not stagger, he was in a very jovial mood. I just could say that he was drinking and was under the influence of liquor" (R9).

McCarthy "went down" to get the weather check for the clearance. He spoke to Lieutenent Gregory who was returning (R10). Gregory talked to accused, at 2025 hours. Accused told him he was ready to fly back to his station; Gregory "suggested" that accused spend the night "there" and fly back in the morning (R11). Gregory described accused's condition:

> "Glover did not stagger, but he did appear to be under the influence of liquor. He did not appear normal, his voice was loud and high, and he was not too coherent and very jovial".

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Lieutenant Gregory told accused that he "would not allow him to take off that night (R11). He did not "grant Captain Glover a clearance" (R12,19). After this conversation, accused went out the door and got into his plane. The engines of number 878 "started up", and sitting in the pilot's seat, he taxied past the control tower (R12,14). After passing the control tower, he turned into a take-off position and started down the runway. He moved off the runway, however, and went to the take-off point a second time. During these maneuvers, the control tower attempted to stop accused by contacting him by "RT, by radio", by shooting 10 red flares at him, also by flashing the red altes light (R9,15,16,39,46,54,55). Radio contact was finally established and the ship was told to hold its position and not to move. Accused did not start on a second run down the runway (R16,17, 31,32,46,47). The plane was taken back to the dispersal area. Accused shut off the engines and got out (R16,47). Major Frederick R. Howard, Headquarters Squadron, Station 216, saw accused shortly after this incident. Asked his opinion as to accused's sobriety, he testified that that was "a rather hard question to answer whether a man was sober or not, but the man" (accused) "was in no condition to fly * * * There was a certain smell of liquor on his breath and his speech was heavy and he was not responsive to me" (R21,22). Accused was seen, when in the control tower, by Sergeant Leif T. Graae, 34th Service Group. He testified:

> "For a little while I did not realize that Captain Glover was under the influence of alcohol but as the time went by, maybe ten minutes, I did, * * * Captain Glover's face was slightly flushed * * * I would say that Captain Glover was talking to much and joking around too much" (R51,53).

Captain Bill Wright, 3rd CCRC Group, saw accused that night. He said he had formed an opinion "as to the state of intoxication of the accused" which he described:

> "He was not staggering but he was not all sane mentally, but he appeared dazed and sad looking * * *. He made remarks such as 'Oh Lord' and kept saying that over and over again" (R54,59).

4. The rights of accused as a witness were explained to him and he elected to remain silent (R67). He called three character witnesses: Captain William S. Campbell, 45th "ADG", Station 519, who had known accused as the adjutant of accused's organization since 1942 (R63), and Major H. H. Clark and Major Lewis Muldrow, both of the 4th BAD, Station 802 (R65,66). These officers had all known accused socially and at work. They described him as temperate, a moderate drinker, and a very efficient officer, "the most popular in the group", held in high esteem by all (R63-66).

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5. The evidence of the prosecution, thus introduced, and undisputed, leaves no doubt as to the guilt of accused of the charges and specifications of which he was found guilty, as modified by the reviewing authority.

He did make an attempt at the time and place, as alleged in Specification 2, Charge I, to take off an aircraft without securing a proper clearance thereof. In fact he was refused any clearance. This was in violation of Flying Bulletin No. 11, Headquarters, United States Army Air Force, United Kingdom, 8 December 1943. The regulations set forth in this bulletin had been in effect for over six months and accused, as an experienced pilot, must have been familiar with them since he had doubtless been required to obtain such clearance before taking off on prior occasions. In fact, the evidence shows that on this occasion accused himself went to the control tower and sought proper clearance. By this act he shows that he was familiar with this regulation. His attempted violation of this regulation was a violation of Article of War 96, as charged.

Specification 3, Charge I, alleges that accused did at the time and place alleged, drink intoxicating liquor with an enlised man. The enlisted man was Technical Sergeant James H. Connor and he himself gave ample testimony to support the allegations of this Specification. Such conduct was a violation of Article of War 96, as charged (Bull. JAG, Vol II, No.9, Sept. 1943, p.342, Sec.453 (9) CM 234558 Field, 21 BR 41).

The proof, finally, shows that accused was found drunk while on duty as pilot of an aircraft at the time and place, and as alleged in the Specification, Charge II. This conduct is charged as an offense under Article of War 85. As to the fact that accused was drunk within the meaning given by the Manual for Courts-Martial, 1928 (par.145,p. 160) there can be no doubt. The quality or degree of intoxication which brings one within the scope of Article of War 85 is:

> "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties" (MCM, 1928, par.145, p.160).

Accused, on the evidence, was certainly not grossly drunk, perhaps at the time he was "found" he was not even very drunk. But it is clear that he was not in that full possession of his faculties which is required of every officer on duty, particularly of a pilot who is responsible for the lives of the crew aboard and the moneitary investment involved in an airplane. As to the question of whether accused was on duty, an essential element in this particular offense, there was no direct evidence. But here the accused himself, at the time he was found in this condition, was attempting to obtain clearance and to take off in an Army plane for his home station. It is impossible to conceive an occasion when an Army Air Force pilot could fly

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an Army plane and not be on a duty status at least with respect to the safety and proper handling of the plane. In accused's drunken condition, and his attempt to take off in an Army plane while in such condition, is found an inherent violation of that particular duty status. It was incumbent on the prosecution to show no more.

6. Accused is 28 years of age. He enlisted as an Aviation Cadet 22 January 1942, was discharged 6 September 1942 to accept a commission as second lieutenant on same date. 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 as approved by the reviewing authority.

8. Dismissal is authorized as punishment for an officer for violation of Article of War 85, and for violation of Article of War 96.

Judge Advocates

Judge Advocates

Judge Advocates

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 12 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Captain JOHN V. GLOVER (O-664567), 13th Replacement Control Depot, formerly 313th Air Transport Squadron, 31st Transport Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5010. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5010).

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

(Sentence ordered executed. GCMO 148, ETO, 22 Dec 1944)

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

BOARD OF REVIEW NO. 2

17 JAN 1945

CM ETO 5012

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Privates ROBERT L. PORTER (34759817) and WILLIS B. DANIELS (33799630), both 582nd Port Company, 521st Port Battalion, Transportation Corps	Trial by GCM, convened at Cherbourg, Manche, France, 2 November 1944. Sentence: Porter: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. Daniels: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

PORTER

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Robert L. Porter, 582nd Port Company, TC, 521st Port Battalion, TC, Cherbourg, France, did, at 9 Rue des Moulins, Cherbourg, France, on or about 2 September, 1944, with intent to commit a felony, viz, rape, commit an assault upon Mme. Yvonne Gain, by willfully and feloniously striking the said Mme. Yvonne Gain about the head and neck and seizing her by the throat.

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Specification 2: In that * * * did, at 9 Rue des Moulins, Cherbourg, France, on or about 2 September 1944, unlawfully enter the dwelling of Mme. Yvonne Gain, with intent to commit a criminal offense, to wit, rape, therein.

DANIELS

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

Specification: In that Private Willis B. Daniels, 582nd Port Company, TC, 521st Port Battalion, TC, Cherbourg, France, did, at 9 Rue des Moulins, Cherbourg, France, on or about 2 September, 1944, unlawfully enter the dwelling of Mme. Yvonne Gain, with intent to commit a criminal offense to wit, rape, therein.

Each accused stated in open court that he did not object to a common trial. Each 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 Charge and specifications against him. Evidence was introduced of four previous convictions by summary court of accused Porter, one for insubordination in violation of Article of War 96, one for absenting himself without leave from his place of duty after having repaired thereto in violation of Article of War 61, one for failure to repair at the fixed time at the properly appointed place of assembly for reveille in violation of Article of War 61, and one for wrongfully appearing in the company area in improper uniform in violation of Article of War 96; and by special court-martial for disorderly conduct in uniform in a public place and disrespect to a superior officer in violation of Articles of War 96 and 63. Evidence was introduced of two previous convictions by summary court of accused Daniels, one for absence without leave for one day and one for failure to repair at the fixed time to the properly appointed place for troop movement, both in violation of Article of War 61. 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 such place as the reviewing authority may direct, Porter for 25 years and Daniels for ten years. The reviewing authority approved the sentence of each, 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. For the prosecution, Madame Yvonne Gain, a Frenchwoman 51 years of age, testified that on 2 September 1944 the two accused, neither of whom she had ever seen before, came to her

attic room on the third floor of 9 Rue des Moulins, Cherbourg, France, and knocked at the door (R8,12). When she did not answer, they called "Mademoiselle! Mademoiselle!", pushed the door, broke the lock and entered the room (R8). Porter, who entered the room first, then seized her and put her down on a bed, holding her by the throat. She defended herself to the best of her ability and in the struggle Porter threw her to the floor and put his finger in her mouth. She eluded his grasp and succeeded in going to the window to open it. Porter then drew a knife and, according to the prosecutrix, "was trying to wound me". During her struggles with Porter, Daniels was engaged in closing the window and in trying to quiet Mme. Gain's dog. Both accused then left the room and almost immediately thereafter the police arrived (R9). After pursuit and search, Daniels was apprehended coming down the stairs of a nearby building and Porter was found under a bed in a room of a house not far from where Mme. Gain lived (R13,17,19). The prosecutrix identified both accused to the military police before they were taken into custody (R13,19). Two knives were found in Porter's possession at the time of his apprehension (R21). There was testimony that both were "under the influence of liquor" at this time, they were not steady, but could stand by themselves (R21).

M. Julian Lecerf, whose house was some twenty-five yards away from the room occupied by Mme. Gain, testified that he heard screams and calls for help emanating from Mme. Gain's room on 2 September 1944. He also heard a dog barking. As a result, he called thepolice. He was present at the time Daniels was later taken into custody (R12,13).

It was shown that Mme. Gain received a black eye and scratches on her cheek as the result of the encounter (R10, Pros. Exs. A,B). Various witnesses testified that her face, hands and neck were bleeding shortly after the incident (R14,15,18). However, it was developed on cross-examination of the prosecutrix that Porter at no time lifted her dress while struggling with her and that he did not touch her private parts nor remove his penis from his trousers. Daniels did not touch her at any time. As she had no knowledge of English, she did not understand anything which the accused said to her (R11).

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

5. Each accused was charged with housebreaking and, in addition, accused Porter was charged with assault with intent to commit rape. The crime of housebreaking is defined as unlawfully entering another's building with intent to commit a criminal offense therein (MCM, 1928, par.149e, p.169). Competent, uncontradicted evidence shows that the two accused entered the prosecu-

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.rix' room by pushing open the door after breaking the lock and it may be inferred that this act was done without the prosecutrix' consent. Under these circumstances, there can be no doubt that the entry was unlawfully made. Nor can there be any doubt that Mme. Gain's room was a "building" within the meaning of that word as used in that portion of the Manual for Courts-Martial which defines the offense of housebreaking. Thus, the only question remaining with respect to the proof of this offense is whether the entry into the room was accompanied by an intent to commit the criminal offense of rape therein, as alleged. In this connection, the evidence shows that, after gaining entry, Porter seized the prosecutrix and threw her on the bed while Daniels directed his efforts towards closing the window. A rather violent struggle between Porter and the prosecutrix ensued and the evidence indicates that, during this struggle, Porter attempted to prevent her from making outcry by putting his finger in her mouth. In the meantime, Daniels was attempting to silence the prosecutrix' dog. Although it does not appear that Porter attempted to fondle the prosecutrix or that he removed his penis from his trousers, his whole course of conduct, judged in the light of human experience, indicates that the purpose of both accused in entering the room of the prosecutrix was to have carnal knowledge of her by force and without her consent (Cf: CM ETO 3750, Bell). The evidence summarized above would also support the inference that Daniels, although he did not touch the prosecutrix any time, entered the room with a like intent. In any event, Daniels, by his actions, aided and abetted Porter in his unlawful entry and may be held guilty of the offense alleged as a principal (CM ETO 1453, Fowler). The court's findings that both accused were guilty of housebreaking in violation of Article of War 93 were therefore proper.

The evidence is also legally sufficient to support the court's finding that Porter was guilty of assault with attempt to commit rape, as alleged. It is clear that he assaulted the prosecutrix and the evidence previously discussed justifies the inference that such assault was committed with the intent to commit rape. An assault with intent to commit rape being shown, the fact that accused voluntarily desisted does not constitute a defense (MCM, 1928, par.149, p.179).

6. The charge sheet shows that accused Porter is 22 years of age and was inducted at Fort Benning, Georgia on 29 September 1943, and that accused Daniels is 34 years of age and was inducted at Philadelphia, Pennsylvania, on 21 September 1943. No prior service by either accused is shown.

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

8. Confinement in a penitentiary is authorized for the offense of housebreaking (AW 42; sec.22-1801, Ch.18, Title 22, D.C. Code, 1940 Ed.). 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).

Judge Advocate

Judge Advocate

Judge Advocate

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(80)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 JAN 1945 TO: Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, APO 562, U. S. Army.

1. In the case of Privates ROBERT L. PORTER (34759817) and WILLIS B. DANIELS (33799630), both of 582nd Port Company, 521st Port Battalion, Transportation Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5012. For convenience of reference please place that number in brackets at the end of the orders: (CM ETO 5012).

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

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

BOARD OF REVIEW NO. 2

6 JAN 1945

CM ETO 5017

U N I T E D S T A T E S	LOIRE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private JAMES E. LEWIS (33730455), 4007th Quartermaster Truck Company (TC)	Trial by GCM, convened at Le Mans, France, 9 October 1944. 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, HILL and SLEEPER, Judge Advocates

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

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

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

Specification: In that Private James E. Lewis, 4007th Quartermaster Truck Company, (TC), APO 350, U.S. Army, did, at Allee Marguerite, France, on or about 29 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Jeanne Guillerm, 7-6 Rue du Bois, Giberville, Calvados, France.

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

Specification: In that * * * did, at Allee Marguerite, France, on or about 29 August 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection by inserting his penis into the mouth of Jeanne Guillerm.

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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 charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for 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 the provisions of Article of War 50½.

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

Jeanne Guillerm, 18½ years old (R22), testified that she was a refugee residing on 29 August 1944 at 7 6 Rue du Bois, Giberville, France. On the above day she left for Caen, about four kilometers, to carry some food and clothing to her brother. She signaled several American vehicles for a ride and finally about noon a truck driven by accused stopped, she got in and they drove on till on arriving at Neuf Chatel, this driver took a new road telling her it was a short cut. Only she and the accused were in the truck. The truck was driven slowly through some woods and accused endeavored to talk with her but she did not understand him. He showed her pictures of naked women and she then understood what he wanted but refused. He then stopped the truck and tried to kiss her but she pushed him back. The truck was driven "into a path of the wood" and he "approached me once more and I called 'Mama'", at which accused took her by the throat with both hands and kissed her still choking her. She felt she was losing consciousness. He struck her in the face seven or eight "punches" causing her face to bleed "much" from her nose and mouth. He then opened the truck door and pulled her out, struggling (R6-10). He tried to see her "chest" and in doing so tore her raincoat (R14). He put his finger to her private parts and compelled her to sit down, holding her shoulders. Accused then held her head "very strongly with his hands" and put his penis in her mouth keeping it there about five minutes. He then forced her to lay down and put his penis in her private parts despite her struggles. He had obliged her to remove her raincoat which was spotted with blood and he wanted to throw it away. She cleaned the blood from her face when he allowed her to get up and succeeded in getting her bundles. Accused gave her some money which, fearing more punches, she took and at his request said she would not go to the police. He tried to get his truck back on the road and it got stuck. She went to the nearest house that of a forest guard, and in answer to questions told her story (R11-13,30).

Armand Guichard, a gendarme, testified that on 29 August 1944, the forest guard notified him of what had happened and as he arrived at the scene, a black man was trying to start his truck and immediately left

when he saw them. Shortly thereafter the gendarme stopped an American car occupied by an officer and driver whom he took to the truck and informed him that the driver had left. The officer returned in a few moments with a black man and the girl on being brought from the forest guard's house, identified the black man as her assailant. She also identified him as the accused. The gendarme identified accused as the black man in question. The girl's left cheek was badly bruised (R26-28).

Captain Fred S. Farler, 358 General Service Regiment, testified that on 29 August 1944 he was returning to his bivouac area when a French gendarme hailed him and indicated that an American soldier and a woman were involved in something and he followed him up the hill into a wood where there was a 2½ ton cargo truck, several gendarmes and a civilian and they gave Captain Farler to understand the soldier had done something to the woman. They indicated that the soldier had gone down the road. A helmet and liner lay on the ground. He recalled seeing a colored soldier without a hat alongside the road and on going back with the jeep found the soldier, whom he identified as the accused, still there. The soldier stated he was waiting for an Ordnance Company to help him get his truck which was back in the woods and at the same time he admitted bringing the woman there with him. He was placed in arrest (R29) searched and turned over to the military police. His truck trip ticket showed his last name as Lewis. At the time the woman appeared to be pretty badly upset, was badly bruised on the face which was "quite puffed up -- mighty swollen" (R30).

It was stipulated between the accused, his counsel and the prosecution that Jeanne Guillerm was physically examined by Major Roscoe O. Illyes, Medical Corps, on 30 August 1944 and that if he was present, he would testify (in substance) that Jeanne had contusions, severe, over entire left side of the face, neck, shoulders, right buttock and mild contusions on inner surface, lower left thigh; multiple lacerations of the upper lip, both eyes swollen and blacked, and an abrasion on the inner surface of the left leg. On the same day he examined accused and found an injury on his right hand which had bled and an abrasion on the penis (R33).

Also on the same day, after being advised as to his rights, accused made to an agent of the Criminal Investigation Division of the United States Army, a signed sworn statement (Pros. Ex.8) in which he corroborated Jeanne's story of picking her up on the road and describing the events after he stopped the truck as -

> "About 5:00 P.M. I pulled my truck off into a side road, and turned off the engine. I then attempted to kiss the girl with me, and she seemed to cooperate, but I then attempted to pull up her dress, and she slapped me and refused to allow me to get up her dress.

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I then grabbed her with both hands at her throat. I was in a fit of passion and being high-strung nature just went to my head. I choked her until she started feinting. I then released her throat, and motioned for her to get out of the truck. I made her sit down on the ground and I pulled out my penis and stuck it in her mouth. I did not lose my load, and my penis fell. I then hit her in the face with my fist twice. She was not hollering then, and hadn't screamed since I first grabbed her in the truck. I pushed her onto the ground, and spread her legs apart. I got my penis, which had fallen, into her cock a short distance. I tried to get it up by moving up and down on her, but it was no use. I then came back to my senses and tried to apologize and made her take 75 francs. I told her not to tell the police. I tried to find some water to wash her face but couldn't. I tried to find my first aid kit but realized that there was nothing I could do".

Accused also gave the officer investigating the charges herein, after having been again advised of his rights, another signed and sworn statement (Pros. Ex.9), admitting the commission of these offenses, that they were committed "against her will" and that he was a pervert and couldn't help himself. That for this reason he had been discharged from the United States Navy.

4. Accused made an unsworn statement as his only defense, among other things saying -

"* * * I was raised that way. There is nothing you can do about it. The doctors can't do anything about it. My brothers and sisters are the same way. What I mean when I was raised up that way, I should say we were raised that way. My father and mother taught us to suck and so we did, and to suck each other and it's something I just can't help. You eat food to live...I have to suck a person to live on. I am skinny now because of that. I have to get someone else's nature. I am willing to make this statement to let the Court know how I am but I am very sorry that I hit--that I committed--that I attacked the lady. I only struck the lady twice in the truck" (R41,42).

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however slight of a woman's genitals is sufficient. * * * "
(MCM, 1928, par.149b, p.165).

The evidence convincingly shows and accused admits that he committed the offense.

"Sodomy consists of sexual connection with any brute animal, or in sexual connection, by rectum or mouth, by a man with a human being. Penetration alone is sufficient * * *"
(Ibid, par.149k, p.177).

The commission of this offense is also fully proven as well as being admitted by accused.

6. The charge sheet shows accused to be 21 years, six months of age. He was inducted at Baltimore, Maryland, 17 July 1943. He had prior service in the United States Navy from 5 May to 7 June 1943.

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. Both the offenses of sodomy and rape are punishable by confinement in a penitentiary (AW 42; Federal Criminal Code, sec.278 (18 USCA 457); D.C. Code, sec.22-167(6:7), sec.24-401(6:401)), and 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).

Judge Advocate

Judge Advocate

Judge Advocate

5017

(86) 1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 6 JAN 1945 TO: Commanding General, Brittany Base Section, Communications Zone, European Theater of Operations, APO 517, U. S. Army.

1. In the case of Private JAMES E. LEWIS (33730455), 4007th Quartermaster Truck Company (TC), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The publication of the general court-martial and the order of the execution of the sentence may be done by you as the successor in command to the Commanding General, Loire Section, Communications Zone, European Theater of Operations, and as the officer commanding for the time being as provided by AW 46.

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 5017. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5017).

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

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

BOARD OF REVIEW NO. 2

8 DEC 1944

CM ETO 5026

U N I T E D S T A T E S v. Second Lieutenant WILLIAM C. KIRCHNER (O-2047025), First Lieutenant MELVIN S. PREBLE (O-1534602), Second Lieutenant KELVIN E. ROOSE (O-2047806), all of Medical Administrative Corps Section, Headquarters, Advance Section	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Reims, France, 7 October 1944. Sentence as to each: Dismissal.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, 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 of Operations.

2. The accused were tried together upon separate charges and specifications, identical except that the name of each was set out in their respective specifications:

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

Specification 1: In that Second Lieutenant Kelvin E. Roose, MAC, Medical Section, Headquarters, Advance Section Communications Zone, European Theater of Operations, having received a lawful order from Colonel James B. Mason, MC, to stay away from Paris, France, unless authorized by the Commanding General or the Chief of Staff, the said Colonel James B. Mason, MC, being in the execution of his office, did at Paris, France, on or about 1 September 1944, fail to obey the same.

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(88)

Specification 2: In that * * * did, at or near Paris, France, on or about 1 September 1944, wrongfully and unlawfully use a Government motor vehicle, to wit, a one-fourth ton truck known as a jeep, for other than official business.

CHARGE II: Violation of the 83rd Article of War.

Specification: In that * * * did, at or near Paris, France, on or about 1 September 1944, through neglect suffer one Government motor vehicle, to wit, a one-fourth ton truck known as a jeep, of the value of about $800.00, military property of the United States, to be lost by leaving said vehicle unlocked and unattended on the streets of Paris, France.

(Identical charges and specifications against Second Lieutenant William C. Kirchner and First Lieutenant Melvin S. Preble).

Each pleaded not guilty and was found guilty of the charges and specifications. No evidence of previous convictions was introduced as to any of accused. Each was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General of the Advance Section, Communications Zone, European Theater of Operations, approved only so much of each sentence as provides for dismissal from the service and forwarded the record of trial for action pursuant to Article of War 48, and in consideration of the recommendation of the members of the court based on the excellent military records of these officers, prior to the commission of the offenses charged and, as their retention in the service is desired, recommended that each of the sentences be suspended. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentences, though finding them as modified by the reviewing authority wholly inadequate punishment, and withheld the orders directing execution thereof pursuant to the provisions of Article of War 50½.

3. The undisputed evidence for the prosecution shows that Colonel James B. Mason, Deputy Surgeon with the Medical Section, Advance Section Communications Zone, at a meeting of all officers on 28 August 1944, at which the three accused were present, personally issued verbal instructions "that no one would go to Paris without the specific approval of the Commanding General or the Chief of Staff". It was stipulated that if the Commanding General and Chief of Staff were present as witnesses in court each would testify that he had not at any time authorized any of accused to make a trip to Paris, France (R9-10). Sergeant Clarence J. Slotter of accuseds' section and unit, testified that he met the three

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accused at about a quarter past six on 1 September 1944 and, left for Paris at about six-thirty in the evening in a government jeep obtained in the Medical Section parking lot. Sergeant Slotter drove the car. There was a trip ticket in the car but the driver did not look at it. Accused Preble was motor officer in the Medical Section. They arrived in Paris at about eight o'clock in the evening and rode around a little sightseeing. They then stopped on the Avenue des Champs Elysees and agreed among themselves that they would leave the jeep but at no time would it be out of the sight of one of them. The jeep was not locked and the driver testified he knew of no way a jeep can be locked. Accused Roose and Preble walked to the corner and accused Kirchner and the driver, seeing a cafe right where the jeep was parked, entered and talked to some French people, occasionally looking out watching the jeep. It was getting dusk and for possibly ten minutes they failed to look out and when they did, they found the jeep gone. Some American soldiers outside told them they had seen two American soldiers get in the jeep and drive off. The other two accused shortly arrived and asked where the jeep was parked. They all then checked the jeeps on the street and not finding it, reported the loss to the Military Police and to the Headquarters, Seine Base Section, and then all hitch-hiked back to their station. It was stipulated in open court by the prosecution, defense and each of accused that the value of a 1/4 ton truck, known as a jeep, when new, is about $800.00 (R11-14).

4. For the defense each of accused submitted an unsworn statement to the court substantially similar to the facts shown by the prosecution except that accused Roose stated he

> "had no knowledge of having received an order from Colonel Mason or have attended any meeting or have seen written order from the Commanding General or the Chief of Section to stay away from Paris without their consent".

Colonel Charles H. Beasley, Medical Corps, testified that the three accused had served on his staff, that each performed his duties in an excellent manner, was of good character, valuable to his service and he would like to retain them. Colonel James B. Mason gave similar testimony (R17-19).

5. The undisputed evidence shows that the three accused, capable and efficient officers, wrongfully and without permission took a jeep from the motor pool and in defiance of orders given them, went to Paris, not on official business where, through their combined neglect, the jeep of a value when new of about $800.00, was stolen. The essentials of all charges and specifications were clearly proved.

(90)

6. The charge sheet shows accused Roose is 26 years and seven months of age. He enlisted 20 August 1941, and was appointed Second Lieutenant "MAC" 19 August 1943; that accused Kirchner is 23 years one month of age, enlisted 20 August 1942, and was appointed Second Lieutenant "MAC", 21 July 1943; and that accused Preble is 27 years one month of age, enlisted 27 June 1941, and was appointed Second Lieutenant "MAC", 28 November 1942.

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 each of the findings of guilty and each of the sentences as confirmed. Dismissal is authorized upon conviction of an officer under either of Articles of War 83 or 96.

Judge Advocate

Judge Advocate

Judge Advocate

5026

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 8 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant WILLIAM C. KIRCHNER (O-2047025), First Lieutenant MELVIN S. PREBLE (O-1534602), and Second Lieutenant KELVIN E. ROOSE (O-2047806), all of Medical Administrative Corps Section, Headquarters Advance Section, Communications Zone, 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 sentences as to each accused, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published 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 5026. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5026).

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

(Sentences ordered executed. GCMO 138, 137, 136, ETO, 17 Dec 1944)

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

BOARD OF REVIEW NO. 2

7 DEC 1944

CM ETO 5027

U N I T E D S T A T E S	)	IX TROOP CARRIER COMMAND
	)	
v.	)	Trial by GCM, convened at United States Army Air Force Station 486. Sentence: Dismissal. Date: 18 October 1944.
	)	
Second Lieutenant GEORGE D. NEWCOMBE (O-1031112), 1229th Military Police Company (Avn)	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant GEORGE D. NEWCOMBE, Detachment "A" 1229th Military Police Company (Aviation), IX Troop Carrier Command, was at USAAF Station 467 on or about 12 August 1944 drunk and disorderly in station.

Specification 2: (Finding of not guilty)

He pleaded not guilty to Specification 2 and guilty to Specification 1 and to the Charge. He was found guilty of Specification 1 and of the Charge and not guilty of Specification 2. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding

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General, IX Troop Carrier Command, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. Accused pleaded guilty and after the effect of his plea was explained to him, repeated, "I was drunk, sir" (R4).

The undisputed evidence for the prosecution shows that Technical Sergeant Metro K. Cymbalak, 72nd Troop Carrier Squadron, was going after some laundry about 2000 hours the night of 12 August 1944. On passing a "pub" an officer stopped him, "stumbled around for a while and tried to get up on the truck and finally made it". He wanted to be taken to town and was refused but Cymbalak offered to take him to his area.

> "He said, 'Hell, no. Let's go to town and get drunk'. I said I couldn't do that, that I was on guard duty. He said, 'Fuck that, I am the Provost Marshal and there will be no guard on duty tonight!' When I got to my area, I left him in the truck and took the laundry in and when I came back out, he was not in the truck. I walked into the barrack and I noticed a lot of commotion in there. * * * I walked in there and this officer turned around to me and said, 'What are you, Yankee or Rebel?' I said 'Yankee' and he grabbed me by the neck. I held on to his hand. He kept pulling on the back of my neck and he scratched me up pretty bad and about that time the charge of quarters came in. I don't know just what all was said but the charge of quarters tried to help me out and said was I ready to go on guard duty and I said I was and the lieutenant said there wouldn't be any guard and wanted to see my commanding officer so he could get me to go with him on a special investigation. Somehow or other I met up with Sergeant Wehrkamp who said he was going to call up the military police which he did. They came and tried to get the officer to go with them and he said he was not going with them and gave them a direct order to get out of the building. After that I left and went back to the hanger and that is all I know about the whole thing"(R5).

In his opinion accused was pretty drunk. He was staggering, stammering and was "pretty" loud (R6). While he was scuffling with Sergeant Cymbalak, the barracks room door was broken off its hinges

(R10,12). Accused kept asking the men in the room if they were Yankee or Rebel and saying he didn't like Yankees (R11). This story was corroborated in detail by five enlisted men all of whom were of the opinion that accused was drunk (R13,15,18, 20,22). Accused was finally gotten to his quarters and at 2130 hours when Captain De Capriles of the 72nd Troop Carrier Squadron was investigating a report of a disturbance in one of the enlisted men's barracks, he went to look for accused and found him

> "lying in bed with his coat off and shirt open and one arm was dangling from the bed. He was fully dressed otherwise and was lying on the bed breathing heavily" (R22-23).

4. For the defense accused's Company Commander who had known him for more than a year, his only witness, testified "He had been an excellent officer" (R24).

The rights of accused as a witness having been explained to him, he elected to remain silent.

5. The plea of guilty as well as the evidence fully establishes the fact that accused was "drunk and disorderly in station". His drunkenness was observed by many soldiers and was accompanied by abuse of rank and destruction of property. Such behavior by an officer of the Military Police or of any branch of the Army is unquestionably prejudicial to good order and military discipline.

6. The charge sheet shows accused is 42 years and eight months of age. He was appointed a Second Lieutenant, Cavalry Rifle Troop, 25 November 1942.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal is authorized upon conviction of an offense under Article of War 96.

Judge Advocate

Judge Advocate

Judge Advocate

5027

(96)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 7 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant GEORGE D. NEWCOMBE (O-1031112), 1229th Military Police Company (Avn), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 5027. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5027).

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

(Sentence ordered executed. GCMO 135, ETO, 15 Dec 1944)

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

BOARD OF REVIEW NO. 1

24 MAR 1945

CM ETO 5032

U N I T E D S T A T E S	) SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)
Technician Fifth Grade ANDREW J. BROWN (34655574) and Private CLAY A. FINNIE (35649593), both of the 3981st Quartermaster Truck Company	) Trial by GCM, convened at Seine Section, Paris, France, 3 November 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York

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

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

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

BROWN

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

Specification: In that Technician Fifth Grade Andrew J. Brown, 3981st Quartermaster Truck Company, European Theater of Operations United States Army, APO 350, did, without proper leave absent himself from his company at Phillippeville, Belgium from about 30 September 1944 to about 6 October 1944.

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

Specification 1: In that * * * did, at, or near Ciney, Belgium, from on or about 30 September 1944 to 6 October 1944, wrongfully and willfully dispose of 800 gallons of gasoline, issued for use in the military service of the United States.

Specification 2: In that * * * did, at Phillippeville, Belgium, willfully and wrongfully apply to his own use without authority a government vehicle, to-wit, a twin tank gasoline truck, of the value of more than $50.00, from 30 September 1944 to 6 October 1944.

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

Specification: In that * * * having been restricted to the limits of his company area, did, at Coubert, France on or about 12 October 1944, break said restriction.

FINNIE

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

Specification: Identical with the Specification of Charge I (Brown) as above set forth except for the appropriate substitution of the grade and name of accused.

CHARGE II: Violation of the 83rd Article of War.

Specification: In that Private Clay A. Finnie, 3981st Quartermaster Truck Company, European Theater of Operations United States Army, APO 350, did at, or near Ciney, Belgium, from on or about 30 September 1944 to 6 October 1944, through neglect lose one spare wheel and tire of the value of about $50.00, issued for use in the military service of the United States.

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

Specification 1: Identical with Specification 1 of Charge II (Brown) as above set forth except for the appropriate substitution of the grade and name of accused.

Specification 2: Identical with Specification 2 of Charge II (Brown) as above set forth except for the appropriate substitution of the grade and name of accused.

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

Specification: Identical with Specification of Charge III (Brown) as above set forth except for the appropriate substitution of the grade and name of accused.

Accused made no objection to being tried together. Each accused pleaded not guilty to and was found guilty of all charges and specifications preferred against him, except that as to Charge III accused Brown was found not guilty but guilty of a violation of the 96th Article of War, and as to Charge IV accused Finnie was likewise found not guilty, but guilty of a violation of the 96th Article of War. Evidence was introduced against accused Brown of one previous conviction by summary court-martial for driving a government vehicle in excess of the speed law in violation of Article of War 96. No evidence of previous convictions was introduced against accused Finnie. 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 ten years. The reviewing authority approved each sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven Prison, Beekman, Duchess County, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Charges were served on each accused the day before the trial. This practice is not approved except in those rare cases where it is required by military necessity. Where an accused was denied a reasonable opportunity to prepare for trial and his substantial rights were injuriously affected thereby, it was held by the Board of Review that he was deprived of liberty and property without due process of law, and that the findings of guilty and the sentence were invalid (CM ETO 4564, Woods). In the instant case neither accused objected to going to trial nor moved for a continuance. Before receiving pleas to the general issue the prosecution advised them that if there were any special pleas or motions to be made they should be made then. Defense counsel asserted that there were no special pleas or motions to be made (R5). There is no indication in the record of trial that either accused was in fact denied the right to a reasonable opportunity to prepare for trial, or that any substantial right of either of them was injuriously affected by the commencement of the trial on the day following the service of charges(CM ETO 3937, Bigrow; CM ETO 5179, Hamlin).

4. The record of trial contains considerable incompetent hearsay

evidence introduced chiefly through the testimony of Captain Howard L. Linton, commanding officer of the 3981st Quartermaster Truck Company, of which both accused were members. The following questions put to him by the prosecution and his answeres thereto, occur at the beginning of the prosecution's case (R6):

"Q I ask you to look at the two men next to the Lieutenant there. Do you recognize those two men, Captain?
A. Yes,Sir.
Q. Were they members of your command on the 30th September of this year?
A. Yes, Sir.
Q Can you tell the court, please, under what circumstances they came to your attention on or about that day?
A. They were reported to me as being absent without leave and the fact that was brought to my attention as being serious is the fact that they left with a government vehicle, one of our 750 gasoline tankers. And further check, why, we found that the tank was filled with gasoline".

Inadmissible hearsay testimony was also introduced by the prosecution in proving breach of restriction by both accused (R7). There was, however, competent evidence of such quantity and quality as practically to compel findings by the court, independently of the evidence illegally received, that each accused absented himself without leave, that they wrongfully applied to their own use without authority a government truck, and that they broke restriction, all as alleged in the pertinent specifications. The erroneous admission of hearsay evidence as to any of those offenses was therefore non-prejudicial to the substantial rights of accused (CM ETO 1201, Pheil; CM ETO 1693, Allen; CM ETO 3811, Morgan and Kimball).

5. The evidence tending to prove that accused wrongfully disposed of 800 gallons of gasoline(Specification 1, Charge II, as to Brown and Specification 1, Charge III, as to Finnie) was not of such character as to compel findings of guilty independently of the erroneously admitted hearsay testimony of Captain Linton, namely, "And further check, why, we found that the tank was filled with gasoline"(R6). Exclusive of inadmissible hearsay, the evidence introduced by the prosecution on the wrongful disposal of the gasoline was substantially as follows:

The vehicle taken without authority by accused was a GMC 6x6 2½-ton truck equipped with twin tanks having an aggregate capacity of 750 gallons and used for hauling gasoline (R6,7,10). These tanks were filled with gasoline at about 5:00 pm 29 September 1944 (R14).

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and the truck was then taken to the company area where it was the practice to keep the trucks under guard (R8,13). From the time it was brought to the company area until it was taken by accused, sometime after 12 o'clock noon on 30 September, the truck was not dispatched to anyone (R10,11,13) nor was it driven on a run for the delivery of gasoline (R13). Units, however, would come to the camp to obtain gasoline which at times was taken from the tank-trucks.It was possible that the gasoline contained in the tanks of the truck involved in this case was used to supply a passing convoy. If this was in fact done, a record of it would have been kept by the dispatcher (R15). Although the soldier who was dispatcher on 30 September was a witness for the prosecution, he was not asked if he knew or had any record that the gasoline in question was so used (R9). There was no competent evidence of any kind tending to prove that the gasoline was notused for this purpose from about 5:00 pm 29 September until noon 30 September - a period of about 19 hours. On 6 October when the truck was found in the possession of the two accused a considerable distance from camp, the twin-tanks were empty (R17,19). There was a total absence of evidence as to what became of the gas.

6. Both accused elected to remain silent and no evidence was presented in their behalf (R21).

7. It cannot reasonably be claimed that this evidence, independently of the hearsay testimony of Captain Linton to the effect that the tanks were full, substantially compelled a finding that during the period of at least 19 hours which intervened between the filling of tanks and the unauthorized taking of the truck by accused, the gasoline was not legitimately used, as was not infrequent, to meet the needs of passing convoys, and that when taken by accused the truck was loaded with gasoline. The Board of Review is of the opinion that the improper admission of the hearsay testimony of Captain Linton injuriously affected the substantial rights of both accused and that the record of trial is therefore legally insufficient to support the findings of guilty of Specification 1, Charge II against accused Brown and of Specification 1, Charge III against accused Finnie(See Pheil, Allen and Morgan and Kimball cases above cited).

Charge II and Specification as to accused Finnie - Except as to value, there was sufficient evidence to warrant a finding of guilty against accused Finnie of losing through neglect a spare wheel and tire issued for use in the military service of the United States. Since there was no evidence of the value of the wheel or tire, or of the condition of either, the court was warranted in finding that the wheel and tire were of some value not in excess of $20.00. The offense is charged as a violation of Article of War 83. The Specification, however, fails to allege that the wheel and tire were military property belonging to the United States (AW 83; MCM, 1928, par.143, p.158). It alleges that they were issued for use in the military service of the

United States. The Specification therefore sets out a violation of Article of War 84 (AW 84; MCM, 1928, par.144a, p. 158). The designation of the wrong article is not material in this case (MCM, 1928, par.28,p.18).

8. The charge sheets show the following data on the age and service of each accused:

Brown is 24 years and two months of age and was inducted at Fort Bragg, North Carolina, 14 May 1943. Finnie is 20 years and eight months of age and was inducted at Fort Thomas, Kentucky, 29 January 1943. Each was inducted to serve for the duration of the war plus six months. Neither had prior service.

9. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial except as herein specifically noted. The Board of Review is of the opinion that as against accused Brown, the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, Charge II and Specification 2 thereunder, and Charge III, as changed by the court, and its Specification, but legally insufficient to support the finding of guilty of Specification 1 of Charge II; that as against accused Finnie the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, Charge III and Specification 2 thereunder, Charge IV, as changed by the court, and its Specification, but legally insufficient to support the finding of guilty of Specification 1 of Charge III, and legally sufficient to support only so much of the findings of guilty of Charge II and its Specification as involves findings that accused did, at the time and place alleged, through neglect lose one spare wheel and tire of a value of not more than $20.00 issued for use in the military service of the United States, in violation of Article of War 84, and that the record of trial is legally sufficient to support the sentences.

10. 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).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 24 MAR 1945 TO: Commanding General, Seine Section, Communications Zone, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Technician Fifth Grade ANDREW J. BROWN (34655574) and Private CLAY A. FINNIE (35649593), both of the 3981st Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that as against accused Brown the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, Charge II and Specification 2 thereunder, and Charge III, as changed by the court, and its Specification, but legally insufficient to support the finding of guilty of Specification 1 of Charge II; that as against accused Finnie the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, Charge III and Specification 2 thereunder, Charge IV, as changed by the court, and its Specification, but legally insufficient to support the finding of guilty of Specification 1 of Charge III, and legally sufficient to support only so much of the findings of guilty of Charge II and its Specification as involves findings that accused did, at the time and place alleged, through neglect lose one spare wheel and tire of a value of not more than $20.00 issued for use in the military service of the United States, in violation of Article of War 84, and that the record of trial is legally sufficient to support the sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. Although held legally sufficient to support the sentences, the record of trial in this case is unsatisfactory. Records of this kind will undoubtedly tend to undermine confidence in the processes of military justice. Some of the errors and improper practices apparent from the record are listed below:

a. Redrafts of the charges are pasted over the originals in such manner as to make it impossible to compare the redrafted charges with the originals.

b. Accused were brought to trial the day following service of charges, thus raising the question of a possible denial of due process of law. An accused and his counsel are entitled to a reasonable opportunity to prepare for trial after the charges have been served. It has been recommended therefore that except in those cases in which military necessity demands it, no accused be brought to trial within a period of five days subsequent to the service of charges upon him unless he consents to the same.

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c. Charge III against accused Brown, and Charges II and IV against Finnie were laid under the wrong Articles of War.

d. Incompetent hearsay evidence of a prejudicial character was introduced in evidence without objection by either the prosecution or the defense.

e. The specifications alleging the wrongful disposal of the gasoline are not properly drawn. No facts are alleged to make out an aggravated case properly chargeable under Article of War 96, and if considered as violations of Article of War 84, the specifications are defective in that no value is alleged.

f. No evidence was introduced to prove the alleged value of the truck or of the spare wheel and tire.

3. The action of the reviewing authority designates the place of confinement as "Eastern Branch United States Disciplinary Barracks, Greenhaven Prison, Beekman, Duchess County, New York". The correct designation of the institution is "Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York". The correction may be made in the published order.

4. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5032. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5032).

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

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

BOARD OF REVIEW NO. 2

9 DEC 1944

CM ETO 5051

U N I T E D S T A T E S	)	9TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Mulartschutte, Germany, 20 October 1944. Sentence: Dismissal, total forfeitures, and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant GEORGE T. WILLIAMS (O-1322498), 60th Infantry.	)	

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

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that 2nd Lt. George T. Williams, 60th Infantry, having received a lawful command from Lt. Col. Harry R. Phipps, 60th Infantry, his superior officer, to deliver a written message to the Headquarters First Battalion, 60th Infantry, did at Regimental Headquarters, 60th Infantry, near Zweifall, Germany, on or about 10 October 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was

sentenced to be 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 20 years. The reviewing authority, the Commanding General, 9th Infantry Division, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution showed that accused was, on 10 October 1944, a Second Lieutenant, Infantry, attached, as Liaison Officer, to the 1st Battalion, 60th Infantry, then on duty at "A.P.O. #9, someplace in Germany" (R5,6). At that time and place Lieutenant Colonel Harry R. Phipps, Executive Officer of the 60th Infantry, gave accused a written message in an envelope and told him to deliver it to the 1st Battalion. Accused "physically took" this message in his hand, but told Colonel Phipps "that he could not go" (R5,6). Colonel added, describing what ensued:

> "I asked him, [accused] 'Do you mean to tell me that you have been given a lawful order by a Senior Officer and that you refuse to carry out the order?' and he said, 'I can't go up' and 'I can't stand mortar and artillery fire'. * * * At the same time Lt. Williams told me that he would rather face a court-martial than go back. He didn't flagrantly say that he would not. He said that he could not" (R6).

Earlier in the day, Colonel Phipps had had occasion to have accused examined by "Dr. Klinger" of the Regimental Medical Section, after which accused went to the 1st Battalion on a mission and returned with information which he transmitted "verbally and correctly and clearly" (R6).

Major Norbert J. Hennen, 60th Infantry, testified and corroborated the testimony of Colonel Phipps (R7,8).

4. Accused, advised fully of his rights as a witness in his own behalf, elected to remain silent, and no evidence was introduced in his behalf.

5. The evidence thus presented supported each and every factual allegation in the Specification. This Specification follows the language of Article of War 64 and alleges in effect that the command in question was lawful, was received by accused from a superior officer, and that accused's disobedience was willfull. There can be no difficulty in deciding that the evidence conclusively shows that the command was

lawful and was given by accused's superior officer (Winthrop's Military Law and Precedents, Reprint 1920, pp.575-577). Nor, in view of the many decisions defining the meaning of "willfull" as used in indictments charging certain offenses at civil law, can it be said that accused's disobedience here was other than willfull within the meaning of that term as used in Article of War 64. "Willfully" means intentionally (Sullivan v. Dee, 8 Ill. App.263; Luttrell v. Commonwealth (Ky), 63 S.W. 2d, 292; In re Light (NY), 21 Misc. 737; Northern Ry. of France v. Carpenter (NY), 13 How. Prac. 222,223; Felton v. United States, 96 U.S. 702; "Words and Phrases", Vol.45, pp.208,209). It was only necessary for the court to decide that accused intended his disobedience in order to find that his conduct was willfull. The evidence supported such a finding. It is clear that accused understood the order and that he was physically capable of complying with it. This was not a case of neglect through forgetfulness, but of intentional refusal to obey. Under the definition of "willfull", stated above, that intangible known as fear may not be accepted as a defense. Fear is relative. Military necessity in time of war can not afford to temporize with this emotion/ short of that stage which Medical authority is willing to declare paralyzation of physical effort. Winthrop's Military Law and Precedents - Reprint 1920, discussing the offense of disobedience to the lawful command of a superior officer, says (pp.571-572):

> "Obedience to orders is the vital principle of the military life - the fundamental rule, in peace and in war, for all inferiors through all the grades from the general of the army to the newest recruit. This rule the officer finds recited in the commission which he accepts, and the soldier in his oath of enlistment, swears to observe it. As in the British system all military authority and disipline are derived from one source - the Sovereign, so in our army every superior, in giving a lawful command, acts for and represents the President, as the Commander-in-Chief and Executive power of the nation, and the source from which his appointment and authority proceed. Hence the dignity and significance of a formal military order, and hence the gravity of the obligation which imposes upon the inferior to whom it is addressed. The obligation to obey is one to be fulfilled without hesitation, with alacrity, and to the full, nothing short of a physical impossibility ordinarily excusing a complete performance."

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6. Accused is 24 years of age. He enlisted 2 August 1940 and served to 15 July 1943. He was commissioned and entered on extended active duty on 16 July 1943. The record does not show that he had 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. Dismissal is authorized upon conviction of violation of Article of War 64.

8. The offense of willfull disobedience committed by an officer in violation of Article of War 64 is punishable by death or such other punishment as a court-martial may impose. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is proper (AW 42; Cir.210, WD, 14 Sep. 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

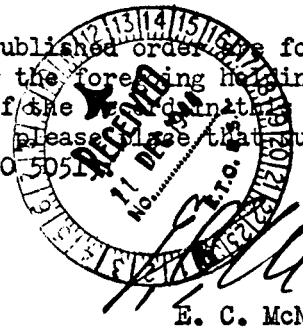
Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 9 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant GEORGE T. WILLIAMS (0-1322498), 60th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 5051. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5051).



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

(Sentence ordered executed. GCMO 141, ETO, 18 Dec 1944)

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

BOARD OF REVIEW NO. 1 21 DEC 1944

CM ETO 5052

U N I T E D S T A T E S	2D BOMBARDMENT DIVISION
v.	Trial by GCM, convened at AAF Station 147, APO 558, U.S. Army, 1, 8 September and 14 October 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for 25 years. United States Penitentiary, Lewisburg, Pennsylvania.
First Lieutenant HUGH I. MALLEY (O-807861), 330th Bombardment Squadron, 93rd Bombardment Group (H)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that 1st Lieutenant HUGH I. MALLEY, 330th Bombardment Squadron, 93rd Bombardment Group (H) AAF, did, at AAF Station 104, on or about 25 July, 1944, forcibly and feloniously, against her will, have carnal knowledge of Hilda Kathleen Moore.

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 intro-

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duced. 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 a place as the reviewing authority may direct, for 12 years. The reviewing authority returned the record of trial to the court for purposes of revision, as the sentence imposed was less than the mandatory sentence required by Article of War 92. On 14 October 1944 the court reconvened, revoked its former sentence and, three-fourths of the members present at the time the vote was taken concurring, sentenced accused 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, 2d Bombardment Division, approved the sentence but reduced the period of confinement to 25 years, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as approved and mitigated, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution was as follows:

Miss Hilda Kathleen Moore of 7 Suckling Avenue, Norwich, Norfolk County, England (R13) the victim of the offense alleged, refused to testify when the court convened on 1 September 1944 and the court adjourned (R6-11). When the court reconvened on 8 September Miss Moore was asked by the prosecution why she refused to testify on 1 September and replied

> "For the same reason I do not wish to testify now. The thing is too hard to think about without having to come to court and tell strange people about it".

Asked if she would testify "now", she replied in the affirmative (R13). She testified that she was 19 years of age (R45) and that on the evening of 25 July 1944 she went to a dance at Longstratton, at the Hardwick Airdrome (R13-14). She attended the dance at the request of a friend, Miss Butters, who had been asked by a "boy" if she (Miss Butters) would "bring some friends out". Miss Moore went to the dance with a group of girls who met at the "Bell Hotel" and were taken to the dance in three or four buses (R13-14, 18,19). Admitted in evidence as Def.Ex.A was a map of the area involved. The dance was held in a building marked "MESS". Accused's quarters were in a building marked "DISPENSARY" (in the large room at the end of this building). The officers' club is

also shown on the map (R31-32). Upon her arrival witness met accused who asked her to dance and they danced together several times (R14,21). During the evening he asked her if she wanted a drink and she requested Coca Cola. As no Coca Cola was available, accused brought her a small "straight" whiskey and he had"a larger one". Prior to this occasion the girl had "sipped whiskey before but never a lot" and "didn't like it". She told him she could not "drink it like that", and that she did not like whiskey. He replied

> "There is nothing to put in it here but there will be something over at the Officer's Club" (R16-17).

About 9:30 pm when it was still light (R43) the couple left the dance and on the way to the officers' club, accused said that he had some lemon powder in his quarters. The girl "didn't think anything about" going to his quarters as he "seemed very nice about getting me the lemon juice", she saw other men going in and out of the building, and could hear the radio playing within. Inside his quarters (in the large room at the end of the building), accused put lemon juice in her drink and then sat on the edge of his dresser. She stood nearby and they engaged in a general conversation. He put his arm around her and as it "didn't mean anything" to her she did not object. When accused wanted her to put her arms around his neck she said "I can't be bothered. I came here to dance. I want to go back to the dance". Accused did not object and they returned to the dance hall (R17,25-27). During the time they were in the room he did not kiss her (R17,27) nor did he stretch out on the bed. She did not stroke his face with her hand (R27). Several "boys" were in and out of the room (R17,26) and she was the only girl present (R27). She took only two or three sips of her drink and left it on the dresser (R17,27-28). They danced several times after their return to the hall and she danced with no other person. She said she "didn't really want one" when accused asked if she desired another drink. He replied "They have got lemon to put in it now". When he brought her the second drink witness took a "sip" and did not like it. She poured half of it into the glass of one of accused's friends, and pretended to drink some of the balance left in her glass. She then put her drink on the window ledge and knocked it over with her elbow. The girl had no further drinks that evening (R16-18,23,29). She had "a little out of two" drinks that evening and did not consume a whole one (R42).

About 11:30 pm "the party was getting rather noisy and several of the boys had seemed to have had quite enough to drink". Witness assented to accused's suggestion that they go to the officers' club because it was late, her coat was there and "we had to leave

from there" (R14,30,43). They went toward the club and when they reached the left hand turn leading to accused's barracks (the "dispensary" - Def.Ex.A), he suddenly seized her and dragged her toward his quarters. No one was in the vicinity. She did not scream because she did not want "to cause a commotion" and did not believe she would be heard. She told accused she thought he was going to take her to the officers' club, and repeatedly told him to release her and leave her alone. She tried to get away and to free her wrists from his grasp. As he pulled her along witness managed to free one hand and held onto the door of the barracks. He then "got behind me and pulled me in" (R15,20,32-34,43). He then dragged her into "one of the smaller rooms" (Captain Johnson's room - Def.Ex.A) where it was dark, picked her up and threw her on the bed. "That is when I really got frightened" (R15,34,43). She attempted to scream but each time he had his hand over her mouth (R15,36). She tried "to squirm" but could not "too much" because he was on top of her and had her arms pinned (R36). She struggled and he began to beat her. He hit the girl several times and "practically" knocked her unconscious (R14,36,44,46). Her nose and mouth bled and she choked because the blood ran down her throat. She had great difficulty in refraining from fainting. When she asked for a drink of water accused said he would get the water if she would be quiet. When he left the bed she jumped up and tried to leave the room. It was dark and although she reached the door, she could not find the knob. He caught her, struck her several times in the stomach and again threw her on the bed (R15,36-37,43-44,46-47). Witness again asked for water and he arose from the bed a second time to get it for her. She also jumped up, once more tried to escape from the room, and she found a door which apparently led to a closet. Accused caught her, hit her on the chin with his fist and again threw her on the bed. She was then "nearly out" (R15,42,44,47). Accused lay on top of her, held her two hands across her chest with one hand, leaned on her with his arms, raised his own body and removed her knickers with his other hand. She screamed as much as she could, and did not in any manner help him remove her clothing. He then inserted his penis in the girl's person and engaged in sexual intercourse with her (R15-16,38-39,45). The insertion of his penis hurt her (R40). While accused was actually engaged in intercourse, someone opened the door and switched on the light. Witness tried to scream but accused put his hand over her mouth. He said "get out" and the "boy" who put on the light said "Oh, excuse me" and left (R35,41-42,45). About five minutes later, during which time accused engaged in intercourse, a knock on the door again interrupted him. Accused left the bed, opened the door and stood in the doorway. The light shone from the hall into the room and the girl saw her knickers on the floor (R40-42,47-48). Three "boys" stood in the door. She put on her knickers inside out, ducked under accused's arm, seized one of the men and said "get me out of here". When she reached the end of the corridor she ran off and left this "boy", bumped into another one and asked him to accompany her while she obtained her coat. He helped her put on the

coat, took her to the "truck" and asked what was the matter. The girl replied she "had a fight". She arrived at her home about 1:45 am (R47-48).

Miss Moore further testified that the rear seam of her knickers was torn about four inches (R49-50). She did not know whether accused removed his trousers during the incident (R38,49). She did not recall that anyone actually entered the room during the incident (R35), or that someone opened the door and said that he was looking for another officer's hat (R37). Accused did not leave the room or bring back a drink of water to her (R38). He did not at any time request to have intercourse with her nor, while they were on the bed, did he attempt to caress her body. She estimated that they were on the bed about ten minutes before the act of intercourse occurred (R46). She did not know that she "was all right until about a fortnight ago when I became queer" (menstruated) (R41-42). Witness identified accused at the trial (R46).

Mrs. Mary Moore, mother of the girl, testified that when the latter arrived home she said that she "had been attacked by a man". She "was crazy with fright" and her mother "had an awful job of getting her to speak rationally at all" (R50-51). The girl's hair was "matted to her face with sweat and blood" (R50). Her left eye was bruised and was turning black, her nose was bleeding and her left jaw was swollen "all out of proportion to her face". Her upper lip was cut, her teeth were bleeding and two of her front teeth were loose. Blood was on the girl's legs and she experienced difficulty in walking. Her knickers were torn and "on inside out" (R51). There were also bruises on the back of her legs and on her arms (R52). Witness identified her daughter's knickers at the trial and they were admitted in evidence (R52; Pros.Ex.1).

It was stipulated by the prosecution, defense and accused, that if Dr. A. O'Donovan, Mile Cross House, Aylsham Road, Norwich, were present in court and sworn as a witness he would testify that he examined Miss Moore about 9:45 am 26 July. She appeared "disturbed", had a "black eye" and several bruises on her face which were "very recently sustained". His examination further revealed the following facts:

"1. Recent blood on the upper portions of the thighs.
2. Abrasions of the mucuous membrane just inside the vulva.
3. Appearance of the injured area suggested that a recent injury had been sustained" (R53).

4. For the defense, Lieutenant Colonel Pedro L. W. Platou,

Chief of Surgical Service, 231st Station Hospital, testified that he examined Miss Moore at 2:00 pm 26 July (R54,57). He further testified that a woman's genitals "Beginning from the external side", were composed of labia minora, labia majora, hymeneal ring, vaginal tract, cervex, uterus, fallopian tubes and the ovaries (R58). The labia minora and majora composed the vulva, the exteria portion of which "figures about five-eights of an inch" (R55), and the distance between the base of the labia minora and the hymeneal ring which surrounds the vaginal tract, was about three-quarters of an inch (R55,57).

Witness found black and blue marks, a laceration of the upper lip, contusions on both forearms and the rear of the left leg, but no abdominal bruises. The girl's upper incisors were loose. Her vulva showed small lacerations on both the labia minora and majora, "left side". There was also bruising and cutting of the posterior comissure of the hymeneal ring. "There was fresh blood there" (R55-56). Her hymen admitted one finger (R56). Based upon this fact, witness was of the opinion that "under normal circumstances" no penetration occurred and that the girl was "still a virgin" (R56).

> "If there had been penetration <u>in the regular conditions</u> it would have caused penetration of the <u>vagina</u>. No penetration had occurred" (R56). (Underscoring supplied).

The following colloquies then occurred during examination of the witness:

> "Q. Is there a possibility of any penetration of the tip of the penis?
> A. I doubt it very much. I doubt it" (R57).
>
> "Q. From your examination have you an opinion as to whether or not there had been any penetration in the <u>canal</u>?
> A. In my opinion she had no penetration.
> * * *
> Q. Did your examination reveal the possibility of any penetration however slight <u>into the genitals</u>?
> A. Yes" (R58-59) (Underscoring supplied).

Colonel Platou further testified that a vaginal smear "was made 26 July in our laboratory for examination" and no spermatozoa, live or dead, was discovered (R57-58).

"Somewhere after" 9:00 pm (R62-63) on the evening in question, Sergeant Paul Bair, 409th Bombardment Squadron, escorted

a Captain Bryan into the big room at the end of accused's barracks, in which there were several beds (R59-60; Def.Ex.A). "It wasn't quite blackout time" and although the room was not lighted "it wasn't to/o/ dark" and Bair "could see and such as that" (R63-65). He saw accused "laying back" on a bed "comfortable as could be", and a girl standing on the floor leaning over him, stroking his neck and the side of his face. She "was doing all of the petting" and "was giggling and having a good time". Bair left Captain Bryan in the room and departed (R60-64). (Bair's evidence apparently related to the first visit of accused and the girl to the barracks).

The room of Captain Robert J. D. Johnson, 93rd Bombardment Squadron, was the "first * * * on the right" in accused's barracks and contained two bunks and a developing room on one end (R65-66; Def.Ex.A). (It also contained a sink (R77)). About midnight (R70) Johnson went to his room to get the hat of a Lieutenant Tool (R66). He opened the door, stood on the threshold, and saw in the dark two people on the bed near the door. Accused, whom he recognized by his voice, said to shut the door (R67,69-70). Johnson closed the door, went to the large room at the end of the building, and after a few minutes returned to his room with First Lieutenant Harry H. Gruener, 330th Bombardment Squadron, 93rd Bombardment Group, and another officer. The door was pulled open by someone and Johnson, as a practical joke, turned on the light in the room but did not look inside. Gruener saw accused standing at the foot of the bed without his trousers and clad in his "shorts". A girl was "laying down". The light was "turned right back off" (R67-68,70-73). During the entire time he was in the barracks Johnson did not hear any screams, yelling, or any noises indicating the girl was in distress (R67-68).

Captain Henry F. Steinback, 330th Bombardment Squadron, 93rd Bombardment Group, went to his room in the barracks (Def.Ex.A) and remained there from 9:45 to 11:45 pm (R75-77). He was awake during this time and heard no disturbance, yells or cries (R77). First Lieutenant Gene L. Maddock, Station 104, went to his quarters (the large room) in the barracks about 10:00 pm and left after remaining there about 30 minutes (R78-79). He returned to the barracks about 11:30 pm and went to bed. During this latter period he heard no noises or sounds which suggest that a girl was in distress (R79-80).

Lieutenant Colonel Howard P. Barnard Jr., Headquarters 93rd Bombardment Group, who was "Air executive" of that organization at the time of the incident, had known accused since April 1944. He testified that accused was combat crew commander of all of the lead crews and that in witness' opinion he was one of the most outstanding combat crew members in the group. He was well thought of as a leader of his crew, as a leader crew pilot, performed his duties in an excellent manner and "proved himself under

fire and combat". Witness knew of no occasion, prior to the incident concerned, when accused had not conducted himself as an officer and gentleman. The reason that the dance was held that evening was the completion by the group of its 200th mission. The 201st mission, whichoccurred that same day, terminated accused's tour of duty and was his last mission (R81-82).

Major Henry K. Seiger, 330th Bombardment Squadron, who was accused's commanding officer, had known him since 22 March 1944 (R81-82). On the date of the offense alleged accused was removed from combat duty because he completed his 33rd combat mission that day, on which he was the lead pilot. In witness' opinion, accused was an excellent officer, a good leader and an outstanding member of the squadron. His reputation for honesty and veracity was excellent. Witness never flew with him but from observation of others, accused "did an excellent job on missions" and was an outstanding pilot in the squadron (R83-84).

First Lieutenant Maurice T. Lawhorne, 93rd Bombardment Group had been bombardier in accused's crew for ten months.

> "We have gone out together and everybody thinks he is a swell guy. I think so myself. I don't know of a guy any sweller than he is" (R86).

Accused had a good reputation for being honest and truthful and conducted himself as a gentleman prior to the incident alleged (R84-86).

Accused, who was advised of his rights and stated that he understood them, elected to testify under oath (R86). He "volunteered" for and entered the service in April 1942 and in September 1942 was "called * * * into the Cadets". He received his commission 28 July 1943, and after receiving further training in the United States, was sent to Stone, Wales, and assigned to his present organization. For about 20 missions he flew the "wing and element lead", "was made crew leader" on his 24th mission, and from his 25th mission on "was flying squadron lead and deputy lead". He flew his 33rd mission on 25 July (R87-88).

After he met and danced with Miss Moore she accepted a drink of "Scotch" and they went to the large room in his barracks (Def.Ex.A) where he put lemon powder in her drink (R88-89). They sat on the bed and conversed. He kissed her four or five times, leaned back on the bed, and "she was petting my face * * * teasing me and rubbing her finger down my nose and I was biting it." Captain Bryan entered with another person (Sergeant Bair) and the girl jumped up. Accused arose, sat on the dresser, kissed her two or three times and held her "real close". She "didn't mind". They then returned to the dance and she accepted another drink. Later they left the dance and went toward the officers'

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club. He suggested that they go to his barracks but she did not wish to do so because other men would probably be in there. As she seemed "a little hesitant" when he suggested they go to Captain Johnson's room he

> "took her by the hand and led her in there. There was no pulling or tugging at all" (R90).

Inside the room he kissed her three or four times, they put their arms around each other and he swung her legs up on the bed (R90-91). He lay down beside her, kissed her three or four times and became "very passionate with her". Someone opened the door, laughed, and asked him what he was doing . He told the person to shut the door and told the girl it "would be all right" when she expressed her fear that someone would enter. She asked for water and he arose, turned on the light and saw no glass by the sink. After he turned off the light and walked down the corridor, intending to get a glass, he returned because he heard voices and thought someone might enter the room. Upon his return the girl was hiding in Captain Johnson's developing room because she thought she "heard somebody coming". They sat down on the bed and as she was "a little excited" he reassured her that no one would enter. After he kissed her he went to the boiler room (Def.Ex.A) and obtained a glass of water at her request (R91). They then reclined on the bed and he kissed her several times and put his hand on her breast. When she pulled his hand away he kissed her again. She "was getting passionate herself" and had her arms around him. She did not object when he again placed his hand on her breast and put his hand between her legs. They "rolled over closer and then she told me not to do that". He believed he "could make love to her", arose, and removed his trousers. He heard "these fellows * * * laughing outside" and as they walked by the door someone turned on the light. They saw him standing there without his trousers and laughed. The girl remained on the bed and after one of the "fellows" turned off the light and closed the door, accused again lay down beside her and told her "it would be all right" when she once more expressed concern that someone would enter the room. He kissed her several times and she "was getting very passionate". He raised himself, pulled up her dress, "got up" on his knees and told her to lift herself. She did so and he removed her "pants" which eventually fell to the floor. She asked him to "Put something on" and he replied that it was not necessary. She then said "Please be careful". He "crawled in" between her legs and attempted to insert his penis in her person.

> "I suppose I did a fraction or so. I didn't put it all the way in" (R92-93).

She said "it was hurting her" and "Please take it out". Accused

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did so, lay on top of her and kissed her. The girl "was hanging on to me and kissing me very passionately" (R92-93). He then had an emission "outside of her legs" and she asked him to get up. She felt between her legs, and said "What am I going to tell my mother". She was crying loudly but did not scream or yell. She said she would have a baby. He asked her not to cry, assured her that there was no chance of her having a baby and that it would be "All right". The girl said "I am bleeding though", sat on the edge of the bed, and was getting hysterical and crying". She asked three or four times what she would say to her mother. Accused feared someone would enter because she cried so loudly, put his hand over her mouth and asked her to be quiet. She bit his little finger and he turned around, swung his arm away and his arm hit her in the face. He did not strike her any other time nor strike her on any other part of her body. Then she "really did start to cry". He told her he was sorry, asked her to lie down and said that he would see what he could do. He turned on the light and put on his trousers in order to get her a glass of water. He saw that her nose was bleeding. He heard some "fellows" outside yelling "Ha,Ha". When he opened the door they entered and said "Ha, Ha, the bus has gone". Miss Moore was still on the bed and asked "Where are my knickers". When accused said "Right ther /e/" she seized them and ran out of the door (R93,97-98).

On cross-examination, accused identified a statement he made on 26 July to a Lieutenant Bricker which was admitted in evidence as Pros.Ex.2 without objection by the defense (R93-94). Accused testified that he was informed of his rights by Bricker (R94). He told the latter that he did not wish to make a statement, whereupon Bricker told him he either could or could not make a statement, but that it would "look awfully funny for you as an officer if you don't" (R95). Accused was nervous, "being accused of such a crime", and made the statment. He saw Miss Moore that day before he made the statement and noticed only her "black eye". When asked by Bricker if he struck the girl accused replied that he did not - "it was an accident and I told her that". On the evening he made the statement accused telephoned Bricker and asked him to come to see him (accused), that there were several things in the statement that were "not right" and that he "wanted it back". Bricker told him "to forget about it", that there was nothing of any importance in the statement (R96).

Accused stated therein that he had five "double Scotches and sodas" before he met Miss Moore about 8:30 pm that evening, and that he was, therefore, "a little tight" at that time. His narrative concerning their first visit to his barracks is substantially the same as his testimony with the exception that his statement referred only to the fact that he kissed the girl three or four times and that she did not object. It was silent as to certain other facts contained in his testimony, namely, that he lay on the bed while she was "petting his face". The pertinent portion of the statement concerning the second visit to the barracks was as follows:

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"On the way over to the Club, I again suggested to Miss Moore we go over to my room. She seemed reluctant and hesitant to go to my room, so I took her by the arm and pulled her along, gently. I took her in another room, a smaller one than my own. This room had 2 beds. I knew this room was usually occupied by Capt Johnson and Lt. Geer, no one else was present in this room at the time we went in. I picked her up, laid her on the bed, and then proceeded to make advances towards her, (Miss Moore); she resisted my advances, she screamed a couple of times. There were no lights on in the Hut at the time or anytime while we were there. It was about 2330 hours. I told her to stop screaming. A few officers at this time opened the door, looked in, said, 'excuse me'. I told them to get out and they shut the door. Miss Moore then asked me for a glass of water. I got off the bed, went to my room, which is at the other end of the Hut to get her the water. I got the glass of water returned to where Miss Moore was, and found her gone. There was a light on at all times in the corridor connecting the room we were in and my own room.

I searched the room for Miss Moore. Could not find her, and thinking she had gone back to the dance at the Officer's Club, I went in search for her, but could not find her there. I stayed around the Officers' Dance, at the Mess Hall, for about 10 or 15 minutes, and bought one drink of Scotch. As I was standing there drinking my Scotch, a group of officers at the bar started arguing in loud voices. One officer shoved another back and into me. I said, 'watch where your going'. He got smart with me and I asked him to come outside. We went outside and the two of us started fighting. I have never seen this officer before.

Only about ½ dozen punches were thrown by me and the officer I was fighting with and then some officers came up and broke it up.

I returned to my hut. It was around twelve o'clock. I undressed, and a bull session with the boys in the hut for about an hour and then went to bed. The boys in the Hut said they had heard a girl yelling 'Rape'. She had been mentioning my name.

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> I knew nothing else about the matter until Major Geich told me what had happened in Col. Phillpal's office at Station 104. I did not at anytime have sexual intercourse with Kathleen Moore, nor did I at any time strike her, or hurt her physically" (Pros.Ex.2).

Second Lieutenant Alex Bricker, Headquarters 2d Bombardment Division, testified that on 26 July after he warned accused of his rights the latter said that he wished to make a statement and did so (Pros.Ex.2). The statement was in Bricker's handwriting and was signed by accused. The following day accused telephoned witness and requested that he come and see him as he (accused) had more information. When witness visited accused the latter asked if it was necessary that the statement be used, that he wanted it returned to him. He did not furnish Bricker with any additional information (R98-100).

5. Called as a witness in rebuttal by the prosecution, Miss Moore testified that when they first went to accused's quarters it was very light and "There was always some of the boys in there". She did not sit on the bed nor did accused lie on it. He sat on the edge of the dressing table. During their second visit accused never left the room at all. He twice left (the bed) to get her a glass of water. He did not feel around her private parts with his hand (R101-102).

6. Among the papers accompanying the record of trial is a request for a rehearing based upon several grounds, addressed to the reviewing authority by the individual defense counsel. Attached to such request is an affidavit by such counsel to the effect that the president of the court told him on 8 September that he

> "would never have voted for conviction if I knew it carried a mandatory sentence of life imprisonment. I would have found some way out of it".

Also attached is an affidavit by the president of the court in which he denied having made that particular statement. It is an elementary principle of law that

> "The trial court commits no error in denying a motion for a new trial in a criminal case, founded upon the affidavits of jurors to the effect that they did not understand the legal effect of their verdict" (Hendrix v. U.S., 219 U.S. p.79 55 L.Ed., p.103, syllabus).

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7. Several irregularities contained in the record of trial are commented upon in the reviews of the Staff Judge Advocate, 2d Bombardment Division, and the Assistant Staff Judge Advocate, European Theater of Operations. Further comment thereon is unnecessary.

8. "Rape is the unlawful carnal knowledge of a woman by force and without her consent.

Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

* * *

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone suffident where there is in fact no consent.

* * *

Proof.—(a) That the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent" (MCM, 1928, par.148b, p.165) (Underscoring supplied).

No question of the identity of accused is involved in the case under consideration. The fact that penetration of Miss Moore's person was accomplished by accused was clearly established by the evidence, apart fromthe testimony of the girl herself. Accused testified that although he did not insert his penis "all the way in", he supposed he "did a fraction or so". When Dr. O'Donovan examined Miss Moore the following morning he discovered abrasions "of the mucous membrane just inside the vulva". Lieutenant Colonel Platou, a defense witness, testified that his examination did reveal the possibility of a penetration, however slight, of the girl's genitals. There were small lacerations on both the labia minora and majora, and bruising and cutting of the posterior comissure of the hymeneal ring where there was "fresh blood". It is clearly apparent that when Lieutenant Colonel Platou testified that in his opinion there was no penetration, he meant penetration beyond the hymeneal ring and into the vaginal tract. However, as stated in the Manual for Court-Martial, the established principle of law is that any penetration, however slight, of a woman's genitals, is sufficient carnal knowledge (CM ETO 3375 Tarpley and authorities therein cited; CM ETO 3859, Watson and Wimberly).

The only question presented for consideration is one of fact, namely, whether the girl consented to the act of intercourse. She testified that accused dragged and pushed her into the room, threw her on the bed and held her down forcibly. He prevented her from screaming by putting his hand on her mouth, repeatedly struck

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her, and knocked her practically unconscious. She then twice attempted to escape from the room, was hit by accused several times in the stomach and on the chin and again thrown on the bed. She was "nearly out". He held her two hands with one of his, leaned on her, removed her knickers and then engaged in sexual intercourse by force and against her will. When Captain Johnson came to the room accused placed his hand over her mouth so that she was unable to scream, and he ordered Johnson to "get out". Her knickers were torn about four inches in the rear seam. Miss Moore's testimony was amply corroborated by that of her mother to whom she complained that she "had been attacked", and who testified as to the girl's pitiful mental and physical condition when she arrived at her home. The victim's version of the incident was further corroborated by the medical testimony of Dr. O'Donovan and that of the defense witness, Lieutenant Colonel Platou. The evidence clearly established the fact that she had received a severe physical beating. The fact that the vaginal smear disclosed no evidence of spermatozoa is readily explained by accused's testimony that he had an emission when he was not within her person.

In his pre-trial statement accused stated in substance that he laid her on the bed, made "advances towards her", and that she screamed and resisted. He then went to obtain a glass of water at her request, returned and found that she had disappeared. He denied having intercourse with the girl. The substance of his testimony at the trial was that he engaged in sexual intercourse with her consent and cooperation, that she thereafter became upset, screamed, cried loudly and became hysterical. He accidently hit her face with his arm but did not intentionally strike her at any time or strike her on any other part of her body. The question whether the victim consented to the act of intercourse or whether it was committed by accused by force and violence and against her will, was a question of fact, within the exclusive province of the court. The findings of non-consent is abundantly supported by competent, substantial evidence of the most convincing character, and such findings will not be disturbed by the Board on appellate review (CM ETO 2472, Blevins; CM ETO 1899, Hicks; CM ETO 1402, Willison and cases cited therein).

9. The charge sheet shows that accused is 28 years and ten months of age and that he was commissioned 28 July 1943 at Army Air Force Student Training Center, Stuttgart, Arkansas. No prior service is shown. Accused testified that he entered the sevice in April 1942.

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

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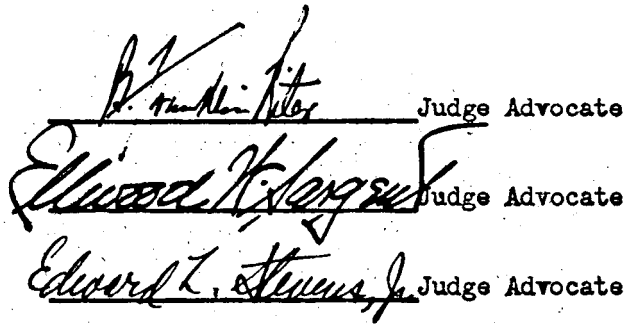
11. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized for the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA, 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b)



Judge Advocate

Judge Advocate

Judge Advocate

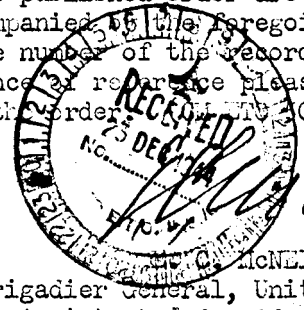
(126)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 21 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, US. Army.

1. In the case of First Lieutenant HUGH I. MALLEY, (O-807861), 330th Bombardment Squadron, 93rd Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved and confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5052. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5052).



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

(Sentence ordered executed. GCMO 28, ETO, 23 Jan 1945)

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

BOARD OF REVIEW NO. 2

8 DEC 1944

CM ETO 5053

U N I T E D S T A T E S	IX BOMBER COMMAND (now 9TH BOMBARDMENT DIVISION)
v.	Trial by GCM, convened at Bournemouth, Hampshire, England, 15 September 1944. Sentence: Dismissal and total forfeitures.
First Lieutenant WALTER G. CAMPBELL (O-560739), Air Corps, Headquarters, IX Bomber Command	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that 1st Lieutenant WALTER G. CAMPBELL, AC, Headquarters, IX Bomber Command, then assigned to 559th Bombardment Squadron, 387th Bombardment Group (M), was, at Bournemouth, Hampshire, England, on or about 28 July 1944, in a public place, to wit: Meriville Hotel, Exeter Road, Bournemouth, Hampshire, England, drunk and disorderly while in uniform.

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

Specification: In that * * * did, without proper leave, absent himself from his station, at AAF Station 452, APO 140, U.S Army from about 0001 hours, 12 August 1944 to about 2230 hours, 14 August 1944.

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He pleaded not guilty to, and was found guilty of, the charges and specifications. Evidence was introduced of one previous conviction by general courts-martial for absence without leave for four days and for seven hours and for being drunk and disorderly in uniform, in violation of Articles of War 61 and 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, 9th Bombardment Division (M), approved the sentence, remitted confinement and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, approved "only so much of the findings of guilty of the charge and its specification - - - as involves findings of guilty of drunk and disorderly in uniform, in violation of Article of War 96", confirmed the sentence as approved and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that shortly before midnight of 27 July 1944, accused was seen lying on the floor of the hall lounge in the Meriville Hotel in Bournemouth, England, playing with a cat rather roughly. He was a visitor to the Meriville Social Club and not a resident of the hotel and, as the club had closed at ten o'clock, accused had no reason for remaining and was asked to leave. He was in the company of another lieutenant. He stopped playing with the cat but some time later, after midnight, was found knocking on bedroom doors and had disturbed several people. He entered one bedroom and had to be put out and was asked to leave the hotel. As he "wouldn't go" the Military Police were called and, as he still refused to leave, they assisted him off the premises and put him in a jeep. Before they could drive away he got out and again "came in". He was then removed, drunk and in full uniform. A number of the employees of the hotel were present in the hotel lounge during this time (R8-14). An extract copy of the morning report of accused's unit of 12 August 1944, admitted in evidence (R7), contained the following entries pertaining to accused under date of 12 August "Dy to AWOL, 0001" and under date of 15 August 1944, "AWOL to dy, 2230, 14th" (R7, Pros. Ex. 1).

4. Accused, being advised of his rights as a witness, remained silent and produced no witness.

5. The offenses of being drunk and disorderly in uniform under such circumstances as to be discreditable to the service and of being absent without leave are fully proved by the evidence.

6. The charge sheet shows accused is 28 years and four months of age. He was inducted with the National Guard 12 February 1941, discharged 4 August 1942, for convenience of the Government and commissioned Second Lieutenant, Air Corps, on 5 August 1942, at Miami Beach, Florida.

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 as confirmed. Dismissal of an officer is authorized upon a conviction under either Article of War 96 or 61.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(130) 1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 8 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of First Lieutenant WALTER G. CAMPBELL (O-560739), Air Corps, Headquarters, IX Bomber Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5053. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5053).

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

(Sentence ordered executed. GCMO 134, ETO, 14 Dec 1944)

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

BOARD OF REVIEW NO. 1 9 MAR 1945

CM ETO 5068

U N I T E D S T A T E S	)	9TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Mersch, Duchy of Luxembourg, 17, 18 November 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Technicians Fourth Grade SAMUEL W. RAPE (34116651) and LLOYD A. HOLTHUS (37093665), both of Battery "C", 73rd Armored Field Artillery Battalion	)	

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

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

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

RAPE

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fourth Grade Samuel W. Rape, Battery "C", 73rd Armored Field Artillery Battalion, did, at Haller, Luxembourg, on or about 28 October 1944, forcibly and feloniously, against her will, have carnal knowledge of Jeanne Dupont.

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HOLTHUS

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician 4th Grade Lloyd A. Holthus, Battery "C", 73rd Armored Field Artillery Battalion, did, at or near Haller, Duchy of Luxembourg, on or about 28 October 1944, wrongfully and feloniously aid and abet Technician 4th Grade Samuel W. Rape, Battery "C", 73rd Armored Field Artillery Battalion, in forcibly and feloniously against her will having carnal knowledge of Jeanne Dupont, by acting as a look-out.

Each accused pleaded not guilty and, two-thirds of the members of the court present at the time the votes were taken concurring, each was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions was introduced against either accused. Three-fourths of the members of the court present at the time the votes were 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 place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, as to each accused 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 is as follows:

On 28 October 1944, Jeanne Dupont and Jean Pierre Roeder, both of Haller, Luxembourg, were standing with their bicycles at a triangle formed by a road junction near Haller. They were talking while Roeder was attempting to fix the saddle of Miss Dupont's bicycle (R10,11,21). The two accused, who had been detailed by their organization commander to take some equipment to their service battery for repair, drove up in a jeep (R35,36,10,21). The jeep stopped and accused Rape came up to Miss Dupont and Roeder. Roeder said to Miss Dupont "I think he's drunk, get on your way". Rape said something to accused Holthus who was still in the jeep and the latter answered "something like 'Frau' or 'Joffer'". Roeder said "Frau, yes" and Rape replied "No". Rape holding his rifle at port, said "alle" to Roeder. He appeared to be drunk and looked at Roeder in a way the latter described as "all dark" and "awful". Miss Dupont said "Go fast, otherwise he shoots you" and so Roeder got on his bicycle and left. He proceeded down the road to the next junction where he turned down a side road out of sight of the others (R11,14,21,22,26).

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Miss Dupont started to leave but had only proceeded a few yards on foot when Rape came up in front of her and held his weapon at her chest, threatening her and pointing to the ground (R12,14). He threw her bicycle aside and she backed away, saying in both German and French "Let me go. I want to go home" (R12,17). Meanwhile, Holthus got out of the jeep and went down the road in the direction Roeder had taken as far as the corner where Roeder had turned off (R12,14). When Holthus returned, he said something to Rape who thereupon gave him his weapon (R12,15,16). Rape then took Miss Dupont in his arms, and put her on the ground (R12,16). She defended herself as well as she could, but she was too afraid of the weapon and was unable to help herself. She "almost froze" and was incapable of shouting because "the shouting stuck in my throat" (R13,15,17). She said "Let me go. I want to go" without knowing how loudly she said it (R17). Rape thereupon had intercourse with her, the act consuming approximately ten minutes. Penetration was effected and Miss Dupont believed that Rape had an emission (R13,15, 17,18,19,69). She did not consent at any time to the act (R16), and she was certain that the penetration was made by Rape's penis and not his finger (R69). She thought he unbuttoned his trousers after they were on the ground (R17). She did not recall that he put his hands on her throat at any time (R17).

Throughout this period, Holthus stood by "a few meters" from where the act of intercourse was going on. "He was standing there and laughing", holding Rape's weapon in his hands (R13,14,15). Just as the act of intercourse was finished and while Rape and Miss Dupont were still on the ground, she heard a truck approaching. Holthus said something to Rape which Miss Dupont did not understand, whereupon Rape got up, releasing her and she ran away in the direction from which the truck was approaching (R15,17,18,19). At a point on the road about 50-75 yards down from the triangle where the intercourse occurred, the driver of the truck met her running toward the truck. She threw up her hands and started yelling, seemingly trying to stop the truck. Not knowing whether it was a trap, the driver kept going until he reached the triangle. He saw two soldiers there, one of whom he recognized as Rape, and stopped for a few seconds to inquire what was wrong with Miss Dupont. Rape laughed and said she had ridden up on her bicycle, jumped off, started hollering and then ran up the road. The driver noticed nothing unusual about the clothes of the two soldiers (R33-35). Rape then took Miss Dupont's bicycle and rode it toward the village, Holthus driving the jeep (R19,20,31,32).

Meanwhile Roeder having gone down the side road after being chased by Rape, started to return to see what had happened to Miss Dupont. On reaching a point approximately 50 yards from the junction between the side road and the road on which he had left Miss Dupont, he saw an armed soldier at the junction. He therefore turned around and continued on down the side road (R22). He circled around to a

place where he could see the triangle some 150 yards distant and where he met Mrs. Anna Sobottka, a fellow resident of Haller, whom he asked to go to Miss Dupont's assistance (R24,30,31). This maneuver required about ten to fifteen minutes. The first thing Roeder saw was Miss Dupont's bicycle lying on the road near the triangle. On closer examination, he saw a "brown mass" on the road. Another soldier was walking up and down the road in the immediate vicinity of "the brown mass". "When he got up", he recognized the "brown mass" as one of the soldiers, although he was unable to distinguish which one. He saw the "brown mass" get up as the truck approached and then Miss Dupont got up and ran away. He distinguished her readily since she was wearing a dark blue coat (R23,24,25,27,28,29). The truck stopped at the triangle but by this time Miss Dupont had run about 30 meters down the road (R26,29, 30,31). Roeder then went to Miss Dupont's house where he met her and was told by her that the soldier had taken her bicycle. He asked her "Did they do anything else with you" to which she replied "Yes, yes". They then went to the military headquarters in the village where they complained first of the taking of the bicycle and then, upon further questioning, of the attack on Miss Dupont. Miss Dupont cried, was frightened and excited, and indicated to the soldiers "her dirty dress where she had been put on the ground, and made signs that she had been put on the ground by a soldier " (R25-28).

4. a. Each accused, having had his rights as a witness explained to him, according to defense counsel, elected to take the stand as a sworn witness. Rape stated that he and Holthus had spent most of the afternoon at the service battery where they had gone to have a trailer wheel fixed. Both had several drinks and were en route to their own command post in a jeep when they approached the triangle near Haller. Roeder and Miss Dupont were standing there. Since they had instructions from their captain to check on civilians found near their installations, some of which were located in the vicinity, accused agreed that they should stop and question the two civilians. As they slowed down, Roeder went off on his bicycle. Rape got out of the jeep and asked Miss Dupont what she was doing there. She "jabbered" something Rape couldn't understand. Rape, holding his gun at port arms, motioned for her to move on, and Miss Dupont thereupon ran up the road with her hands over her head. Holthus, meanwhile, had walked up the road to the intersection where Roeder had gone, to see what had become of him. He returned with the report that he was out of sight. About this time, a truck drove up and stopped for a few seconds while the driver asked what the trouble was. Rape then rode Miss Dupont's bicycle down to the command post, Holthus driving the jeep. On arrival, Rape found Roeder and Miss Dupont already there. He denied that he at any time touched Miss Dupont and stated that he spoke to her for two or three minutes before she ran away and that altogether he spent about four or five minutes at the triangle. Miss Dupont neither fell nor lay on the ground at any time during this period and Rape noticed no mud on her clothing (R47,48,51-57,66-68).

The testimony of Holthus was substantially the same as

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that of Rape. He stated that by the time he returned from his trip up the road to see where Roeder had gone, Miss Dupont was already running off with her hands in the air. He denied seeing the truck which Rape and the various other witnesses described in their testimony (R58-64).

b. Several other witnesses were introduced for the defense. The accuseds' battery commander testified that when Roeder and Miss Dupont came to the command post, Roeder complained through an interpreter first that Rape had taken Miss Dupont's bicycle and then that he had "made advances" toward the girl. He noticed nothing unusual about the appearance of either Rape or Holthus, but the girl had mud on the back of her coat which was definitely dry and of a reddish brown color. She did not look unusually disheveled, but upon seeing Rape, she became emotional (R35-38). Testimony of the enlisted man who acted as interpreter at the command post showed that Miss Dupont was hysterical, but that the only complaint made there by Roeder concerned the taking of the bicycle. Witness accompanied Miss Dupont and Roeder to the former's house, however, and on the way Roeder complained about the rape (R39-42). It was also shown that a medical examination of Miss Dupont, made on the same day but some time after the alleged rape, revealed no evidence of forced intercourse. The medical officer further testified that, depending on the individual and her age, a woman might submit to intercourse under fear of her life without such intercourse being apparent on subsequent examination. He also stated that it would have been possible for Miss Dupont to have had intercourse that afternoon without indication thereof appearing on the examination (R43,44).

5. It is apparent that two squarely contradictory versions of the events which occurred at the triangle are presented by the prosecution and the defense. Except perhaps for the disagreement between Holthus and Rape as to the arrival of the truck at the scene of the offense, there are no discrepancies or inconsistencies in the evidence supporting either version which, upon a reading of the record, seem so glaring as to compel the acceptance or rejection of either one or the other. The issue is therefore one of fact wherein the relative credibility of the witnesses is of paramount importance. Such issue, as the Board of Review has frequently held, is within the exclusive province of the court, whose findings will not be disturbed upon appellate review if supported by competent substantial evidence (CM ETO 1621, Leatherberry; CM ETO 4172, Davis et al). The only question before the Board therefore is whether the evidence produced by the prosecution is legally sufficient to support the findings of guilty of the Specification and Charge as to each accused.

a. With respect to accused Rape, the record of trial is clearly sufficient to support the findings. This accused is charged

with rape under Article of War 92, the form of specification used being the conventional one provided in Appendix 4, Manual for Courts-Martial, 1928. The elements of the offense, that accused had carnal knowledge of Miss Dupont by force and without her consent, are proved by substantial and competent evidence. Proof of the assault and actual penetration is dependent entirely on Miss Dupont's testimony, but such testimony is strongly supported by the surrounding facts and circumstances including the testimony of Roeder, the truck driver and Mrs. Sobottka. This is sufficient, since a conviction of rape may be sustained on the uncorroborated testimony of the victim, where her testimony, as here, is clear and convincing and free from doubts, inconsistencies or improbabilities (CM ETO 6193, Parrott et al; CM ETO 2625, Pridgen; CM ETO 5009, Sanders et al). It is apparent from Miss Dupont's testimony that she did not struggle to any great extent after she had been put to the ground by Rape. However, in view of her testimony as to the fear produced by Rape's threats with his rifle and the presence of Holthus armed with a gun, it cannot be said that her apparent submission coupled with her failure to offer further resistance amounted to consent (CM ETO 4017, Pennyfeather, and cases cited; CM ETO 3933, Ferguson and Borie).

b. The position of accused Holthus 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 * * * wrongfully and feloniously aid and abet" his fellow-accused in committing rape upon Miss Dupont, "by acting as a look-out". It is necessary therefore to determine whether such a Specification is proper under Article of War 92 and if so, whether the mandatory punitive provisions of that article are applicable in this case.

In CM ETO 4234, Lasker and Harrell, a virtually identical specification was upheld under Article of War 92, and the following observation by the Board of Review in that case is therefore pertinent to Holthus' situation:

> "As to accused Lasker, charged under Article of War 92 with aiding and abetting Harrell in his commission of the crime of rape, the distinction between principals, and aiders and abetters has been abolished by Federal Statute (sec.332, Federal Criminal Code, 18 USCA 550; 35 Stat.1152). The distinction is also not recognized in the administration of military justice (Winthrop's Military Law and Precedents - Reprint, p.108; CM ETO 72, Farley and Jacobs; CM ETO 1453, Fowler). Accordingly Lasker might properly have been charged with rape as a principal (CM ETO 3740, Sanders et al, pp.23-24). It does not follow, however, that it was improper

> to charge him with the substantive offense of aiding and abetting the actual rape, as distinct from rape itself. The purpose of section 332 of the Federal Criminal Code was not to grant aiders and abetters any immunity, but merely to prescribe and simplify the procedure for their prosecution (Haggarty v. United States, 5 Fed. (2nd) 224; CM ETO 3740, Sanders et al)".

In view of the abolition of the distinction between principals and aiders and abettors provided in the Federal statute above mentioned, 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. In the Lasker and Harrell case, a life sentence was upheld on the ground that

> "The measure of punishment for aiding and abetting the commission of the crime of rape, determined by analogy and not made mandatory by any Article of War, is any punishment excepting death which the court-martial may direct".

The result thus reached was proper, but the quoted reasoning given in support thereof is erroneous, and in view of the principles outlined above, is now disapproved. In CM ETO 3740, Sanders et al, relied on by the Board of Review in the Lasker and Harrell case in support of its reasoning, the facts are distinguishable from both the Lasker and the present case. In the Sanders case one of the accused was charged both as an aider and abettor to the rape under Article of War 96 and as the principal thereof under Article of War 92. He was acquitted of the latter charge and convicted of the former. A sentence of confinement for 20 years was upheld on the ground that, in view of the peculiar circumstances of the case involving an actual acquittal of the crime of rape, the offense of aiding and abetting charged under Article of War 96 was a distinct and separate crime. Hence it was held that appropriate punishment thereof must be determined by analogy to the closely related offense of rape and was not controlled by the mandatory provision of Article of War 92. Obviously, this line of reasoning has no application to either the present case or the Lasker and Harrel case.

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There remains the question whether the evidence is legally sufficient to sustain the court's finding that Holthus was in fact guilty of aiding and abetting in the commission of the rape. In this connection, it was shown that prior to the commission of the offense, Holthus searched for Roeder and upon his return, said something to Rape who then handed his gun to Holthus and proceeded to the commission of the crime. Throughout, Holthus stood by, gun in hand, laughing from time to time during the proceeding. Shortly after the completion of the intercourse, and at the time Miss Dupont heard the approaching truck, Holthus again spoke to Rape who then released Miss Dupont. It is evident therefore that Holthus' part in the affair was more than that of a mere spectator and that the court was justified in drawing from his conduct an inference of preconcert and mutual purpose and intent between him and Rape with respect to commission of the crime. Hence he was properly found guilty as an aider and abettor (CM ETO 6193, Parrott et al; CM ETO 4589, Powell et al; CM ETO 4234, Lasker and Harrell; CM ETO 3740, Sanders et al; CM ETO 804, Ogletree et al).

6. The charge sheet shows the following concerning the service of the accused: Rape is 29 years of age and was inducted 18 July 1941 at Fort Bragg, North Carolina. Holthus is 27 years of age and was inducted 20 October 1941 at Fort Snelling, Minnesota. Neither had prior service.

7. 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 sentence.

8. The penalty for rape as a principal or as an aider and abettor is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized for rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). Since the accused are 29 and 27 years of age respectively, confinement in the United States Penitentiary, Lewisburg, Pennsylvania, is proper (Cir.229, WD, 8 June 1944, sec.II, par.1b(4) and 3b, as amended).

B. Franklin Riter, Judge Advocate

Mahlon C. Sherman, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 9 MAR 1945 TO: Commanding General, 9th Armored Division, APO 259, U. S. Army.

1. In the case of Technicians Fourth Grade SAMUEL W. RAPE (34116651) and LLOYD A. HOLTHUS (37093665), both of Battery "C", 73rd Armored Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. Considering all the facts shown by the record, it appears that some reduction in the sentence of Holthus is appropriate. There is no indication that the crime was planned before arrival at the scene. Rape was the active party, the only one who had intercourse with the woman, and there is no indication that Holthus intended to even had there been opportunity. The latter acted as a look-out, watching for the return of the woman's companion and warning of the approach of the truck. He did not threaten or hold at bay potential rescuers, as frequently has happened in similar cases. There is a very definite difference in the culpability of the two accused. It is suggested that Holthus' period of confinement be reduced so as not to exceed 20 years.

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 5068. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5068).

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

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

BOARD OF REVIEW NO. 1

31 JAN 1945

CM ETO 5079

U N I T E D S T A T E S	)	3RD INFANTRY DIVISION.
	)	
v.	)	Trial by GCM, convened at Luxeuil-les-Bains, France, 6 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private TRUMAN A. BOWERS (20817834), Company C, 10th Engineer Combat Battalion.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Truman A. Bowers, Company C, 10th Engineer Combat Battalion, did, at Valeras, France, on or about 27 August 1944, desert the service of the United States by absenting himself without proper leave from his organization, with the intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he surrendered himself at Marseilles, France, on or about 17 September 1944.

He pleaded not guilty and, three-fourths of the members of the court

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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, the first for failing to repair at fixed time and place for guard in violation of Article of War 61, and for breach of restriction in violation of Article of War 96, and the second for absence without leave for eight 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 period 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 50½.

3. The evidence for the prosecution established that accused absented himself from his organization without leave at a time when he and the rest of his squad were advancing toward the enemy. From the circumstances surrounding the commencement of his unauthorized absence the court was warranted in finding that he quit his organization with intent to avoid hazardous duty as alleged. The offense was committed on 27 August 1944 after accused and his squad arrived at the command post of an infantry company and were awaiting orders to perform such duties for the company as might be required in the course of an advance against the enemy which was then in progress. The testimony of the witnesses for the defense was not in conflict with this evidence since it referred to another incident involving absence without leave of two defense witnesses and accused which had occurred at a different place some time previous to 27 August. The Board of Review is of the opinion that the findings of guilty of the Charge and Specification are supported by competent and substantial evidence (CM ETO 5555 Slovik; CM ETO 5393 Leach; CM ETO 1664 Wilson; CM ETO 1432 Good).

4. The charge sheet shows that accused is 22 years of age and enlisted at Bowie, Texas, 22 February 1940, for three years. His service period is governed by the Service Extension Act of 1941. He had no prior service.

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

6. 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 proper (Cir. 210, WD, 14 Sept.1943, sec.VI, as amended).

P. Franklin Peters Judge Advocate

Malcolm C. Sherman Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 31 JAN 1945 TO: Commanding General, 3rd Infantry Division, APO 3, U. S. Army.

1. In the case of Private TRUMAN A. BOWERS (20817834), Company C, 10th Engineer Combat Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5079. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5079).

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

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

BOARD OF REVIEW NO. 1

27 JAN 1945

CM ETO 5080

U N I T E D S T A T E S	)	3D INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Luxeuil-les Bains, France, 6 October 1944.
Private ANTHONY F. PUGLIANO (13126183), Company B, 15th Infantry	)	Sentence: 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. 1
RITER, SHERMAN and STEVENS, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Anthony F. Pugliano, Company B, Fifteenth Infantry, did near St Germaine, France, on or about 17 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 returned to military control, near St Germaine, France, on or about 20 September 1944.

He 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. 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

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dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 40 years. The reviewing authority approved the sentence but reduced the period 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 50½.

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

Accused was a member of Company B, 15th Infantry (Pros. Ex.A). The platoon sergeant of the weapons platoon of the same company testified that on 17 September 1944, in the course of an attack near St. Germaine, while the company was being subjected to intensive enemy fire, accused moved back from his squad, came up excitedly to the sergeant and asked him, "Am I safe here?" The sergeant told him it was safer for him to stay with his own squad. Accused stated that he "couldn't take it". The sergeant tried to calm him and urged him to go back to his squad and to "hit the ground" and seek cover whenever the firing started. This incident happened at about 1500 hours. A half-hour later, as accused was returning to his squad, there was a recurrence of enemy small-arms fire but he appeared to be much calmer. That night accused followed the sergeant who was immediately behind the platoon and ahead of the tanks. He remained with the sergeant until about 2300 hours. The sergeant did not see him after that time, searched for him and did not find him. A lieutenant also looked for him that night. The following morning the sergeant searched for him again and, not finding him, reported him as missing (R5,6). He had not given accused permission to leave the platoon, and it did not come to his attention that the company commander or platoon leader or any other person of competent authority had done so. The sergeant was continuously present for duty since 17 September but did not see accused again until the time of trial (R7).

Defense counsel stating he had no objection, a certified extract copy of the morning report of Company B, 15th Infantry, containing two entries relating to accused was received in evidence. One entry, under date of 19 September 1944, showed a change in the status of accused from duty to absent without leave as of 2030 hours, 17 September. The other entry, under date of 20 September, showed changes in his status from absence without leave to duty and from duty to confinement as of 20 September (R7; Pros.Ex.A).

4. a. The defense offered no evidence. The rights of accused to testify, to make an unsworn statement, or to remain silent were explained to him, and defense counsel stated that accused elected to make an unsworn statement through counsel. Counsel asserted that

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accused had not been previously convicted and had never suffered punishment under the 104th Article of War. He joined the 9th Infantry Division in 1943 and fought with that division through the African and Sicilian campaigns. He became a member of the 3d Infantry Division after the Sicilian campaign and had been a member of it since that time.

b. After resting his case and before the court closed for the findings, defense counsel made the following closing argument:

> "We wish to point out to the court that the accused has had a long service with this division and this is his first offense, and we do not think it is a 50 year offense (R8) (Underscoring supplied).

This statement in effect conceded the guilt of accused even before the court closed to deliberate and vote on the findings. In view of accused's plea of not guilty, the concession was highly improper and was certainly not indicative of that careful and competent assistance of counsel which accused was entitled to receive. There is nothing in the law, in the record of trial, or in any known policy on sentences which renders intelligible defense counsel's assertion that he did not think this was "a 50 year offense". In view of the nature of the evidence against accused, however, the Board of Review is of the opinion that the improper statement did not injuriously affect the substantial rights of accused.

5. The uncontradicted evidence clearly established all the elements of the offense charged, and the findings of guilty of the Charge and Specification were fully warranted (CM ETO 5393, Leach; CM ETO 4987, Brucker; CM ETO 4753, Gotschall; CM ETO 1664, Wilson; CM ETO 1432, Good).

6. The charge sheet shows that accused is 23 years of age and enlisted at Philadelphia, Pennsylvania, 16 October 1942, to serve for the duration of the war and six months thereafter. 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 as approved.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designa-

tion 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).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 27 JAN 1945 TO: Commanding General, 3d Infantry Division, APO 3, U. S. Army.

1. In the case of Private ANTHONY F. PUGLIANO (13126183), Company B, 15th 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 modified, 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 5080. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5080).

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

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

BOARD OF REVIEW NO. 2 13 JAN 1945

CM ETO 5107

U N I T E D S T A T E S	36TH INFANTRY DIVISION
v.	Trial by GCM, convened at Headquarters 36th Infantry Division, (France), 17 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Corporal JOHN H. NELSON (36419495), Company L, 142nd Infantry.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Corporal JOHN H. NELSON, Company "L", 142d Infantry, did, near REHAUPAL, FRANCE on or about 18 October 1944, with intent to deceive 1st Lieutenant SAMUEL J. LUSTMAN, Company "L", 142d Infantry, officially report to the said 1st Lieutenant Lustman, that a certain area in the vicinity of REHAUPAL, FRANCE, was clear of enemy troops, which report was made by the said Corporal Nelson, with disregard of the knowledge of the facts, thereby endangering the safety of Company "L", 142d Infantry, which was then engaged with the enemy.

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Specification 2: In that * * * did, near REHAUPAL, FRANCE on or about 19 October 1944, willfully maim himself in the toe by shooting himself with a rifle, M1, U. S. Caliber 30, with intent to avoid hazardous duty.

He pleaded not guilty to and was found guilty of the Charge 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 the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 18 October 1944, Company L, 142nd Infantry, was occupying a defensive position near Rehaupal, France, and was tactically engaged with the enemy. The executive officer of Company L briefed and ordered three men of his organization to proceed with accused as leader to proceed on a reconnaissance patrol. The patrol was instructed to investigate certain territory, search any houses on a special route and bring back any information regarding the enemy in that area. The patrol was ordered to start at 11 o'clock on the night of 18 October 1944. At approximately 3 a.m. 19 October 1944, accused reported to Lieutenant Lustman that he had completed his mission and that he had not encountered anything. He indicated that the area was cleared of Germans and that everything was all right (R6-9). On the morning of the same day, accused made a second and more detailed report to his company and battalion commanders, at which time he pointed out specific places that had been investigated and which he reported were cleared (R9). Based upon this information, another patrol was scheduled to take and occupy the area which accused had reported was free of enemy troops (R8), and accused was to guide it (R18). Prior to the latter force moving out, at approximately 4:30 p.m., 19 October 1944, accused reported to Lieutenant Lustman and requested to speak to him alone. He told the lieutenant that he did not go out on the patrol or complete the mission as he had previously reported. He confirmed this fact in a statement made by him later that afternoon to the company commander admitting also at the same time that he had purposely shot himself in the foot (R10).

Private Evans L. Charles, a member of the patrol, testified that following an extended briefing, at which accused was present, the patrol located the tactical wire, intended as a guide, and proceeded

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on the mission. About halfway between the command post and the first platoon area the members of the patrol ran into an artillery barrage and as a consequence they lost the guide wire. However, they were able to find K Company where they obtained some information as to the location of a house supposedly occupied by the enemy (R13). They continued their search for this house for sometime (R13). Accused said it was useless to carry on as they were lost (R19). It was raining very hard at the time and they were not making any headway so at approximately 2:30 a.m., the patrol reported in. None of the houses were located (R13-14). Witness further testified that late in the afternoon, 19 October 1944 he observed accused standing outside a foxhole cleaning his rifle, a .30 caliber carbine. The accused put a clip in the weapon, slid the bolt forward, inserted his finger in the trigger housing and while pointing the gun towards his feet, fired the piece, injuring the left side of the second or third toe of his left foot (R14-15).

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. Competent uncontradicted evidence establishes that accused was given a hazardous and important military mission to perform, and that he failed to accomplish the assignment. Following such failure, accused officially reported to his company and battalion commanders that he had completed the reconnaissance patrol and had not encountered the enemy. He asserted that the prescribed area of his patrol was cleared of enemy troops and that it was therefore all right for the task forces to occupy such territory. Based upon this report a patrol was ordered forward to occupy this area but prior to their leaving accused made known for the first time the fact that he had not accomplished the required reconnaissance or completed the mission concerning which he had previously reported. It is clear therefore, that such report was made by accused with disregard of the knowledge of the facts and as a result the safety of his company was endangered, as alleged.

Concerning Specification 2 of the Charge, the evidence is undisputed that accused purposely shot himself in the foot with an M-1 carbine. The resulting injury sustained, however, was minor as only the left side of the second or third toe was grazed by the bullet. According to Winthrop, the gravamen of the offense of mayhem, cognizable by a military court, is that the act must be of such a charactor as to permanently disable the person or to render one less able to fight or to defend himself against his adversary (Winthrop's Military Law and Precedents, Reprint 1920, p.676). The shooting herein did not result in disabling accused or incapacitate him from service and therefore he did not technically commit the offense of mayhem. However, from the fact that accused was notified that he was

to guide a subsequent patrol over enemy occupied territory, the court was justified in inferring that the shooting was self-inflicted with intent to avoid hazardous duty. Such conduct is certainly service discrediting within the meaning of Article of War 96.

The Table of maximum punishments, (MCM, 1928, par104c, p.100) authorizes confinement for three months for the offense by a non-commissioned officer in knowingly making a false official statement or report in violation of Article of War 96. However, the offense, as charged by Specification 1 hereof, is unlike such listed offense, the punishment for which is limited and prescribed. The specification herein alleges a military offense of a different character, in that accused is charged with discreditable conduct which endangered the safety of his company then engaged in combat with the enemy. The misconduct described involves all the essential elements of a violation of Article of War 75, which prescribes death as the maximum punishment for any soldier who, before the enemy by any misconduct endangers the safety of any command which it is his duty to defend. The designation of Article of War 96 in the charge does not affect the legal sufficiency of the findings or the sentence (MCM, 1928, par.28, p.18; Dig. Ops. JAG 1912 - 1940, sec.394(2), p.197; CM 227863, Kiplinger (1943), 15 B.R.388).

The offense alleged in Specification 1 hereof supports the sentence. The sentence, imposed by the court upon conviction of both specifications and the charge, is therefore legally sustained.

6. The charge sheet shows that accused is 21 years of age. He was inducted without prior service, at Marquette, Michigan on 14 January 1943.

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 is legally sufficient to support the findings of guilty and the sentence.

8. The punishment which may be imposed upon conviction of offenses under Article of War 96, is within the discretion of the court (AW 96). The designation of 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 of Operations. 13 JAN 1945 TO: Commanding General, 36th Infantry Division, APO 36, U. S. Army.

1. In the case of Corporal JOHN H. NELSON (36419495), Company L, 142nd Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5107. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5107).

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

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

BOARD OF REVIEW NO. 1 16 DEC 1944

CM ETO 5114

U N I T E D S T A T E S	)	36TH INFANTRY DIVISION
v.	)	Trial by GCM, convened at APO 36, U.S. Army (France), 15 November 1944.
Private ARTHUR W. ACERS (33798168), Company F, 141st Infantry	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 50 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Private Arthur W. Acers, Company F, 141st Infantry, did, at vicinity of Rouge Eaux, France, on or about 2 November 1944, run away from his organization, which was then engaged with the enemy, and did not return thereto until he was apprehended on or about 7 November 1944.

Specification 2: In that * * * did, in the vicinity of Xamonrupt,, France, on or about 7 November 1944, misbehave himself before the enemy by refusing to return to duty with his company which was then engaged with the enemy.

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He pleaded 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 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 50 years. The reviewing authority approved only so much of the finding of guilty of Specification 1 of the Charge as involved a finding of guilty of absence without leave from his organization at the place alleged, from 2 November 1944 to 7 November 1944, in violation of Article of War 61, 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 only testimony in the record was that of Captain Gregory A. Commes. He testified that he was Service Company Commander and Kitchen Train Commander, 141st Infantry. As Service Company Commander he had charge of men returning to their units. On or about 2 November 1944, the 141st Infantry, located east of Bruyeres (near Rouge Eaux), France, was tactically engaged with the enemy (R6).

On 7 November the regiment was also tactically before the enemy and the Service Company was located at or near Xamontarupt, France. On that day accused was one of a group of seven soldiers who were returned to witness' installation by the division military police. Witness gave them an order

> "That they would be equipped from my kitchen train and returned to their unit for duty" (R6).

One member of the group stated that he would not return. Thereupon, witness testified,

> "One man in the group said that he wouldn't return and after turning to him and taking care of him I turned again to the group and said that I wanted the men that were ready to go back to step forward and they all stepped backward, away from me" (R7).

Accused was in the group which received the foregoing direction but he did not obey it (R6-7). The group, by stepping away,

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indicated they would not obey the order. Witness then sent them to the stockade (R6).

4. After he was advised of his rights, accused elected to remain silent and no evidence was introduced for the defense (R7).

5. Specification 1 of the Charge alleges that accused did

> "on or about 2 November 1944, run away from his organization, which was then engaged with the enemy, and did not return thereto until he was apprehended on or about 7 November 1944".

The question arises whether the reviewing authority properly reduced the offense above alleged, in violation of Article of War 75, of which accused was found guilty, by carving out of it as a lesser included offense absence without leave by accused from his organization at the place alleged for the period from 2-7 November, in violation of Article of War 61. Absence without leave under Article of War 61 may be a lesser included offense of Article of War 75 when the Specification, as in this case, is so drawn as sufficiently to allege an unauthorized absence (CM 130412 (1919), Dig. Op. JAG, 1912-1940, sec.433 (3), p.304; CM NATO (M.J. Review), 1021, Boudreaux). Running away from his company on the part of a soldier necessarily comports and includes separation therefrom without authority (CM 126647 (1919), Ibid.). The foregoing authorities were cited with approval by the Board of Review in CM ETO 2212, Coldiron, p.11, Bull. JAG, Aug. 1944, Vol.III, No.7, sec.433, p.342), wherein the Board held that

> "When some other offense is necessarily included in the phraseology of a specification under the 75th Article of War, a conviction under the 96th Article of War (or some other cognate article) is proper".

Accused's plea of guilty, to the extent that it admits absence without leave between 2 and 7 November 1944, is supported by the evidence.

6. Accused herein was a member of the same group of seven soldiers returned to the Service Company by division military police of which the accused in CM ETO 5004, Scheck was a member. The facts in the latter case were substantially similar

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to the facts with respect to Specification 2 herein. On the basis of that case and the authorities therein cited, the Board of Review is of the opinion that the pleas of guilty to Specification 2 and the Charge are supported by the evidence. The comments of the Board of Review in paragraph 7 of its holding in that case are equally applicable to the record of trial herein, which, although legally sufficient to sustain the findings of guilty as approved, and the sentence, is far from satisfactory from the standpoint of the proper administration of military justice, particularly in a capital case.

7. The record shows (R2) that the trial took place only three days after the charges were served on accused. Neither he nor his counsel made any objection to trial at this time. In the absence of indication of prejudice to any of accused's substantial rights, the irregularity may be regarded as harmless (CM ETO 5004, Scheck, and authorities therein cited). It is better practice to ask accused if he is ready to go to trial.

8. The charge sheet shows that accused is 19 years of age and was inducted at Philadelphia, Pennsylvania, 8 September 1943.

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 as apporved and the sentence.

10. The penalty for misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 75). 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 Sep 1943, sec.VI, as amended).

B. Walter Kite Judge Advocate

Edward Holzgrew Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 DEC 1944 TO: Commanding General, 36th Infantry Division, APO 36, U.S. Army

1. In the case of Private ARTHUR W. ACERS (33798168), Company F, 141st 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 as approved and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Particular attention is invited to the comments of the Board of Review in paragraph 7 of its holding in CM ETO 5004, Scheck, which are equally applicable to the record of trial herein. See paragraph 6 of the Board's holding herein.

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 5114. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5114).

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

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

BOARD OF REVIEW NO. 1

15 DEC 1944

CM ETO 5117

U N I T E D S T A T E S	36TH INFANTRY DIVISION
v.	Trial by GCM, convened at Headquarters 36th Infantry Division, APO 36, U.S. Army, (France) 17 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private MILTON J. DeFRANK (39420715), Company A, 141st Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Milton J. DeFrank, Company A, 141st Infantry, did, at or near Demengstat, France, on or about 22 October 1944, desert the service of the United States, and did remain absent in desertion until on or about 2 November 1944.

Specification 2: In that * * * did, at or near Demengstat, France, on or about 2 November 1944, desert the service of the United States, and did remain absent in desertion until on or about 7 November 1944.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring,

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was found guilty of the Charge 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 under Article of War 50½.

3. The specifications of the Charge upon which accused was arraigned and tried allege two separate acts of desertion of the military service of the United States by accused under the 58th Article of War. The forms of the specifications are those prescribed in the Manual for Courts-Martial (MCM, 1928, Form 13, App.4, p.240), covering the offense of desertion under circumstances where the proof shows that an accused was absent without leave "accompanied by the intention not to return" to the military service (MCM, 1928, par.130a, p.142). In the instant case if the findings of guilty depended solely upon proof that accused on the occasions of his absences intended to return to the military service, they could not be sustained. Upon such premise the evidence is only sufficient to support a finding of guilty of absence without leave under the 61st Article of War.

It is an approved principle that in the absence of a direct attack upon a specification, which alleges desertion based upon an absence without leave with intent not to return, because of its vagueness or indefiniteness, the prosecution may prove an act of desertion under the 28th Article of War which includes absence without leave from an accused's organization or place of duty with intent to avoid hazardous duty or to shirk important service (CM 245568 (1943) Clancy, 29 BR 215, Bull. JAG, April 1944, Vol.III, No.4, sec.416, p.142).

In the instant case the evidence shows that on 22 October 1944 while accused's organization was at Demengstat, France preparing to move "into the line" to attack the enemy accused, a rifleman in the second platoon of Company A, 141st Infantry, left his company without authority and did not return to it until 2 November. The company entrucked and departed for the front lines at 3:00 pm on 22 October and (R7-9), entered its position in the line the next day and encountered enemy fire (R10). During accused's absence he was at the supply dump near Bruyeres, located in an area of comparative safety. The company was "cut off" by the enemy during this period (R13). Accused returned to his company on 2 November on which day it "came back

from the lines" (R7,10). On that day the unit was preparing to go out into a defensive, "holding" position and again accused left without permission (R7,10-11) and was not with the company when it went into its position. He again went to the company supply dump. During his second absence he was supposed to be on an outpost with his platoon (R8). Upon being informed by the supply sergeant that the first sergeant desired him to return to his company he declared "he was finished, he was through" (R15). He returned to the company on 7 November (R8).

4. Accused elected to remain silent and presented no evidence in defense (R16).

5. There is uncontradicted evidence in the record of trial that accused's organization was under orders on both 22 October and 2 November to advance toward and engage the enemy. Beyond peradventure this was hazardous duty. Accused's absences on both occasions were without authority. There is substantial evidence from which the court was entitled to infer that accused had full knowledge of the immediate future activities of his organization at the times he departed from it. The irrefragable conclusion is that he consciously and deliberately avoided combat with the enemy and sought and found safety in the rear. Proof of accused's guilt of the offense of absenting himself from his company at the times and places alleged with intent to avoid hazardous duty is complete (CM ETO 1249, Marchetti; CM ETO 3196, Puleio; CM ETO 3948, Paulercio; CM ETO 4783, Duff). Under the rule of the Clancy case, supra, the prosecution sustained the burden of proving accused's guilt of the serious offense of desertion.

6. The charge sheet shows that accused is 23 years of age and that he was inducted at Sacramento, California, 4 December 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 of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (Cir.210, WD, 14 Sep 1943, sec.VI as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 15 DEC 1944 TO: Commanding General, 36th Infantry Division, APO 36, U.S. Army.

1. In the case of Private MILTON J. DeFRANK (39420715), Company A, 141st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5117. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5117).

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

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

BOARD OF REVIEW NO. 1 27 DEC 1944

CM ETO 5137

U N I T E D S T A T E S)	LOIRE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.)	
Private WALTER J. BALDWIN (34020111), 574th Ordnance Ammunition Company)	Trial by GCM, convened at Palais de Justice, Le Mans, France, 6-7 October 1944. Sentence: To be hanged by the neck until dead.

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

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

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

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

Specification: In that Private Walter J. Baldwin, 574th Ordnance Company, did, without proper leave, absent himself from his organization at or near Beaufay, France, from about 18 August 1944 to about 23 August 1944.

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

Specification: In that * * * did, at or near Beaufay, France, on or about 23 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Adolpha Drouin, a human being, by shooting him with a carbine.

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

Specification: In that * * * did, at or near Beaufay, France, on or about 23 August 1944, with intent to commit a felony, viz., murder, commit an assault upon Madame Louise Drouin by willfully and feloniously shooting her with a carbine.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of all charges and their specifications. Evidence was introduced of two previous convictions, one by summary court for breaking restriction and appearing without proper authority with first sergeant chevrons in violation of Article of War 96, and one by special court-martial for disobeying the lawful order of a noncommissioned officer in violation of Article of War 65. All 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, Loire 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, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

3. With reference to the offenses of murder and assault with intent to commit murder (Charges II, III and their specifications), the evidence for the prosecution showed that on 23 August 1944, Adolphe P. Drouin (deceased) his wife Louise, and daughter Yvette, age twenty-one, lived at Rigauderie, Beaufay, France (R6-7,14,24, 26-27). Admitted in evidence was a map of their house and the neighboring area (R9-13; Pros.Ex.2). Stoves were kept in a room marked A on the map. The kitchen window was designated B, the kitchen door C, the bedroom door D, the bedroom window E and the cellar door F (R13-14,27). On 23 August about 1:30 pm, Monsieur Drouin left on his bicycle to inspect a turnip field (R14,20,28). Ten minutes after his departure Madame Drouin and Yvette were in the bedroom (R14,28), the door and window shutters of which were closed (R14,33,35). They heard footsteps in the yard outside and about 15 minutes later Yvette saw a soldier peer through the glass at the top of the bedroom door. He then shook the bedroom door, "very strongly" shook the shutters and also shook the cellar door. The two women heard him open and close the stove room door and then return to the yard (R14,23,28-29). Yvette climbed on a bread box in the bedroom, peered out through the shutters and saw the soldier standing at point K (Pros.Ex.2) holding his rifle. He then returned,

sat down on a bench at point J, and "spoke to himself". After he again opened and shut the stove room door, the women heard him "manipulating his rifle * * * the noise clicking and the noise of the rifle" before the bedroom window (R23,29). The noise in the yard lasted at least an hour (R18,32). Yvette heard no other footsteps nor did she see any other person in the yard during this time (R29,37). About 3:30 pm (R18), she saw her father return on his bicycle, arrive at point N (Pros.Ex.2), lean his machine against the wall and open the gate. She saw him take a few steps, saw the soldier go to him immediately, and then she descended from the bread box (R29,31). Madame Drouin and Yvette heard the two men talking and Drouin say "No, No". Immediately thereafter both women heard a shot and ran out the bedroom door (R18,29-30,32,34).

Madame Drouin testified that when she came outside she saw her husband lying on the ground at point H (Pros.Ex2) and the soldier standing at point I holding his rifle. As she ran toward Drouin who called for help, the soldier shot her in the thigh and she fell near her husband at point G. She shouted for help, became unconscious and next recalled being at La Blancheirdiere in an American hospital. She exhibited to the court a wound on the left thigh slightly above the knee (R18-21). The first time witness saw the soldier that afternoon was when she ran from the house. Only the soldier and her husband were then in the yard. The soldier "wore khaki clothes as they all do" but as she did not "look at him long enough", Madame Drouin could not remember his appearance and could not recognize him if she saw him again (R23-24). Her husband's correct name was Adolphe Paul Drouin (R24). (The spelling of his first name in the Specification of Charge II was changed accordingly (44)).

When Yvette ran from the house she saw her father falling to the ground at point H (Pros.Ex.2) and heard him crying for help. The soldier held his rifle in his hand and was at point N (R30-31,33). She knew he was an American soldier because he was dressed "as most American soldiers" and wore a field jacket and helmet (R31,33,37-38). She last saw her mother as she ran out the gate at point F toward Drouin (R31,35). The girl ran through the field behind the house and in a few seconds met a neighbor named Evrard who was running toward her house. She told Evrard to go to the house and immediately thereafter heard a second shot (R31-32,35). Witness saw only her father, mother and the soldier when she ran from the house (R38). She saw only the soldier's helmet and his back, did not see his face, and was not able to identify him (R33,36-38).

About 3:30 pm French time (4:30 pm) (R39) Basile Evrard, who lived about 400 meters, from the Drouins (R38), was working in his garden and heard at least two shots, a few seconds apart, and also cries for help (R39,41). He ran toward the Drouin house and

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met Yvette who said "Come right quickly, there is a colored soldier who has shot my father" (R39-40). When Evrard arrived in the yard he saw Drouin lying at point O (Pros.Ex.2), Madame Drouin lying along the wall at point H and a colored soldier who stood at point P, facing the Drouins and holding a rifle in a horizontal position (R40-41). No one else was present. When Evrard went toward the victims to help them, the soldier said something not in the French language, and aimed his gun at Evrard who was "forced to withdraw" and "sheltered at the end of the wall". As the soldier continued to aim the gun at him, Evrard went into the bedroom and waited. After a while he opened the door, saw that the soldier had disappeared and went to the Drouins. When the woman told him to "go quickly and fetch a doctor", he left, met a Dr. Perimony on the way, and returned with him to the scene of the shooting (40-43). Evrard testified that he was not certain that the soldier was an American, that he was "not completely black" (R43), and that he could not identify him (R42). When the law member pointed out accused to the witness and asked if he would describe accused as "completely black", witness replied in the negative (R43-44).

About 4 pm (R77) the same day, accused appeared at the area of the 570th Ordnance Ammunition Company which was about 300 yards from the Drouin house (R77,84). He said to First Lieutenant Russell F. Flanders of that organization "I have just shot a Frenchman in the leg". Flanders sent Technician Fifth Grade Harold A. Cooley and Corporal William H. Morton to the scene of the incident to administer first aid (R76,80,84). Cooley and Morton found Drouin and his wife lying together on the ground "begging for help". Morton administered first aid to the woman who was wounded around the thigh and placed her in a weapons carrier (R77-78,81-83). Cooley, who gave first aid to Drouin, saw a small hole in his upper stomach or lower chest and observed that his back was bleeding. There was also blood on his foot. Both the man and woman were conscious. Drouin was also placed in the weapons carrier (R77-78). Lieutenant Flanders secured the aid of a medical officer and overtook the weapons carrier on the way to the hospital. Madame Drouin, who was bleeding badly, became unconscious and it was necessary to apply a tourniquet (R82,84,86). Upon Drouin's arrival at the 101st Evacuation Hospital (at Le Mans) (R84), a medical officer pronounced him dead (R82). Dr George Perimony of Beaufay, on 23 August also pronounced him dead and executed a death certificate (R44-45). On the same day Madame Drouin was treated by Roger Verjat, an interne at the Civil Hospital at Le Mans, who found two holes in her thigh, "one in the front and one at the back"(R25-26). Dr. Perimony also treated the woman for two wounds in her left thigh (R46).

Lieutenant Flanders was with accused about two hours before he surrendered the latter to the military police at Le Mans (R88). Accused was armed with a carbine, wore a helmet liner

and did not have a field jacket. Flanders believed he "was in O.D" (R86). Accused "absolutely was not" under the influence of liquor but was excited (R86-87). Flanders testified that his conversation

> "was very incoherent. He mumbled something about, I believe it was crazy Frenchman and M.P.'s and I got the idea from my own mind that the Frenchman had had him arrested" (R86).

Agent Harvey M. Fisher, 14th Military Police Criminal Investigation Section, visited the Drouin premises where he found an empty cartridge case. In his opinion it was "a 30 calibre Carbine cartridge case". In the barn he found a wooden shoe. It appeared to be bloodstained and Fisher "noticed it had a bullet hole, similar to what could be made by a Carbine". The cartridge case and shoe were identified by Fisher and admitted in evidence (R47,49-50; Pros.Exs.4,5).

On 26 August Fisher interviewed accused and before questioning him warned him of his rights under Article of War 24. Accused said that he understood his rights and acknowledged the fact by signing "yes" and his name on a form under the warning (Pros.Ex.6). He then made a statement and Fisher "wrote it down sentence by sentence" after which he re-read the statement to accused and then gave it to him in order that he could read it himself. A summary court officer, Lieutenant Santa Cruz, then read the 24th Article of War to accused and re-read the statement. In response to questioning, accused told Santa Cruz that the statement was made voluntarily, that no force was used and that he wished to sign it. Accused then signed at the end of each page and initialed each interlineation. At the trial Fisher identified the statement (Pros.Ex.6) and signature thereon which were made in his presence (R54-56,71-72,74-75). He further testified that the interrogation and complete processing of the statement consumed about three or four hours (R73) and that Agents Healy and Poust, who were with Fisher, were in and out of the room (R71,74). No one picked up a chair in a manner which indicated that he would threaten or strike accused with it (R71). When accused signed the statement (Pros.Ex.6) the writing on each page and the pages were exactly the same as they were at the trial.

> "the pages were exactly the same. The only difference now is that they are stapled together and marked confidential, otherwise they are exactly the same" (R71-72).

No promises of reward were made to accused nor was any punishment threatened if he did not make a statement. He was not told that it was necessary to continue the examination or to sign the statement because of the 24th Article of War (R74). He showed no reluctande and seemed "too eager to talk" (R75). After the statement was

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taken, accused was shown a carbine and asked if it was the carbine to which he referred in the statement. As he replied that it was and that the carbine belonged to him, "we had him sign an identification statement" to the effect that the carbine taken from his possession by "the M.P." belonged to him (R75).

After his rights were explained to him accused testified solely with respect to the circumstances which surrounded the taking of the statement (R57-58). His testimony is confusing and far from clear in this regard. Substantially he testified that on 26 August three men who said they were "F.B.I. Agents" asked him about the shooting and he "began relating a story to them" which was recorded by Fisher in a notebook. He then said he would tell no more and was told that "he would have to give more information under the 24th Article of War". As one of the men threatened to hit him with a chair accused told "some more story" (R59-60,63-64) to get rid of him (R61). Accused was then allowed to go upstairs to eat. He later refused to make any statement until he "got in court". He was then given a paper to sign on which there was no writing. There was printing on the top of the paper but he did not read it. Accused signed it in the belief that it concerned the turning in of his rifle. Shown Pros.Ex.6 he testified that the signature below the warning under the 24th Article of War and on the bottom of each on the four pages, were his. With the exception of the printed material at the top of page 1, the pages were blank when he signed them. He was told to turn in his rifle and as the pages were "very similar to a Form 32" he signed them in the belief that the papers concerned the surrender of his rifle, and that page 2 "was supposed to be the copy for someone else" (R60,64-65,67). He also signed them because he was told that he had to do "as this man saw fit" or severe punishment would follow (R67-68). He did make a statement "under force" but it was not the one contained in Pros.Ex.6 (R68).

Accused further testified that he then was again asked if he would make a statement and he refused not only to make a statement but also to sign "another paper", whereupon the agent threatened him with his fists and called him a "few vulgar names". Accused then signed "three to four more papers", put his initials on some papers and again refused to make a statement. Lieutenant Santa Cruz then entered and asked if accused understood his rights under Article of War 24 and he replied in the affirmative. Accused returned upstairs. He "merely told the man something to get rid of him" (R60-61).

Pros.Ex.6 was admitted in evidence (R76). It was in pertinent part as follows:

> "Pvt. Walter J. Baldwin It is my duty to inform you of your rights at this time. It is your privilege to remain silent. Anything you say may be used either for or against you in the

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event that this investigation results in a trial. Do you thoroughly understand your rights? yes

SIGNATURE: s/ Walter J. Baldwin

STATEMENT:

I entered the farmyard of a farmer now W.B I know to be M. Drouin, a Frenchman on Wednesday, August 23, 1944 at about 1530 hrs I was holding my carbine at port arms. The carbine had a full clip in it, and I had one bullet in the chamber. I came through the gate near the right side of the house and crept slowly along the front of the house, stopping at each door to listen for anyone. I was ready at that time to shoot anyone who would come out of those doors who would look funny at me.

After I got almost to the left side of the house I saw a farmer

SIGNED: s/ Walter J. Baldwon

Page 2 of C.I.D. report made by Walter J. Baldwin (continued:)

came riding up through the front gate on his bicycle He put in the / the W.B bicycle in the barn and then he saw me. I had a carbine still in my hands at port arms. He shouted something to me in French. What is was I dont know as I dont understand French. I yelled 'Halt'. The farmer ran about forty feet away from me and picked up a pitchfork. He then returned to the barn. I was about fifteen feet away from the farmer at that time. There was a pause as the farmer pointed the pitchfork at me and said something in French. I made a motion with my carbine and said, 'Halt' again. At this time I could see no one around nor was there anyone so far as I could see barring my chance of escaping or running away. The farmer then took about one step toward me and I then shot him in the foot deliberately. The W.B. farmer still came at me with the pitchfork and I put the gun between the prongs of the pitchfork and we wrestled. It was then that I remembered another shot going off. I had my hands on the gun at that time, but I don't remember

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where. It was then that I saw the farmer's wife coming around the right side of the barn. I was wrestling with the farmer near the left side of the barn. The women was bleeding in her ~~thing~~ thigh W.B. She come over toward her husband to help him. She had one of those sharp irons things that looked like a fork. She pointed it at me and then collapsed near her husband who was already on the ground moaning. The young lady who was in the farm house, meanwhile ran for help. Then I saw a neighbor come up near to where I was standing and he said something in French. I pointed my carbine at him and motioned for him to get back. ~~which~~ W.B. He took a couple of steps toward ~~me~~ I W.B. aimed my carbine at him then, and intended to shoot him, if he came any further toward me. I still had a bullet in my chamber at that time too. Finally the neighbor went away, and I went over to the 570 Ord Co. nearby and gave myself up. I had been A.W.O.L. for five days from my company before this shooting happened. W.B. I dont remember a third shot going off. I tried to call for help, but no one was around to help.

I have read my statement of 4 pages and it is true.

s/ Walter J. Baldwin

Subscribed and sworn to before me this 26 of August 1944

Joseph A. Santacruz
Summary Court.
2nd Lt, CMP"

With reference to the offense of absence without leave (Charge I and its Specification) an extract copy of the morning report of accused's company was admitted in evidence, the defense stating that it had no objection thereto. It contained the following entry with respect to accused "Dy to AWOL as of 0900 19/ Aug/44" (R5; Pros.Ex.1). Accused was confined in the Loire Section guard house at Le Mans on 23 August (R6).

4. For the defense, a map of the area surrounding the Drouin home was admitted in evidence as Def.Ex.1 (R93-94).

Accused testified that the area of his company, the 574th Ordnance Company, (Def.Ex.1) was less than a half mile from the Drouin farm (R105), and that he had passed through the

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farm on two or three prior occasions (R106). On 18 August he was ordered to go to Depot 7 about seven miles away. He did so, worked about 15 hours and asked a truck driver to take him to the highway which led to his company area. Instead, the driver took another road and accused found himself in Le Mans. He went to a house in the "red light district" where he was arrested by the military police. They did not take away his gun or ammunition and made him perform duty on Sunday and Monday, 20-21 August, on which days he asked a lieutenant colonel to send him to his organization. On Monday he and two white military policemen left to go to his company but instead they went to a room in a hotel in Le Mans where they stayed all day and night. They had "drinks" and a woman. On Tuesday (22 August) they went to his area, found that his company had moved, secured some eggs at a farmer's house, cooked them in the woods, and returned to the hotel in Le Mans where they spent the night (R90-91,103-104). On 23 August they returned and arrived at his company area about noon where accused sat on some gasoline cans for about an hour. Between noon and 1:30 pm he went along the path marked F (Def.Ex.1) toward Evrard's house to point L, where he had left a corporal's and a sargeant's fatigues. He saw Evrard's wife at point M, met Evrard himself, gave him some jelly beans and remained with him about three minutes (R91,100-101,106-107). Accused and the military policemen then went to the house of a farmer which was behind the Drouin house, about 250 yards from the vicinity. One of the military policemen left and about 1:30 pm accused and the other one while in the farmer's yard, practiced shooting at cans which they placed in trees at point A (Def.Ex.1). Accused, who had his carbine, two hand grenades and eight clips of ammunition, fired three shots (R91,97-98,107-109). The farmer cooked some eggs for the remaining military policeman, and the farmer's wife gave him some cake. Accused refused the cake because he did not eat "woman's cooking" and also refused cognac. He left the military policeman there and went to search for the one who had left. He stopped to get a few pears in the farmer's yard and about 3:30 pm heard two shots (R91-92,109). He went down the road about 250 yards, followed path A, arrived in the Drouin yard at point B and saw a woman at point D or Y, who was running (Def.Ex.1). He could see only her hair. He thought that someone was hurt, started toward the house and saw that the bedroom door (D-Pros.Ex.2) was open. He looked in the room, started back, noticed that the gate (Z-Pros.Ex.2) was partly open, and for the first time saw a man and a woman who were both bleeding, lying on the ground at about point Y (R91-92,95-96,98-99, 100,105,108-109). The woman whom he saw running disappeared. She was not the woman whom he saw lying on the ground (R99,109). Accused noticed a hay fork between the man and woman, "under the body", and a hoe "with prongs on it like a fork", against the barn (R96,109). Accused was "very excited * * * very scared" (R96,109). He started through gate E, heard voices from the 570th Ordnance Company area and also heard people coming along the path marked H (Def.Ex.1). He knew that "fellows have been picked up

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for rape", believed someone was raped in this instance, and decided to surrender to some officer as quickly as possible as he might be caught leaving the scene, be suspected and "have no proof". He went through gate G, crossed the cabbage patch and met two colored guards at point J (R96-97,109; Def.Ex.1). The guards told him where he could find an officer, and when he met Lieutenant Flanders he told him that he (accused) "had shot a man in the leg" (R96,102,110). The statement to Flanders was untrue and the reason accused made the statement was

> "that I know there was no way for me to tell any one that I was not in that vicinity until at a trial if someone should happen to fail to identify me because I thought the point was rape
> * * *
> due to the fact of me being AWOL, it would have been probable * * * I think it would have a great effect on me being on the farm at such time and such thing happening (R101-102).

On the way to Le Mans he started to tell Lieutenant Flanders that the statement was untrue but "was afraid as I didn't have no proof of it" (R103).

Accused further testified that he saw no one else while he was in the yard (R97,109). He denied that Evrard ever entered the yard and testified that he never told Fisher that he pointed a carbine at a neighbor and motioned that the man get back (R100-102, 109). Accused had his carbine when he was in the yard and surrendered it to Flanders near Le Mans (R111). The two military policemen were supposed to return accused to his company (R105). He surrendered to Flanders instead of returning to give himself up to the military policeman, because the policeman himself, probably "should want to disappear" as both the policeman and his vehicle were "absent without leave" (R103,108).

When Fisher asked him for information with regard to the shooting, accused hesitated before "I gave it to him because I actually didn't know very much about the crime". The story he gave was one which he

> "had to make up to try and find some details that I could explain of the crime. The CID man seemed to think that I was lying which at that time I was lying and threatened to hit me with the chair if I didn't tell him more" (R96).

The statement admitted in evidence as Pros.Ex.6 was false (R14).

Shown another statement (made to CID Agent Poust), accused admitted that he made it and that it also was false. He made this latter statement because he was tired of the CID agent (Poust) "nagging" him and also, as accused

> "was the person who had turned himself in for the crime, I had to tell something, something about the crime and to add I had been threatened".

He further testified that this statement was made on 26 August and not on 28 August, the date contained in the statement (R112-115). The statement admitted in evidence as Def.Ex.2 (R112) was as follows:

> "STATEMENT OF: Agent John G. Poust DATE: 28 August 1944
>
> ORGANIZATION: 14th MP CIS
>
> STATEMENT:
>
> After warning Pvt. Walter J. Baldwin (Colored), 34020111, 574 Ord Co., APO 403, U.S. Army, of his rights under the twenty-fourth Article of War, on 26 August 1944, he made the following statements to me, but did not wish to include them in a written statement. Pvt. Baldwin said that he did not wish to personally state the following information until he was tried by a U.S. Army Court Martial.
>
> Pvt. Baldwin stated to me on 26 August 1944 that on 18 August 1944 while washing some clothes in a pond near his company bivouac area, that a German dressed in a U.S. Army uniform came up to him, gave him some cognac, took his U.S. Army Carbine rifle away from him, and forced him to come with him to the same farm house near Beaufay, Sarthe, France, at which he later shot M. Adolphe Paul Drouin. According to Baldwin, he was held prisoner at this farm by the German until some time during 21 August 1944, except for several trips which he made upon a motorbike with the German.
>
> Pvt. Baldwin stated that the German wore a German uniform some times and at other times he wore a U.S. Army uniform. He said that the German asked him questions about his unit and that he told him where it was located and where the depot where he worked was and answered all questions the German asked him for fear that the German would kill him if he did not answer.

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Pvt. Baldwin stated that he slept in a hay loft with the German, but that he always went to sleep before the German so that it was impossible for him to escape. Baldwin also stated that when he and the German went to U.S. Army Depot No. 7 that there were many other U.S. soldiers there working, but that he made no attempt to escape. Baldwin said that he always rode on the back of the motorbike whenever he and the German traveled, but that he made no attempt to escape until 21 August 1944 when the motorbike skidded and fell and the German was knocked unconscious. At that time he did not take the German into custody.

Badwin stated that he and the German had met German paratroopers on one occassion but that he did not report this or any other information of his capture to U.S. Army officers after he became free. According to Baldwin, after he was free of his German captor he roamed around the country near Beaufay, Sarthe, France, U.S. Army Depot No. 7 and the bivouac area of the 570 Ord. (Am). Co., APO 403, U.S. Army, asking various enlisted men where his company, the 574th Ord. (Am). Co., APO 403, U.S. Army, had moved. He said that he preferred not to bring the matter to the attention of an officer until finally on Wednesday, 23 August 1944 he decided to report to an officer of the 570th Ord. (Am). Co., APO 403, U.S. Army, and that it was while on this mission that he passed through the same farm where he had been held prisoner and shot M. Drouin and Mme. Drouin.

s/ John G. Poust
t/ JOHN G. POUST
Agent, C.I.D."

Dr. Perimony, recalled as a witness for the defense, testified that it was Evrard who brought him to the Drouin house that afternoon. Witness observed at point N a pitchfork stained with blood "on the upper part of the iron piece" and blood on the ground about four meters away at point O (R116-118; Def.Ex.1).

Louis Rallier, who lived at point P, heard two or three shots about 3:30 pm French time that day and then heard a woman shouting. He went to the scene and saw two negroes bandaging the Drouins at point O. A pitchfork was on the ground near Drouin and there was a lot of blood on the "fingers". Evrard and Dr. Perimony were at the scene (R119-122; Def.Ex.1).

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5. Evrard, recalled by the prosecution in rebuttal, testified that on 22 August, the day before the shooting, he passed accused at point R on the path about 50 meters from witness' yard. He saw another soldier at point S. Witness later testified that he was not certain that it was accused whom he met on the path. "I thought it was him but I can't be precise". A soldier pointed a gun at witness in the Drouin yard on the following afternoon but when asked if it was accused, Evrard testified "I can't be precise", and he could not "remember" if it was the same man he saw in the path the day before (R122-124; Def.Ex.1).

6. (a) It is stated in the review of the Staff Judge Advocate, Loire Section, Communications Zone, European Theater of Operations, that the Specification of Charge III was changed from assault with intent to do bodily harm with a dangerous weapon to assault with intent to commit murder, that the change was made "over" the signature of the accuser, and that the case was not reinvestigated. Any discussion of the question herein would be purely moot as the sentence imposed (death) was the maximum imposable for the most serious offense of which accused was found guilty, namely, murder.

(b) There was considerable evidence offered by Fisher for the prosecution and by accused as to the circumstances surrounding the taking of the pre-trial statement admitted in evidence as Pros. Ex.6. The questions of fact as to whether the pages of this statement were signed in blank by accused in the belief that they pertained to the turning in of his gun, and whether the statement was freely and voluntarily made or was made as the result of threats, promises or duress, were resolved against accused by the court. Inasmuch as its decision was supported by an abundance of competent, substantial evidence, it will not be disturbed by the Board of Review on appellate review (CM ETO 2926, Norman and Greenawalt, and authorities cited therein).

7. The evidence was legally sufficient to support the findings of guilty of absence without leave, at the time and place, and for the period alleged. Accused admitted he had been absent without leave for five days before the shooting (Pros.Ex.6). (Charge I and Specification).

8. With reference to Charge II and its Specification (murder of Drouin):

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without justification or excuse.
>
> * * *
>
> Malice does not necessarily mean hatred or personal ill-will toward the person

killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exists at the time the act is committed. * * *
Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grevious bodily harm to, any person, whether such person is the person actually killed or not * * * knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused" (MCM, 1928, par.148a, pp.162,163-164) (Underscoring supplied).

The following principles of law are particularly applicable in the instant case:

"Mere use of a deadly weapon does not of itself raise a presumption of malice on the part of the accused; but where such a weapon is used in a manner likely to, and does, cause death, the law presumes malice from the act" (1 Wharton's Criminal Law, 12th Ed., sec.426, pp.654-655) (Underscoring supplied).

An intent to kill

"may be inferred from the acts of the accused, or may be founded on a manifest or reckless disregard for the safety of human life. Thus an intention to kill may be inferred from the willful use of a deadly weapon" (40 CJS., sec.44, p. 905) (Underscoring supplied).

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

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App.124" (Ibid., fn.67, p.944) (Underscoring supplied).

"In every case of apparently deliberate and unjustifiable killing, the law presumes the existence of the malice necessary to constitute murder, and devolves upon the accused the onus of rebutting the presumption. In other words, where in the fact and circumstances of the killing as committed no defense appears, the accused must show that the act was either no crime at all or a crime less than murder; otherwise it will be held to be murder in law" (Winthrop's Military Law and Precedents, 2d Ed., Reprint 1920, p.673).

"'The rule, as applicable to military cases, is similarly stated in the manual of Military Law, p.71, as follows - * * * On a charge of murder the law presumes malice from the act of killing, and throws on the prisoner the burden of disproving the malice by justifying or extenuating the act'" (Ibid., fn.55, p.673) (Underscoring supplied).

"While a specific intent to kill is an essential ingredient of the offense of assault with intent to commit murder * * * this requirement does not exact an intent, other than an intent which is inferable from the circumstances. The law presumes that one intended the natural and probable consequences of his act and the requisite intent to kill may be inferred from such acts. It may be inferred or presumed as a fact from the surrounding circumstances, such as the acts and conduct of accused, the nature of the instrument used in making the assault, the manner of its use, from an act of violence from which, in the usual and ordinary course of things, death or great bodily harm may result, or from a total or reckless disregard of human life" (40 CJS, sec.79b, pp.943-944) (Underscoring supplied).

Aside from the testimony of Madame Drouin and her

daughter, the only direct evidence concerning the actual shooting of Drouin was accused's own testimony and his two pre-trial statements, Pros.Ex.6 and Def.Ex.2. In the statement admitted as Pros.Ex.6, accused in effect claimed that he shot accused, in self-defense. However, according to this statement he was admittedly a trespasser on the property, provoked the supposed conflict with deceased by his own actions, and made no effort whatsoever to retreat when deceased supposedly attacked him with a pitchfork, although there was nothing to prevent him from doing so. Under such circumstances any claim of self-defense was clearly without merit (CM ETO 3957, Barneclo and authorities cited therein).

According to the statement admitted as Def.Ex.2, accused was held prisoner at the Drouin farmhouse by a German soldier from 18-21 August. After escaping from the German on 21 August, he roamed the country looking for his unit. On the day of the shooting he passed through the Drouin farm on the way to the 570th Ordnance Company area and "shot M. Drouin and Mme. Drouin". In his testimony at the trial accused claimed that the Drouins were shot by an unknown person when he was about 250 yards away.

The court was entitled to believe or disbelieve the whole or any part of his statements or testimony. Competent, substantial testimony showed that accused, who was armed, entered the yard, repeatedly but unsuccessfully tried to effect an entry into the bedroom and loafed around the premises for at least an hour. When deceased returned from the turnip field, he and accused engaged in a brief conversation and deceased said "No, No". Accused for some reason known only to himself, deliberately shot the man in cold blood. The best indication of accused's frame of mind at the time of the shooting was his admission (Pros. Ex.6) that when he first entered the yard there was a full clip of ammunition in his carbine and a bullet in the chamber.

> "I was ready at that time to shoot anyone who would come out of those doors who would look funny at me" (Underscoring supplied).

Such an intention on the part of accused was further evidenced by his wholly unjustified shooting of Madame Drouin, and the aiming of his gun at Evrard who was forced to flee and take shelter in the house. The court was justified in finding that accused used the weapon in a manner which is "likely to, and does, cause death". In such a case "the law presumes malice from the act". The court was clearly warranted in inferring an intent to kill on the part of accused, "founded on a manifest or reckless disregard for the safety of human life". Whether accused rebutted the resulting presumption of malice was a question of fact for the determination of the court and in view of the competent and substantial evidence establishing

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his guilt of murder, the Board of Review will not disturb the findings of the court on appellate review (CM ETO 4149, Lewis; CM ETO 3042, Guy, Jr; CM ETO 1901, Miranda).

9. When Madame Drouin ran to the aid of her husband accused deliberately shot her also and seriously wounded her. Had she died the evidence would clearly have sustained a charge of murder, and the findings of guilty of assault with intent to commit murder were fully warranted (CM ETO 4269, Lovelace and authorities cited therein) (Charge III and its Specification).

10. The charge sheet shows that accused is 21 years and ten months of age and that he was inducted 10 March 1941 at Camp Shelby, Mississippi, to serve for the duration of the war plus six months. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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CONFIDENTIAL

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 27 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private WALTER J. BALDWIN (34020111), 574th Ordnance Ammunition Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty 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 5137. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5137).

3. 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 ordered executed. GCMO 10, ETO, 10 Jan 1945)

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

BOARD OF REVIEW NO. 1

17 FEB 1945

CM ETO 5155

U N I T E D S T A T E S v. Private First Class COYT CARROLL (35293409) and Private EMIL J. D'ELIA (32772646), both of Company C, 12th Infantry	4TH INFANTRY DIVISION Trial by GCM, convened at Stavelot, Belgium, 3 November 1944. Sentence as to each accused: To be shot to death by musketry.

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

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

2. Accused were tried together, with their consent given in open court, upon several and separate charges and specifications as follows:

CARROLL

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Coyt Carroll, Company C, 12th Infantry did, near Losheimergraben, Germany, on or about 7 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: an engagement with the enemy, and did remain absent in desertion until he surrendered himself at Harleen, Holland, on or about 18 October 1944.

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D'ELIA

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Emil J. D'Elia, Company C, 12th Infantry, did, near Losheimergraben, Germany, on or about 7 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: an engagement with the enemy, and did remain absent in desertion until he surrendered himself at Harleen, Holland, on or about 18 October 1944.

Each accused pleaded not guilty and, all of the members of the court present at the time the votes were taken concurring, each was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions of either accused was introduced. All of the members of the court present at the time the votes were taken concurring, each accused was sentenced to be shot to death by musketry. The reviewing authority, the Commanding General, 4th Infantry Division, approved each of the sentences, and directed that "pursuant to Article of War 50½ the order directing execution of the sentence is withheld and the record forwarded for action by the confirming authority". The confirming authority, the Commanding General, European Theater of Operations, confirmed each of the sentences and withheld the order directing execution of each of the sentences pursuant to Article of War 50½.

3. The charge sheet discloses that the original charge preferred against each accused was for violation of the 75th Article of War:

"In that [each accused] did, at Losheimergraben, Germany, on or about 7 October 1944, run away from his platoon, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded".

The accuser in each case was Captain Philip W. Wittkopf, Company C, 12th Infantry. He verified each charge on 29 October 1944 before Major D. W. Whitman, summary court officer.

The papers and documents accompanying the record of trial reveal that the investigation required by the 70th Article of War was made prior to the verification of the charges. There is shown no reference of the charges for investigation, but under date of 24 October 1944 written reports of investigation signed by "D. Whitman, Major 12th Inf." were made covering each accused. Each report was accompanied by supporting documents as follows:

1 - Report of Provost Marshal XIX Corps dated 20 October 1944 and report of Provost Marshal 4th Infantry Division dated 19 October 1944 showing custody of the accused and delivery of their persons to their command (12th Infantry).

2 - Written statements (verified on 29 October 1944) by First Lieutenant Alfonso W. Barrack, Technical Sergeant Martin J. Kane and Staff Sergeant Robert J. Smith, all of Company C, 12th Infantry.

3 - Unverified and undated statement of First Lieutenant Philip W. Wittkopf, commanding officer of Company C, 12th Infantry.

The charges were forwarded by the commanding officer of 12th Infantry to the Commanding General, 4th Infantry Division, by indorsements dated 31 October 1944. Each of said indorsements bears the following hand-written notation:

"Hq. 4th Inf. Div.
1 Nov. 1944
To CG: Recommend trial by GCM

/signed/ White E. Gibson, Jr.
Lt Col JAGD
Div J.A."

Each of the charge sheets show that the original charges under the 75th Article of War were cancelled by crosshatched pen lines and on the margin opposite each original charge are the initials "RJB". In lieu of each of the original charges there was inserted on each charge sheet the Charge and Specification (above set forth) laid under the 58th Article of War, and on the margin opposite each substitute Charge and Specification are the initials "RJB".

Neither of the charge sheets indicates that the accuser, Captain Philip W. Wittkopf, re-verified the charges after the aforesaid cancellations and substitutions, and no report of investigation of the new charges under the 58th Article of War is shown, although the staff judge advocate in a letter to the Assistant Judge Advocate General in charge of the Branch Office of the Judge Advocate General with the European Theater of Operations, dated 24 December 1944, asserts that the "accuser concurred personally and orally in the alteration of the charge over his signature on the charge and the verification prior to trial".

By first indorsement, dated 1 November 1944, on each charge

sheet the substituted charges and specifications were referred for trial by the Commanding General, 4th Infantry Division, to Captain Richard J. Ballman, trial judge advocate of general court-martial appointed by paragraph 1, Special Orders 164, Headquarters 4th Infantry Division, 1 September 1944, as amended by paragraph 1, Special Orders 178, Headquarters 4th Infantry Division, 26 September 1944, and paragraph 4, Special Orders 182, Headquarters 4th Infantry Division, 6 October 1944. The accused were arraigned before and tried by the court appointed by the special orders of 4th Infantry Division described in the aforesaid indorsement.

Also accompanying the record of trial are letters applicable severally to each accused dated 3 November 1944 from Major Meyer H. Maskin, Division Psychiatrist, addressed to the Judge Advocate, 4th Infantry Division, each of which recites:

> "Psychiatric examination of this EM reveals no evidence of Insanity. Court martial proceedings are therefore not precluded".

There is not shown any written report accompanying the recommendation of the Staff Judge Advocate, Lieutenant Colonel White E. Gibson, Jr., above set forth.

4. Prosecution's evidence presented substantial proof of the following facts:

On 7 October 1944 each accused was a rifleman in the second platoon of Company C, 12th Infantry (R6,10). At 1000 hours on that date, Company A, 12th Infantry was in position about 200 or 300 yards from the town of Lorsheimergraben, Germany. Company C advanced to relieve Company A. The town is situate upon or near the Siegfried line. There were no German fortifications in front of Company C other than a building, which was occupied by Germans, located at a crossroads in the town (R8). The derelictions of the accused occurred as Company C moved forward to occupy the foxholes formerly occupied by Company A. In the forward movement of Company C the second platoon was on the left flank; the third platoon was on the right of the second platoon, and the first platoon was on the right of the third platoon. In the advance the first and third platoons received no fire from the enemy, and moved into position in relief of Company A. The second platoon, under command of a Lieutenant Smith, as it advanced through a wooded area unexpectedly encountered an intruding German patrol and received small-arms fire from it (R6,7,11). The company commander, Captain Philip W. Wittkopf, placed the first and third platoons in their positions on Company A's line. He learned that the second platoon had received German fire, went to a point on the left flank of the movement and discovered the second platoon was disorganized. Some of the platoon members ran to the rear but the platoon commander and others of the

soldiers remained at the point where they had received the fire (R9,11). Captain Wittkopf described the melee thus:

> "There wasn't much to this particular engagement. We were moving up into position and ran into this trouble. It was all over in a short time - I would say fifteen minutes - and right after that the platoon moved into position. At the time the platoon ran into the small arms fire they withdrew for a short way and immediately reorganized and moved back up. The fire lasted about ten minutes" (R7).

When the platoon was reorganized the two accused were missing from their organization (R6,7). They had been present with the platoon as it advanced and immediately before it received the fire from the enemy patrol (R8,9,10,12-14). They were shown absent without leave on the company's morning report as of 7 October 1944, extract copies of which were admitted in evidence without objection (R7,8; Pros.Exs.B,C). An investigation showed that they had not been evacuated through the clearing station (R9) and no authority was given either of them to be absent at this time (R10, 12-14).

First Lieutenant Alfonso W. Barrack, who was the leader of the third platoon, heard shots in the woods through which the second platoon was compelled to pass. He corroborated the testimony of other witnesses that certain men of the second platoon ran to the rear. Near the command post of the third platoon about six of them were halted by Lieutenant Barrack. The accused D'Elia led the group. Lieutenant Barrack inquired of him "What was going on". D'Elis replied "They had received some rifle fire and he was looking for a hole", to which Lieutenant Barrack responded

> "it was perfectly safe in that vicinity and to remain there until I found out what was going on in his platoon, and I told him to get in my hole if he wanted to" (R11).

The accused Carroll was in this group of fleeing soldiers (R11). Lieutenant Barrack then went to the woods and found that Lieutenant Smith had reorganized his platoon and moved to another position. Lieutenant Barrack returned to the location where he had left the six soldiers including the two accused. He discovered that all of them were gone. He did not see Carroll and D'Elia until they returned to the company about a month later (R11). They were not with the company from the time they fled from the woods until they were returned to it two or three weeks later (R11-14). It was stipulated in open court that each accused surrendered himself to military authorities at Harleen, Holland, on 18 October 1944 (R14).

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5. Each accused elected to make the following unsworn statements:

D'ELIA

"Well, I will start out with that morning when we left. They moved up to the north about ten miles and told us we were supposed to relieve some company in the woods. So I was scared - I guess everyone was - and we passed up some company and they said there wasn't anything up there. Then a little later we all went straight into the woods. And there was some pine trees and we got on the other side and I guess the Germans were waiting there and they fired on us and we all hit the ground. I got behind a tree and from that time on we didn't move any. The firing went off and we got up again and all of a sudden a German machine gun opened up and - I didn't hear an order - everybody ran like mad. I ran to the rear - I was scared. When we finally got back I couldn't stand it any more - I had to leave. And Lieutenant -- I forget his name, he was in here -- stopped me and asked me where I was going and I told him I couldn't stand any more, that they had fired on the hill and was close to us. He asked where Lieutenant Smith was and I told him up ahead somewhere, I didn't know where. I just couldn't stand any more - I guess it just got the best of me. And after I left and was gone a couple of days I finally calmed down a little and relized what I was doing and decided to come back and get what I had coming - but I didn't think I would be put up for desertion, sir. I didn't know where I was. I met three officers one night in a town and they asked where the outfit was and I told them I didn't know where it was and they said they were lost and one officer told me where one infantry division was and how to go about finding it, so I started out and finally got to an engineer outfit and an officer there told me to stay there and he would try to find out where the outfit was. He restricted me to that area and kept me there six days and then he told me he couldn't find the outfit and told me it would be best to turn myself in to the provost marshal and told me where to go, and from there I came back.

Trial judge advocate: Is that all you have to state.

A. Yes, sir. I just can't take it, I guess" (R15).

CARROLL

"My story is a great deal like his, I guess. We were both together. When we entered the woods and were fired on we hit the ground and I never heard an order to withdraw. I was behind a tree, and several of the other boys and me went back and we went back through another heavy woods and we were all scared. They were all replacements and I had been with them a good while and it seemed like nobody knew what to do, and it made me scared and when the mortars came in there I just got more scared and started out. I was gone for a couple of days and ran across these officers and they told us where another infantry outfit was, and on the road there we ran into this engineer outfit and they held us there for six or seven days and then we couldn't leave until they gave us orders. The officer there couldn't find where our outfit was and sent us to the provost marshall, and then we came back to our company. That's all" (R16).

6. The action of the approving authority in directing that "pursuant to Article of War 50½ the order directing execution of the sentence is withheld and the record of trial forwarded for action by the confirming authority" did not follow the prescribed formula with respect to sentences which must be confirmed by the Commanding General, European Theater of Operations. The approving authority's action should simply have directed that the record of trial be forwarded for action under the provisions of Article of War 48. It is obvious, however, that the action did in fact comply with the substance of the statutory requirements (AW 50½) and that the sentence in the case of each accused was confirmed by the Commanding General, European Theater of Operations. The failure to use the prescribed formula was therefore a harmless discrepancy which in no respect affected or impaired substantial rights of the accused.

7. The charges (as altered) were served on accused on 1 November, the trial commenced at 1035 on 3 November 1944, and was concluded at 1140 on said date. Each accused personally consented to be tried together and upon the interrogation of the trial judge advocate, "Do both of the accused men waive the five day statutory period from service of charges to trial?", the defense counsel responded, "They both do".

The total evidence in the case, including the unsworn statements of accused, is highly convincing that the accused were fully accorded due process of law within the principles enounced in CM ETO 4564, Woods, and that, in spite of the fact that only one day intervened between date of service of charges and date of trial, accused were denied no privileges guaranteed them by the Federal Constitution and Articles of War. The consent to trial on 3 November appears to have been consciously given by defense counsel after he believed himself fully prepared to defend accused. The case exhibits none of the vicious deficiencies of the Woods case. A careful examination of the record of trial convinces the Board of Review that the accuseds' substantial rights were not injured or impaired by their trial on the second day following the service of charges upon them.

8. The pre-trial practice in the instant case with respect to drafting and formulating the charges and the investigation of the same under the 70th Article of War have been summarized in paragraph 3 hereof. Although not shown as one of the documents accompanying the record of trial, the inference is indisputable that the shifting of the charge from Article of War 75 to Articles of War 58-28 after the original charges were signed and verified by the accuser was prompted by the letter of 5 October 1944 (signed by the Theater Judge Advocate) from Headquarters European Theater of Operations, which is set forth in extenso in CM ETO 4570, Hawkins. The staff judge advocate in his review of the record of trial confirms this inference by his statement:

> "This case was within that class which it is considered preferable to try under the 58th Article of War. For that reason, it was so charged and tried. Actually another specification and charge under the 75th Article of War could have been readily sustained under the evidence".

In a letter addressed to the Assistant Judge Advocate General in charge of the Branch Office of the Judge Advocate General with the European Theater of Operations under date of 24 December 1944 (attached to record of trial), the staff judge advocate stated:

> "When the charges reached this office on or about 1 November 1944, it was considered appropriate, in view of the policy expressed in letter, Headquarters European Theater of Operations, 5 October 1944, subject 'Desertion', that the accused be brought to trial for another aspect of the same acts, i.e., violation of the 58th Article of War instead of violation of the 75th Article of War".

The practice followed in the instant case is, with slight variation, identical with that pursued in the Hawkins case where the legality

of the same was carefully considered by the Board of Review with resultant detailed discussion in its holding. It was there concluded that the letter of 5 October 1944 was not an attempt by the Commanding General, European Theater of Operations, illegally or arbitrarily to impose his will upon the appointing, referring, and approving authorities of general courts-martial within the theater; that it was the expression of the Commanding General's policy with respect to offenses falling under both Articles of War 58-28 and Article of War 75 and left the subordinate authorities, empowered to appoint general courts-martial, free to exercise the discretion in such matters with which they were endowed by Congress. With respect to other pre-trial practices and investigation (which in the Hawkins case and instant case are almost identical), the Board of Review was of the opinion that irregularities arising therefrom were primarily of administrative concern to the authority referring the charges for trial and that the same neither affected the jurisdiction of the court nor were they prejudicial to the substantial rights of accused.

Because each accused herein is charged with the commission of one of the most serious of military offenses, and because of the fact that the extreme penalty of death has been imposed and confirmed as to each accused, the Board of Review has reconsidered its holding in the Hawkins case with the thought of modifying or limiting its application should good cause appear therefor. Upon such reconsideration, the Board of Review has discovered no reasonable basis for altering or modifying its views therein announced. For the reasons set forth in the holding in the Hawkins case and upon the authority thereof, the Board of Review is of the opinion that neither the alteration of the charge sheet, nor the pre-trial practice in the instant case injured or impaired the substantial rights of either accused and that the jurisdiction of the court to arraign and try accused upon charges in violation of Articles of War 58-28 was not in any respect impaired or affected thereby.

9. The facts of this case are clear beyond dispute. The unsworn statements made in open court by each accused confirm almost in minute detail prosecution's evidence. Cogently and briefly stated, the two accused were members of the second platoon of Company C, 12th Infantry. On the morning of 7 October 1944 Company C was ordered to relieve Company A which occupied a line of advance about 200 or 300 yards from the town of Losheimergraben, Germany. The enemy held a building located at a crossroads in the town. The second platoon was on the left flank of the company line in its forward movement. The third and first platoons were on the right of the second platoon and they successfully attained, without enemy interference, their objectives, viz., the line of foxholes formerly held by Company A. The second platoon in its advance was compelled to pass through a wooded area. The two accused were with the platoon when it entered the woods. A German intruding patrol had also entered the woods unknown to the Americans, who unexpectedly encountered it and received fire from it. Immediately the platoon was disorganized and six members thereof, including the two accused, fled to the rear. They were met by Lieutenant Barrack, commander of the third platoon, who directed them to remain where he had halted them until he could determine the status of the second platoon. He proceeded

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into the woods where he met Lieutenant Smith, the commander of the second platoon, who had reorganized it. The platoon was prepared to resume its mission. Lieutenant Barrack returned to the place where he left the group of six soldiers. All of them, including the two accused, in the meantime had departed. Each accused remained absent from his company until he surrendered himself to military authorities at Harleen, Holland, on 18 October 1944.

The foregoing facts make it plain that each accused knew that it was his duty to proceed forward with the second platoon and to continue to advance notwithstanding the advent of enemy fire until the platoon had achieved its objective. Thereafter it was the duty of each accused to participate with his platoon in action against the enemy. Upon encountering opposition in the advance, both accused fled to a place of safety in the rear. Thereafter, with full knowledge that the company was to occupy a front-line position opposed to the enemy with its usual risks and hazards, they took advantage of the opportunity afforded them by this momentary confusion, which they had helped to create, to leave the platoon. They remained absent from the company for 11 days during which time they escaped the perils and hazards of front-line combat. All of the elements of absence without leave with intent to avoid hazardous duty were proved beyond reasonable doubt (CM ETO 3380, Silberschmidt; CM ETO 3473, Ayllon; CM ETO 3641, Roth; CM ETO 4570, Hawkins; CM ETO 5080, Pugliano and authorities therein cited).

10. The charge sheet shows that accused Carroll is 32 years eight months of age and was inducted at Columbus, Ohio, 9 October 1943. Accused D'Elia is 21 years ten months of age and was inducted at Newark, New Jersey, 6 March 1943. Each accused was inducted to serve for the duration of the war plus six months. Neither had prior service.

11. 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 and the sentence.

12. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58).

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 FEB 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private First Class COYT CARROLL (35293409) and Private EMIL J. D'ELIA (32772646), both of Company C, 12th 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 50½, you now have authority to order execution of the sentences.

2. I have examined the record of trial and accompanying papers with great care, and have also for considerable time deliberated upon the legal issues involved, in view of the sentences imposed herein. I recognize the seriousness of the offenses of which the accused were found guilty and I offer nothing by way of condonation of their conduct. Likewise, I am keenly aware of the difficult problems of discipline presented as a result of conduct of officers and soldiers on the battle line which threatens the integrity of the forces under your command and serves to impair both their loyalty and efficiency. It is my great hope and desire that my office in the performance of its duties (which are also of most serious import) support you to the utmost in the performance of your duties consistent with the mandates of Congress. On the other hand, I believe I would default in my obligations if I did not speak frankly when I believe it my duty to speak.

Congress has vested you, as Commanding General of this theater, with the exclusive power and authority to consider and decide upon the appropriateness and expediency of the sentences imposed upon an officer or soldier found guilty of desertion. I am concerned with and here direct my comments to the question of the legal sufficiency of the record of trial to sustain the findings of guilty and the sentences in the instant case.

Neither the record of trial nor accompanying papers indicate that the instant accused deliberately premeditated their absence in order to be incarcerated and thereby avoid the perils and hazards of combat such as characterized the conduct of Slovik (CM ETO 5555) and Fendorak (CM ETO 5565). The element of moral turpitude was present in the actions and attitudes of the latter. It is the absence of this element which differentiates the conduct of Carroll and D'Elia from that of Slovik and Fendorak, and which in my opinion entitles the former to consideration which was properly denied the latter.

The Board of Review in its holding has set forth in detail the

pre-trial practice and procedure in this case and has concluded that the irregularities and deficiencies therein noted neither affected the jurisdiction of the court nor prejudiced the substantial rights of the accused. An examination of the papers and documents accompanying the record of trial discloses that certain requirements of the 70th Article of War were disregarded. Of serious import was the changing of the Charge from a violation of Article of War 75 to a violation of Articles of War 58 and 28 by methods which at least provoke a serious question as to legality and upon which legal minds might differ.

The conclusion of the Board of Review is premised upon the proposition that the requirements of the 70th Article of War are of administrative concern to the appointing and referring authority only and are primarily for his benefit. Such construction of the Article is primarily based upon the holding of the Board of Review (sitting in Washington) in CM 229477, Floyd, 17 B.R. 149, which received the approval of The Judge Advocate General. There is no adjudication by the Federal courts, however, construing and applying the 70th Article of War. While I believe (as my approval of the holding in the instant case indicates) that the construction of said Article approved by The Judge Advocate General is correct, I cannot say definitely that it will be the interpretation finally adopted by the courts. I make this statement because I am cognizant of the situation which existed when Congress enacted this Article. Certain abuses of authority by officers during World War I were called to the attention of Congress. After a prolonged and detailed investigation, the Article, in its present form, appeared in the Code of 1920. A study of legislative history of the Article definitely indicates that Congress intended to protect a military accused against unfounded or malicious charges by providing for a preliminary investigation, particularly adapted to military courts, but which nevertheless found its inspiration and pattern in the examing trial or the preliminary hearing before a magistrate which are fundamental in civil criminal procedure. With this legislative history as a background, the courts may well differ from the administrative interpretation of the Article approved by The Judge Advocate General. While such interpretation is given great weight by the courts, it is not binding upon them.

In this connection, another fact is worthy of consideration. Some of the Federal courts have extended the function of the writ of habeas corpus in the review of sentences imposed by military courts to include an examination of the record of trial to determine whether an accused has been afforded "due process of law" as that term is applied under the Federal Constitution. There can be no denial that the tendency of the Federal civil courts is to exercise greater appellate control over the Federal military courts. Under such condition, the question whether the requirements of Article of War 70 were met in a given case will probably be of vital concern.

Since Article ofWar 70 has not to date received an interpretation and construction by the Federal civil courts, and inasmuch as

there is a possibility that the authoritative judicial interpretation of the Article may hold that defects and irregularities in pre-trial procedure such as occurred in this case were either prejudicial to the substantial rights of an accused or denied him due process of law, I recommend that consideration be given by you to the matter of commuting the sentences herein concerned to punishments of less severity.

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 5155. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5155).

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

(On reconsideration each sentence commuted to dishonorable discharge, total forfeitures and confinement for life. GCMO 58, 59, ETO, 25 Feb 1945)

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

BOARD OF REVIEW NO. 2 14 DEC 1944

CM ETO 5156

U N I T E D S T A T E S	IX AIR FORCE SERVICE COMMAND
v.	Trial by GCM, convened at Ashford, Kent, England, 6 and 9 October 1944. Sentence: To be hanged by the neck until dead.
Corporal ERNEST LEE CLARK (33212946), 306th Fighter Control Squadron, IX Air Defense Command.	

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

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

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

CHARGE: Violation of the Ninety-second Article of War.

Specification 1: In that Corporal Ernest Lee Clark, 306th Fighter Control Squadron, IX Air Defense Command, did, in conjunction with Private Augustine M. Guerra, at Ashford, Kent, England, on or about 22 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Betty Dorian Pearl Green, a human being, by choking and strangling the said Betty Dorian Pearl Green.

Specification 2: In that * * * did, in conjunction with Private Augustine M. Guerra, at Ashford, Kent, England, on or about 22 August 1944, forcibly and feloniously, against her will, have

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carnal knowledge of Betty Dorian Pearl Green, a female child below the age of sixteen years, the said Corporal Ernest Lee Clark penetrating the sexual organs of the said Betty Dorian Pearl Green with his penis, being aided and abetted therein by the said Private Augustine M. Guerra who held and subdued the said Betty Dorian Pearl Green during such action.

Specification 3: In that * * * did, in conjunction with Private Augustine M. Guerra, at Ashford, Kent, England, on or about 22 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Betty Dorian Pearl Green, a female child below the age of sixteen years, the said Private Augustine M. Guerra penetrating the sexual organs of the said Betty Dorian Pearl Green with his penis, being aided and abetted therein by the said Corporal Ernest Lee Clark during such action.

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 of Specifications 2 and 3 thereof, and of Specification 1, except the words "and with premeditation" inserting the word "and" before the word "unlawfully", of the excepted words, not guilty, of the inserted word guilty. Evidence was introduced of one previous conviction by summary court for absence without leave for nine 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 hanged by the neck until dead. The reviewing authority, the Commanding General, IX Air Force Service Command, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing the execution thereof pursuant to Article of War 50½.

3. The prosecution's evidence shows that Betty Dorian Pearl Green, born 1 April 1929 (R10,19) living with her parents at 180 New Town Road in Ashford, Kent, England, returned to her home from work at Norman's Cycle Works about 5:45 and left home again at 6:45 on the evening of 22 August 1944, walking with her friend Peggy Blaskett, employed at the same place (R19,21). They went to a fair in the town and met two American soldiers, George Williams who was with Peggy and the other known only as "Eddy" who was with Betty (R22). They all remained together until 9:40 or 9:45 when the two girls left the boys and started for home and continued together to the "top of Frances Road", near Peggy's home where she arrived about 9:50. Betty did not have sexual intercourse while the two girls were together (R22-24). She was wearing a silver cross (Pros. Ex.1), a brooch (Pros. Ex.2), and a hair-slide

(Pros. Ex.3) that night (R24). A railroad worker, cycling home from his work at about 10:20 that evening, met Betty about 300 yards from the corner of the New Town Road and Black Path (R27), recognized her from the headlight on his cycle and spoke to her (R28).

About 7:15 the next morning, 23 August, an employee of the railroad, while shunting cars on the railroad bridge which looks down on the "Old Cricket Field" (R31) near the corner of the Black Path and New Town Road (Pros. Exs. 9 and 10) observed something in the Old Cricket Field that attracted his attention and he called to Arthur E. Tournay, another employee of the railroad who was then near the junction of the New Town Road and Black Path (R30-31). In response to the call, Tournay went into the Old Cricket Field some 15 or 20 feet and found the body of a girl lying close to the fence and not far from Black Path. He did not touch the body but immediately notified the police who arrived within a few minutes. He identified Prosecution's Exhibits 5, 6, 7 and 8 as accurate pictures of the scene and body (R32-34). The body was identified as Betty Green by the girl's father, both at 7:45 in the morning and again at 3:15 in the afternoon. He also identified the cross, brooch and hair-slide (Pros. Exs.1,2 and 3) as belonging to his daughter (R9-10). The father had been at the Smith Arms pub (R8) about 150 yards from the junction of New Town Road and Black Path (R45) on the evening of 22 August and identified Private Guerra, who had been brought into the courtroom, as one of two American soldiers he had seen there at that time and who had left the pub with another soldier about 10:15 and gone towards the Black Path about 30 yards distant (R8-9). Another soldier who had remained at the Alfred Arms public house in Ashford the evening of 22 August till closing time, went down New Town Road by the railway bridge, passing the junction of New Town Road and the Black Path about "ten past ten". At the junction he saw two soldiers dressed in American uniforms. It was too dark to identify them (R29-30).

The police took photos of the body and surroundings (R11-12, Pros. Exs.4,5,6,7 and 8) and the body was examined by Dr. Frederick J. Newall, a medical practitioner about 8:30 on the morning of 23 August, and he was of the opinion that death had occurred more than six hours before (R13). He also visited the police station on 25 August where he saw Guerra and accused (R14) whom he identified in the courtroom, from each of whom he took samples of pubic hair and head hair (R14-15) and gave them to the police (R15). The police also removed some pubic hair (Pros. Ex.11) and some head hair (Pros. Ex.12)from the girl's body (R18). They also prepared a map of the district around the Old Cricket Ground not to scale (R17, Pros. Ex.9) and a scale map of the junction of Black Path and New Town Road showing the Old Cricket Grounds (R18, Pros. Ex.10). The police found the silver cross (Pros. Ex.1) at the side of the body, the brooch (Pros. Ex.2) about four feet away and the hair-slide (Pros. Ex.3) about 24 feet away toward the gate from the body (R38). At the autopsy, the

police took the clothing removed from the girl's body (R39), and they were present and received the samples of hair taken from accused and Guerra which were placed in envelopes marked as Exhibits 13 to 16, inclusive. The knickers (Pros. Ex.17), vest (Pros. Ex.18), skirt (Pros. Ex.19), blouse (Pros. Ex.20), and coat (Pros. Ex.21) were the clothing taken from the body of the girl (R41). The shirt of accused was in evidence as Prosecution's Exhibit 22 (R41-42) and Prosecution's Exhibits 23, 24 and 25 were articles of clothing taken from Guerra (R42) and which he had worn the night of 22 August 1944 (R48). One set of the hair was turned over to Dr. Keith Simpson of London and one set was given to Dr. Henry J. Wall of the Metropolitan Police Laboratory, Hendon, England, for analysis (R43). Dr. Wall found in examination that the girl's knickers (Pros. Ex.17) were torn down the right side and in the fork. The button was torn off and there was blood and seminal staining present in the region of the fork. There was some blood and seminal staining also on the girl's vest (Pros. Ex.18) about the center of the lower hem, front and back, and some small blood stains on the outer surface of the front and inner surface of the back of the skirt (Pros. Ex.19). He also found human pubic hair on the seam inside the front of the midline of the skirt about 11 inches from the waist band on the surface of the fabric. He also examined the various hairs contained in Exhibits 11 to 16, inclusive (R55) and found that the hair on the skirt "were from Clark, to which it was similar". The blouse (Pros. Ex.20) had blood stains and smears on the outer surface on the left front below the pocket and all the buttons but one had been torn off. There was blood staining on the left lapel and on the line of the left sleeve of the coat (Pros. Ex. 21) near the cuff. There was also an area of seminal staining inside of the back, on the midline, close to the lower hem. Exhibits 11 to 22, inclusive, were returned to thepolice after the examination (R57). Comparison of this hair on the skirt (Pros. Ex.19) showed it to be "dissimilar" to the hair removed from the girl's body (R57-58, Pros. Exs.11 and 12). He also testified that the hair of many individuals is exactly similar (R58). Prosecution's Exhibits 11 to 22, inclusive, were admitted in evidence (R57).

When the body of the girl was found, the skirt was lifted so that its lower hem was turned up to the waist band. The knickers were raised up around the waist, the left seam was torn, the crotch was torn away in front and the right side fastening button was laying loose -- the crotch region and adjacent private parts were exposed and bloodstained. A hair caught under the left forefinger fingernail and other hairs from the skin around the thigh and buttocks were removed, together with several hairs from the skirt and knickers, clothes and one from the left knee. An autopsy examination was also made (R59). She had been a healthy girl, used to sexual intercourse. There was a single bruise on the right side of the girl's neck under the angle of the jaw which a thumb could have made and four bruises down the left side of the neck (R60). There was bruising behind the

voice box but no fracture of its bones. Changes were present in the internal organs which showed death to be due to asphyxia, consequent upon this constriction of the neck (R61). There were also other and minor injuries on the hands and fingers and there were bruises on the head and face, on the left shoulder, to the crest of the left hip and the outer right thigh. Seven small rounded bruises lay over the right groin, close to the private parts and there were bruises and scratches on the legs (R62). A swab was taken from the vagina (R63) which showed disintegrating spermatozoa (R64). The injuries found in the region of the throat and the condition of the lungs, heart and other internal organs indicated that death was due to asphyxia (R63). The hand placed on the neck of the body could easily be made to conform with the location of the thumb and finger marks.

In the opinion of Dr. Keith Simpson, pathologist, there was evidence that sexual intercourse had occurred about the time of death. He took samples of head and pubic hair from the deceased and (R64) found other hairs located on the body. He also received from Sergeant Martin of the Kent Constabulary, samples of head and pubic hairs labeled "Clark" and "Guerra". By examination and professional examinations of these hairs, he found

> "that one hair removed from the skin of the left buttock, a second hair from the left hip crest and a third from the inner aspect of the left knee, corresponded with the hairs labeled "pubic - Guerra". The hair removed from the left forefingernail and a hair removed from the outer aspect of the left buttock corresponded with samples labeled "Clark". The buttock hair was clearly pubic. The hair from the finger, might in my view, be either pubic or head".

He found from internal examination that the condition of the vagina was in keeping with the deceased having acquiesced to the sexual intercourse which took place shortly prior to death, "provided that one person was concerned and the deceased was conscious and able to resist" (R65). The marks of injury on the hands, body and throat showed evidence of resistance (R66).

Accused made a signed and sworn detailed statement after due warning, on 25 August 1944 (Pros. Exs.28a,28b,28c and 28d) in which he described how he and Private Guerra left camp on pass the afternoon of 22 August, going to Ashford to a movie and from the theater to several pubs where they drank considerably, ending up at the "Smith Arms". From there they went through the Black Path and came near the railway bridge. Guerra had stopped but they saw a girl approaching from the direction of the theater and accused went over and asked her where she was going to which she answered,

home. They talked for five minutes and accused asked her to go for a walk, put his arm around her and walked towards the gate to the field. Guerra was standing back from the gate. Accused picked her up and carried her through the gate with Guerra following. She got scared then as Guerra came up and started to holler and Guerra put his hand over her mouth. As she struggled and tried to say something, accused carried her further into the field and laid her on the ground still struggling. Guerra raised her dress and tore her knickers apart. She started to scream and accused put his hand over her mouth while Guerra had intercourse with her, he holding one of her arms and accused holding one as well as holding her mouth shut. After Guerra was finished, accused got on top of her, Guerra holding one hand over her mouth to keep her quiet and also holding one of her arms, accused holding the other. As accused was "finishing up on her" he suddenly felt her relax her resistance. They both arose, accused buttoned his clothes and Guerra unbuttoned the girl's blouse, accused lifted her slip and felt her heart beating but she was unconscious and they started to leave. Accused returned, found her heart was still beating and they both left, leaving the girl lying in the field. They returned to camp and went to bed. Guerra asked accused if anything was wrong with the girl as they went back to camp and was told by accused that he didn't think so as her heart was still beating when they left. Accused claimed that both he and Guerra had been drinking heavily and he thought the girl had fainted and that after a rest she would be all right again.

On 12 September 1944, again after due warning, accused made another sworn statement in which he declared that everything in the former statement of 25 August was true except that he did not remember Guerra asking him as they were going back to camp if anything was wrong with the girl and his reply (Pros. Ex.27). Approximately five minutes after the conclusion of the interview when the last statement was made (R111), accused remarked to the officer who took the statement "I know I am guilty of the rape but I know I didn't murder her" and he repeated the remark to a Sergeant who was in the room at the time (R112). These two statements were admitted in evidence and read to the court.

4. Accused remained silent and the defense introduced but one witness, the adjutant and mess officer of accused's organization. He testified he had known accused who was a cook, for approximately one year and that he was a good worker. He had never seen accused drinking but from accused's condition on the "morning after", he was of the opinion accused "could not hold his liquor" (R125-126). A stipulation was entered into agreeing that "Government Exhibit 26 /not offered or admitted in evidence but attached to the record of trial with the other Exhibits/ is a handwritten statement from which Government Exhibits 28a,b,c and d was copies" (R127).

5. "Murder is the unlawful killing of a human being with malice aforethought" (MCM,1928, par.148a, p.162).

> "Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life * * * Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: * * * intent to commit any felony" (Ibid, pp.163-164).

All offenses punishable by death or imprisonment in excess of one year are felonies (18 USCA 541). The term "felony" includes rape (MCM,1928, par.149d, p.168). An intent to kill is not a necessary element in the crime of murder in those cases where the design is to perpetrate an unlawful act, and the homicide occurs in carrying out of that purpose (Wharton's Criminal Law, Vol.1, sec.420, p.632).

> "In every case of apparently deliberate and unjustifiable killing the law presumes the existence of the malice necessary to constitute murder * * *" (Winthrop's Military Law and Precedents - Reprint, 1920, p.673).

The distinctions between principals, aiders and abettors have been abolished by Federal statute.

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

The distinction is also not recognized in the administration of military justice (Winthrop's Military Law and Precedents - Reprint, 1920, p.108; CM ETO 72, Farley and Jacobs; CM ETO 1453, Fowler).

> "* * * To constitute one an aider and abettor, he must not only be on the ground and by his presence aid, encourage or incite the principal to commit the crime, but he must share the criminal intent or purpose of the principal". (Whitt v. Commonwealth, 221 Ky. 490, 298 S.W. 1101; Morei v. United States, 127 Fed. (2d) 827, 831; CM ETO 1922, Forester and Bryant).

"Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM,1928, par.149b, p.165). That accused committed this offense on Betty Green is amply proven, not only by his two sworn statements but by the physical facts found during the investigation. The injuries apparent in and on the body, the condition of the clothing, the comparison of the hairs and the presence of accused in the vicinity where and at the approximate time that the crime occurred, compellingly indicate that accused had "unlawful carnal knowledge" of the girl, a minor, "by force and without her consent". Outside of the written and verbal confession of accused, the evidence substantially indicates that rape, a felony, was committed by accused, during or shortly after the accomplishment of which act, the victim died of strangulation through manual pressure on her throat to stifle her outcries. The accused, if not a principal in that act, was at least an active aider and abettor and under both Federal and military law, equally guilty of her murder.

6. The charge sheet shows accused is 24 years 12 days of age. With no prior service, he was inducted 17 September 1942 at Roanoke, Virginia.

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. In the opinion of the Board of Review, the record is legally sufficient to support the findings of guilty and the sentence. A sentence of either death or life imprisonment is mandatory upon a conviction under Article of War 92.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Corporal ERNEST LEE CLARK (33212946), 306th Fighter Control Squadron, IX Air Defense Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5156. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5156).

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 its files may be complete.

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

(Sentence ordered executed. GCMO 152, ETO, 30 Dec 1944)

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

BOARD OF REVIEW NO. 2

23 DEC 1944

CM ETO 5157

U N I T E D S T A T E S	)	IX AIR FORCE SERVICE COMMAND
	)	
v.	)	Trial by GCM, convened at Ashford, Kent, England, 22 September 1944.
	)	
Private AUGUSTINE M. GUERRA (38458023), 306th Fighter Control Squadron, IX Air Defense Command	)	Sentence: To be hanged by the neck until dead.

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

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

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

CHARGE: Violation of the Ninety-second Article of War.

Specification 1: In that Corporal Ernest Lee Clark and Private Augustine M. Guerra, both of 306th Fighter Control Squadron, IX Air Defense Command, acting jointly and in pursuance of a common intent, did, at Ashford, Kent, England, on or about 22 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Betty Dorian Pearl Green, a human being, by choking and strangling the said Betty Dorian Pearl Green.

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Specification 2: In that * * * did, at Ashford, Kent, England, on or about 22 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Betty Dorian Pearl Green, a female child below the age of sixteen years, the said Corporal Ernest Lee Clark penetrating the sexual organs of the said Betty Dorian Pearl Green with his penis, being aided and abetted therein by the said Private Augustine M. Guerra who held and subdued the said Betty Dorian Pearl Green during such action.

Specification 3: In that * * * did, at Ashford, Kent, England, on or about 22 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Betty Dorian Pearl Green, a female child below the age of sixteen years, the said Private Augustine M. Guerra penetrating the sexual organs of the said Betty Dorian Pearl Green with his penis, being aided and abetted therein by the said Corporal Ernest Lee Clark who held and subdued the said Betty Dorian Pearl Green during such action.

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. 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 hanged by the neck until dead, The reviewing authority, the Commanding General, IX Air Force Service Command, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing the execution thereof pursuant to Article of War 50½.

3. The prosecution's evidence shows that Betty Dorian Pearl Green, born 1 April 1929 (R11,22), living with her parents at 180 New Town Road in Ashford, Kent, England, (R22) returned home from work about 5:45 on the evening of 22 August 1944 and left again about 6:45 (R22) with Peggy Blaskett. Betty was wearing a small silver cross (Pros. Ex.1) and a red hair slide (Pros. Ex.3) (R23,28-29). Peggy Blaskett and Betty went from Betty's home down New Town Road to the fair (R26) at the cattle market (R33; Def.Ex.1) where later they met "George Williams" and "Eddie" (R26), two American soldiers (R29). At about "half past nine" the four of them went to the park where they remained a short time when the girls started for home just before ten o'clock, leaving the soldiers at Jemmet Road. They continued together

to the "top of Francis Road" where they separated, at "5 to 10" (R25), Peggy arriving home at three minutes to ten (R30). Peggy had walked from the top of Francis Road to Hastings Bridge many times (R25) and it was a 10 to 15 minute walk (R26). The two girls were together all the evening and Betty did not have sexual intercourse with any man during that time (R27-28). Peggy identified the cross (Pros. Ex.1), the brooch (Pros. Ex.2) and the hair slide (Pros. Ex.3) as having been worn by deceased on the night of 22 August (R28-29). She failed to identify any soldier in the courtroom as anyone she had seen on the night of 22 August (R29). A railway worker was cycling home from work about 10:20 the evening of 22 August under the Hastings Bridge on the New Town Road, when he saw deceased in the cycle headlight and they exchanged greetings (R39-40). She was about 300 yards on the Ashford side towards the cinema from the Black Path where it leads from the New Town Road underneath the bridge (R40). A soldier who had walked down New Town Road under the Hastings Railway Bridge about "10 past 10" after leaving the Alfred Arms pub at closing time that evening, saw two American soldiers whom he could not identify, when he passed the junction of New Town Road and Black Path (R41-42).

At about 7:15 the next morning, 23 August, an employee of the railway in Ashford, was on the Hastings Line Bridge when he "noticed something lying, like a body" in the Old Cricket Field which is separated from the bridge by a path known as the Black Path. He called to another railway employee, a Mr. Tournay, who was walking on the New Town Road and Tournay went into the field (R43) where he found the body of a girl lying close to the fence (R44) inside the Cricket Field. He called the police and remained there until they arrived at about "twenty to eight" (R45). The body was removed from the field about 3:40 in the afternoon (R48), prior to which time it was not disturbed (R45,46,47,48). The body was identified as Betty Green by the girl's father (R13). He also identified the cross, the brooch and the hair slide (Pros. Ex.1,2 and 3) as Betty's (R11). He had been at Smith Arm's pub the evening of 22 August where he saw an American soldier (R9) whom he identified as accused who left the pub with another soldier between 10 and 10:15 p.m. (R10) and went over the Hastings Bridge to the Black Path. The father walked behind them (R14) just a short distance and saw them turn into the Path (R15). It is 200 to 400 yards from the pub to Hastings Bridge. He later, at an identification parade at a camp about three miles from Ashford, identified accused as the man seen by him that night (R10). An inspector of the Kent Constabulary took photos of the scene of the crime and of the girl's body on the morning of 23 August which were admitted in evidence as Prosecution's Exhibits 4,5,6,7 and 8 (R15-16). Dr. Frederick J. Newall, a "Medical Practitioner" of Ashford (R16) visited the Old Cricket Grounds, the morning of 23 August and saw the body of deceased lying in the field. In his opinion death had occurred over six hours previous (R17), he estimated from six to 12 hours. On 25 August he saw two American soldiers at the police station and identified

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accused as one of them and from each of whom he took samples of hiar (R18). Another police officer visited the Old Cricket Field, took measurements and prepared a diagram, not to scale, showing the Ashford Railway station, Black Path, Old Cricket Grounds and Hastings Railway Bridge (Pros. Ex.9) and also a plan of the Old Cricket Grounds, New Town Road, and Hastings Railway Bridge to scale (Pros. Ex.10; R19-20). He also removed from the body of deceased some pubic hair (Pros. Ex.11) and some head hair (Pros. Ex.12), which he put in separate envelopes and gave to Police Sergeant Martin (R12) who arrived at the Old Cricket Grounds at 8:30 on the morning of 23 August (R49). On searching the area Martin found a small silver cross (Pros. Ex.1) close to the body, a brooch (Pros. Ex.2) about four feet from the body towards the gate and the hair slide (Pros. Ex.3) 24 feet from the body towards the gate. The body was 40 feet from the gate into the field. He supervised the removal of the body in the presence of Dr. Keith Simpson (R50), who examined the body before its removal, and he was present at the autopsy and saw the clothing removed from the body. Martin was also present at the police station on 25 August when Dr. Newall obtained samples of head and pubic hair from both accused and Clark. This Martin divided and put into eight envelopes, marking and describing the contents of each, taking one set of four envelopes containing head and pubic hair of each accused, to Dr. Simpson in Guys Laboratory, London, and the other similar set of envelopes (Pros. Exs.13,14,15 and 16) to Dr. Walls of the Metropolitan Police Laboratory, Hendon (R51-52). The pubic and head hair from the body of deceased (Pros. Ex.11 and 12), deceased's knickers (Pros. Ex.17), vest (Pros. Ex.18), skirt (Pros. Ex.19), blouse (Pros. Ex.20), and coat (Pros. Ex.21) were also delivered to Dr. Walls (R52,53). On 25 August, Clark surrendered to the police the clothing worn by him the night of 22 August and accused also turned some clothing over to Martin (R53-54). The shirt surrendered by Clark (Pros. Ex.22), the trousers (Pros. Ex.23), pair of short trunks (Pros. Ex.24) and shirt (Pros. Ex.25) worn by accused on the night of 22 August and surrendered by him to the police on 25 August, were also all delivered to Dr. Walls. When Martin saw the body the front of the blouse was undone and at the time the knickers were removed, they were torn, bloodstained and pushed up around the waist. There were no stockings on the body and there were abrasions near the ankle of the left leg. The body was lying about one foot from the fence and the left shoe was off (R55) and lying two or three feet away. Martin estimated the Smith Arms pub to be about 150 yards from the gate into the Old Cricket Grounds near the corner of Black Path and New Town Road (R56).

Dr. Henry J. Walls, analysist for the English Police Department, received the various exhibits numbered from 11 to 25, inclusive, from Martin on 28 August and made an analysis of them (R57-58). The knickers (Ex.17) were torn in the region of the fork, were bloodstained and also had seminal stains in the region of the crotch. The

girl's vest (Ex.18) had both blood and seminal stains at the lower hem about the middle line in front. The girl's skirt (Ex.19) had small bloodstains both on the outer surface and the middle line on the inner surface of the back near the lower hem and also on the hem of the front of the inner surface on the seam 11 inches from the lower hem there was bloodstains and a loose hair (R58). When examined this hair was found most similar to Clark's pubic hair and quite dissimilar from that of accused. The blouse (Ex.20) had a bloodstain on the front below the left pocket and all the buttons but one had been torn off. The coat (Ex.21) had small bloodstains on the left lapel and lining of the left sleeve near the cuff; also an area of seminal staining on the lining close to the lower hem about middle of the back. (R59). On accused's shirt (Ex.25) there was faint bloodstaining on the right arm but too small for grouping purposes. On accused's trousers (Ex.23) on the left hand side pocket was found some blue fiber similar to the fiber of the material of deceased's coat (Ex.21). On his short pants (Ex.24) there were seminal stains on the front of the left leg, on the side and immediately below the lower end of the fly opening (R60).

Dr. Keith Simpson, pathologist, examined the body of deceased the afternoon of 23 August in the field at Ashford. He found parts of her clothing disarranged, the skirt being lifted so the lower hem was above the knees, the knickers, part of which were torn away, were lifted so that the private parts were exposed and the fastening button on the right side of the knickers was detached, but later found. The left shoe was detached and lying beside the body which was lying on its left side. Certain hairs and fibers were removed from various parts of the body. He later saw the body in the mortuary where he removed the clothing and examined the body in detail (R62). The girl was well developed and healthy up to the time of her death. Dr. Simpson testified:

> "She was not a virgin, she was, in my view already used to sexual intercourse. There was some evidence, from the examination, that sexual intercourse had taken place shortly prior to or about the time of the death. A swab, which I removed, from the vagina. There was no bruising or tearing of the lips at the entrance to the vagina or of the remains of the hymen were present, but there were marks of injuries which were, in my view, in keeping with a grasp by a fastening on the neck and a further grasp by---being made in the region of the right groin. The injuries to the neck were as follows: There was a single deep-seated bruise on the right side of the neck, the deceased's right side. It lay immediately under the angle of the jaw on the side and there was also near to it a number of scratches or other marks. On the opposite side of the neck I found four rounded or oval bruises, the whole

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> group being, in my view, very much in keeping with the tight application of a right hand from in front. * * * The voice box was not fractured but some bruising was present behind it as result of it being pressed against the spine. Intense asphyxial changes were developed in the lungs and the heart, but in keeping with death, asphyxia due to manual strangulation by the hand. * * * /with/ the same condition of asphyxia present of head and neck. I found in addition to this injury, a group of finger marks most in keeping in my view with that made over the deceased's right groin region. There were seven finger marks laying over the right groin as from pinning pressure by a hand. There were, in addition, small bruises over the left side of the head in front of the left shoulder and the left hip, which might be explained in the same way. Lastly, I found a group of injuries of a minor character which were most in keeping with my view of the deceased making some attempt to free herself from the grasps pinning her down. The last cuticle of the left middle finger being marked in the skin in keeping with a finger mark being pressed into the skin. * * * There were tears in the left thumb nail and in the right middle finger nail I found a hair, pinned under the nail of the left index finger. This hair was removed and which I subsequently examined with samples of the deceased's head and pubic hairs, which incidentally were removed for purposes of comparison. Lastly there was bruising present on the left side of the head, and abrasions lay across the left side of the nose, the adjacent cheek and, below this, to the skin of the cheek on the left side of the mouth, all of these injuries in keeping with the head striking and chafing against the fence close to which the deceased lay" (R63,64).

He received from the British officer Martin, samples of head and pubic hairs labelled Clark and Guerra, in addition to the hairs he himself took from the girl's body.

> "The positive facts from the examination of the hairs I removed from the body and the comparison with the samples taken by myself from the body and received labelled Clark and Guerra were as follows: One hair removed from the skin of the left buttock, a second from the left hip crest, and the third from the inner aspect of the left knee corresponded with samples of pubic hair labelled Guerra. They were similar in color, in texture and structure and dis-similar on examination with the samples removed from the dead girl. The hair found under the left forefinger nail

of the dead girl and one found on the outer aspect of the left button corresponded in color, texture, and structure with samples labelled Clark" (R64).

No injuries were found to the entrance to the sexual passage which would indicate that she was willing at the earlier part to the sexual acts, including penetration. The findings suggestive of an involuntary act are:

"First the necessity to place and maintain a grip upon the neck for such as interpretation of the marks in the neck and grip on the thigh. Secondly, the grip of the -- I should say the group of tears in the nail and the skin of the hands. Which, in my keeping with the deceased struggling to tear away with her hands from these pinning grips, and thirdly, of the hair in the nail of the left forefinger from the same act" (R66).

Accused was questioned, after due warning of his rights as a witness, by Second Lieutenant Dianesus Economopoulos, an officer of the investigating section of the Military Police on the evening of 24 August and gave a detailed story of his whereabouts during the evening of 22 August. He stated that he and Clark had left camp by bus and gone to a show (in Ashford); that thereafter they visited various pubs and had many drinks, leaving the last pub Smith's Arms about "10 to 10" when they started walking back to the trucks which were supposed to leave for camp at 10:30 that evening. He failed to account for his whereabouts between "10 and 10:30", saying he did not remember. He thought he had been around a field which had a fence around it and he admitted he had seen a girl riding a bicycle to whom he had said "hello". He also stated that the truck for camp had gone when they arrived and they "hopped" a ride back to camp arriving about 11 o'clock (R67-71). The next morning, 25 August, about ten o'clock accused was again advised of his rights and then asked "who did the job on the girl" (R71). He then stated that they met a girl and he and Clark took her into a field and laid her down -

"* * * He took us there, to where they had the girl and the place they went through the gate and the exact spot where they laid the girl on the ground and where Clark asked Guerra to have intercourse with her" (R72).

On their return to police headquarters and after being again advised of his rights, accused gave a sworn signed statement of the whole story as it happened on the night of 22 August 1944 (Pros. Ex.26; R73). The part missing in his first statement and contained in Exhibit 26, reads:

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"It wasn't closing time yet when Cpl. Clark and I left the 'Smith's Arms'. It was about 2145 hours. We both went through the 'Black Path' and noticed a girl on a cycle approaching us in the direction of 'Smith's Arms', I said hello to her but she didn't answer or stop. At the end of the path to the left, we both saw a girl approaching in our direction. She was a well built girl, taller than I am. My height is 5'6". I can't recall the description of her clothing.
I remained at the corner and Cpl. Clark went after the girl and brought her back to the place where I was standing. I heard Cpl. Clark speak to the girl in the middle of the Railway Bridge. I couldn't hear what was said. I recall that Cpl. Clark had his left arm about the girl's waist. She didn't speak, laugh, cry. I recall now that she said something to the effect 'Let me go'. Cpl. Clark didn't answer her. He came to me with the girl and said 'Follow me'. I did so, walking behind him about 2 or 3 feet to his right. It was dark. He approached the gate, still holding the girl and told me to open the gate. It's a wooden gate leading into a field. Inside the field Clark and the girl went to the left about 50 or 60 feet away against the fence. I was standing beside Cpl. Clark. He laid the girl down on the ground. She didn't move or speak. Clark told me to have 'sexual intercourse' with her first. He asked me if I wanted to 'go on' first. I said 'yes'. I got on top of the girl with my 'fly' of my O.D. trousers unbuttoned. I spread her legs apart and inserted my penis. The girl didn't move, didn't speak, she didn't resist, she didn't kiss me. She was laying on her back. I recall taking her 'panties' off. She was just laying there. I had no trouble about it. Cpl. Clark was standing on the side.
I had intercourse with the girl for about 5 minutes. I didn't use a 'rubber'. I know that I discharged inside of her. All this time the girl hadn't spoken a word. She did, I think move her legs. I didn't kiss her.
When I arose I saw Cpl. Clark lie down on top of her. I stood aside. I think Cpl. Clark was with her for about 10 minutes. Cpl. Clark didn't use a 'rubber'. I didn't hear him speak to the girl all this time. I didn't hear her say anything. When Cpl. Clark finished with the girl we both got up and left. The girl remained lying on the ground.

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She didn't speak or move. We left her lying there. We proceeded back to camp. * * * I don't recall the color of the girl's clothing but I do remember that she had a skirt & a blouse. I know this because I opened her blouse by unbuttoning. The color of it may have been white. As far as I recall I thought that girl was unconscious when I had sexual intercourse with her. Her arms were by her side and I had my hands around her waist. Her eyes were closed. I recall that when we three entered the field, Cpl. Clark had his arms around the girl. I think he lifted her up in both arms and carried her to the spot where we later had intercourse with her. He picked her up by the gate and carried her inside" (Pros. Ex.26).

Clark was given an opportunity that same afternoon to talk with accused.

"Clark asked Private Guerra whether or not Private Guerra had given that statement to me. Private Guerra replied, 'Yes'. The second question that Cpl. Clark asked Private Guerra was did he give it voluntarily and Guerra answered yes. The third question that Clark asked Private Guerra was why did he tell me that and Private Guerra said 'Because it's the truth' and that was all" (R75).

On the evening of 11 September 1944, accused again after due caution, gave to the officer appointed to investigate the charges against him a signed and sworn statement of "what transpired on the night of 22 August 1944" (R91; Pros. Ex.27). This statement (Pros. Ex.27) is substantially the same as the statement (Pros. Ex.26), differing only in the admission that force was necessary to overcome the girl's screaming and resistance when she and Clark reached the gate to the Old Cricket Field and she discovered the presence of accused for the first time. At this time Clark "put his hand over her mouth, picked her up and carried her into the field". She was still struggling and trying to scream but "Cpl. Clark was holding her tightly over the mouth with his hand". Accused's statement reads in part:

"While he /Clark/ was screwing her I placed her two hands underneath her head and took the position on my knees behind her head. With my two elbows I pinned her two arms underneath my knees. With one hand I fondled her breasts and with the other I held her mouth to prevent her from hollering" (R95-96).

4. The defense produced no evidence or witnesses other than accused who made an unsworn statement as follows:

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"The only thing I can say is that I was drunk and I did not know what I was doing and when I get drunk I loose my mind or something. I never done something like that before. * * * I still don't believe that girl is dead, I don't have it on my mind or anything. If I know I kill her I would have it on my mind, my nerves or something like that. I don't think about it, I don't think that girl is dead" (R99).

5. "Murder is the unlawful killing of a human being with malice aforethought" (MCM, 1928, par.148a, p.162).

"Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life * * * Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: * * * intent to commit any felony" (Ibid, pp.163-164).

All offenses punishable by death or imprisonment in excess of one year are felonies (18 USCA 541). The term "felony" includes rape (MCM, 1928, par.149d, p.168). An intent to kill is not a necessary element in the crime of murder in those cases where the design is to perpetrate an unlawful act, and the homicide occurs in carrying out that purpose (Wharton's Criminal Law, Vol.1, sec.420, p.632).

"In every case of apparently deliberate and unjustifiable killing the law presumes the existence of the malice necessary to constitute murder * * *" (Winthrop's Military Law and Precedents - Reprint, 1920, p.673).

The distinctions between principals, aiders and abettors have been abolished by Federal statute.

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

The distinction is also not recognized in the administration of military justice (Winthrop's Military Law and Precedents - Reprint, 1920, p.108; CM ETO 72, Farley and Jacobs; CM ETO 1453, Fowler).

"* * * To constitute one an aider and abettor, he must not only be on the ground and by his presence aid, encourage or incite the principal to commit the crime, but he must share the criminal intent or purpose of the principal" (Whitt v. Commonwealth,

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221 Ky. 490, 298 S.W. 1101; Morei v. United States, 127 Fed. (2d) 827,831; CM ETO 1922, Forester and Bryant).

"Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.149b, p.165). That accused committed this offense on Betty Green is amply proven, not only by his two sworn statements but by the physical facts found during the investigation. The injuries apparent in and on the body, the condition of the clothing, the comparison of the hairs and the presence of accused in the vicinity where and at the approximate time that the crime occurred, compellingly indicate that accused had "unlawful carnal knowledge" of the girl, a minor, "by force and without her consent". Despite the opinion of Dr. Simpson that the absence of injuries to the entrance to the sexual passage indicated consent including penetration during the earlier part of the act, the fact that the cross, brooch and hair slide as well as her shoe were strewn along the path from the gate where Clark found it necessary to pick her up and carry her into the field and the convincing evidence that the two perpetrators of the crimes had so securely and closely pinned her to the ground during the act that she was helpless and unable to struggle before losing consciousness, show otherwise. From the evidence as well as the stories of the two accused, it very substantially appears that deceased at no time consented to any of accused's advances. Outside of the written and verbal confession of accused, the evidence convincingly indicates that rape, a felony, was committed by accused, during or shortly after the accomplishment of which act, the victim died of strangulation through manual pressure on her throat applied to stifle her outcries. The accused, if not a principal in that act, was at least an active aider and abettor and under both Federal and military law, equally guilty of her murder.

6. The charge sheet shows accused is 20 years and three months of age. Without prior service, he was inducted 5 April 1943 at Fort Sam Houston, Texas.

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. In the opinion of the Board of Review, the record is legally sufficient to support the findings of guilty and the sentence. A sentence of either death or life imprisonment is mandatory upon a conviction under Article of War 92.

Judge Advocate

(SICK IN QUARTERS) Judge Advocate

Judge Advocate

(220) 1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 23 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private AUGUSTINE M. GUERRA (38458023), 306th Fighter Control Squadron, IX Air Defense Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5157. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5157).

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 its files may be complete.

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

(Sentence ordered executed. GCMO 151, ETO, 30 Dec 1944)

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

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BOARD OF REVIEW NO. 2

6 JAN 1945

CM ETO 5167

U N I T E D S T A T E S	35TH INFANTRY DIVISION
v.	Trial by GCM, convened at Oriocourt, France, 25 November 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JOSEPH CAPARATTA (36869984), Company H, 137th Infantry	

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

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Joseph Caparatta, Company H, 137th Infantry, having received a lawful command from First Lieutenant Charles W. Parkhurst, Infantry, his superior officer, to report for duty to his platoon which was then engaged with the enemy, did in the vicinity of Rhin-de-Bois, France on or about 21 October 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due 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 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 showed that accused was an ammunition bearer, first platoon, Company H, 137th Infantry. The platoon was commanded by First Lieutenant Charles W. Parkhurst and was, on the 20th and 21st of October, 1944, located in the "Gremecy Woods" near the village of Rhin-de-Bois, France. The platoon command post was in the village itself and the platoon was "split up in sections in Gremecy woods in defense" (R7). On 20 October 1944, after securing the permission of the platoon sergeant, accused reported to Lieutenant Parkhurst at the command post and "said he couldn't take it any longer" (R7,12). Approximately three weeks earlier, after some particularly bitter fighting, accused had made a similar statement to Lieutenant Parkhurst, had been sent to "the medics", "stayed out for a week", and had then returned to his unit (R8). When he repeated this statement on 20 October, he was again sent to "the medics * * * to verify if there was anything wrong with him" (R8). The medical officer reported that he "couldn't do anything for him" and returned him to duty (R9). Accordingly, on the morning of 21 October 1944, Lieutenant Parkhurst ordered accused to return to his section (R7). At this time, accused said that he could not report and remarked "you can court-martial me if you like" (R7). The lieutenant pointed out to accused the possible effects of his refusal to obey but he persisted in his disobedience. At the time the order was given, no one other than accused and the lieutenant were present because the lieutenant "knew he was going to refuse and it would be bad for the military service if it got to the men of my platoon" (R8).

On cross-examination, Lieutenant Parkhurst testified that he had no knowledge that accused had any difficulty with his eyes other than the fact that he wore glasses. He also stated that accused had never made any complaint to him in this regard (R8,9).

4. On behalf of the defense, Sergeant Harold A. Polzin, squad leader of the machine gun section to which accused was assigned as ammunition bearer, testified that certain incidents in the past indicated to him that accused had difficulty in seeing at night. While on maneuvers in the United States, he frequently "rattled ammunition boxes" and became lost from his squad while on night problems. Upon being reprimanded, he replied that "it bothered him to go over brush and one thing and another, because he couldn't see at night" (R10,11). Accused experienced similar difficulties during the fighting in France. In bringing up ammunition at night, he "would have to be on the shirttails of the man in front" in order not to get lost. He also rattled ammunition boxes "which he said was caused by his eyes, and I figure it is.I figure if the man could see good, he wouldn't be stumbling around" (R11). Sergeant Polzin also testified that, except for a period of approximately one week when accused "went back to get his glasses fixed", he had been with his unit continuously during the fighting in France (R12). Sergeant Polzin's testimony was corroborated by that of another member of accused's company (R13).

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Major Roy M. Matson, MC, testified that the medical profession recognized that there was such a disability as night blindness and that there were tests by which the presence of this disability could be detected. However, no facilities for administering such tests were then available. He further stated that this disability was easily simulated.

After being advised of his rights as a witness, accused made an unsworn statement through his counsel reciting that he had been troubled with night blindness both on maneuvers in the United States and during operations in France. As a result of this disability, when moving over unfamiliar terrain in the dark, he constantly fell behind, stumbled and rattled the ammunition boxes. Despite these difficulties and the reprimands resulting therefrom, he stayed with his organization throughout the campaign in Normandy and through France. He had never been away from his organization for any length of time except for an absence of one week caused by the necessity of having his broken glasses repaired. Because of his defective vision, he had repeatedly requested an assignment where night duties were not essential. He felt that it was unfair to the other members of his organization to post him as a guard at night. He had tried so to arrange his guard duty that he could perform it in the early evening or early morning but, with the coming of winter and longer nights, this became impossible. He first found that he was subject to night blindness during the week when he was getting his glasses repaired. Before that he knew that he had difficulty in getting about at night but supposed it was merely a result of his nearsightedness. Upon discovering the extent of his disability, he felt even more strongly that it was unfair to the other members of his organization that he should be the only means of safeguarding them from a surprise attack by the enemy. When he refused to return to his organization on 21 October he made this fact known to Lieutenant Parkhurst and stated that he could not return because he felt he was not fulfilling his share of the task. He closed his statement by saying that he was subject only to the usual amount of fear in the face of enemy action, that he had never refused to perform his full duty in daytime and that he would "still go back" to perform any duty of which he was capable (R15,16).

5. Lieutenant Parkhurst, upon being recalled by the court, testified that he knew "before we left the States" that accused "had some trouble with his eyes or something, and they tried to get him taken care of before we came across, and that failed". Lieutenant Parkhurst further stated that accused had never refused to obey an order involving the performance of duties during the day. It was also brought out that the order here in question was given at 0830 hours and the only reason given by the accused for his refusal to obey was that "he couldn't take it any more and wouldn't go back * * * He never said a word about his eyes". Accused made no offer to perform normal daylight duties with his squad (R17).

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6. The evidence adduced shows that accused received a lawful command from his superior officer and that he willfully disobeyed such command. There was some conflict in the evidence as to the reason given for this disobedience. However, even if the version of the incident related by accused be accepted as true, the mere fact that he deemed himself incapable of performing his full duty in the squad would not have been a legal justification for his refusal to obey the order especially in view of the fact that he had been examined by a medical officer and returned to duty (Winthrop's Military Law & Precedents, Reprint, 1920, p.572).

It is true that Lieutenant Parkhurst expected the accused to disobey the order when given and that the disobedience of an order which is given for the sole purpose of increasing the penalty for an offense which it is expected that the accused may commit is not punishable under Article of War 64 (MCM, 1928, par.134b, p.148). However, even though it was expected that the order would be disobeyed, such order was not given for the sole purpose of increasing the penalty for an offense which it was expected the accused would commit but as a necessary exercise of the function of command (Cf: CM ETO 314, Mason; CM ETO 3078, Bonds, et al; SPJGJ, CM 244537, Bull. JAG., Vol. II, No.11, Nov. 1943, sec.422(6), p.426). The fact that it was anticipated that the order would be disobeyed thus did not render the order illegal and the disobedience thereof constituted violation of Article of War 64.

7. The charge sheet shows that accused is twenty-seven years of age and was inducted on 22 July 1943. He had no prior service.

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

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 6 JAN 1945 TO: Commanding General, 35th Infantry Division, APO 35, U. S. Army.

1. In the case of Private JOSEPH CAPARATTA (36869984), Company H, 137th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The evidence both for the prosecution and defense shows that accused has had trouble with his eyes for a long time, especially at night. A medical officer testified that the medical profession recognized a disability such as night blindness and that there are tests by which it can be detected, but that such facilities were not available to him. In view of this, it is recommended that execution of the dishonorable discharge be suspended and that accused be sent to a hospital for such examination, thus enabling final determination as to discharge to be made with full knowledge of all pertinent facts.

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 5167. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5167).

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

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

BOARD OF REVIEW NO. 1 5 JAN 1945

CM ETO 5170

U N I T E D S T A T E S v. Sergeant JAMES P. RUDESAL (34080716), and Private JAMES L. BILES (14043066), both of 378th Quartermaster Truck Company	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Cherbourg, Department of Manche, Normandy, France, 25 October, 20 December 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

Accused Rudesal was tried upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification: In that Sergeant James P. Rudesal 378th Quartermaster Truck Company, did at

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Gosseville, à la commune de Ste Suzanne Sur Vire, France, on or about 26 August, 1944, forcibly and feloniously against her will have carnal knowledge of Mme. Lucie Duval.

CHARGE III: Violation of the 94th Article of War. (Disapproved by confirming authority)

Specification: (Disapproved by confirming authority)

Accused Biles was tried upon the following charges and specifications:

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

Specification: In that Private James L. Biles, 378th Quartermaster Truck Company, did without proper leave absent himself from his company area at 2½ miles south St Lo, Normandy France, from about 2230 hours 26 August, 1944 to about 0730 hours 27 August, 1944.

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

Specification: In that * * * did at Gosseville, à la commune de Ste Suzanne Sur Vire, France, on or about 26 August, 1944, unlawfully enter the dwelling of M. Alfred Rollet, with intent to commit criminal offense, to wit: rape therein.

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

Specification: In that * * * did at Gosseville, à la commune de Ste Suzanne Sur Vire, France, on or about 27 August, 1944, forcibly and feloniously against her will, have carnel knowledge of Mme. Lucie Duval.

Each accused pleaded not guilty to the charges and specifications preferred against him. All members of the court present at the time the vote was taken concurring, accused Rudesal was found not guilty of Charge I and its Specification, guilty of Charge II and its Specification and, two-thirds of the members of the court present at the time the vote was taken concurring, guilty of Charge III and its Specification. All members of the court present at the time the vote was taken concurring, accused Biles was found guilty of all charges and their specifications. No evidence of previous convictions of accused Rudesal was introduced. Evidence was introduced of one previous conviction of accused Biles by summary court for being disorderly in camp and drinking while on duty in violation

of Article of War 96. All members of the court present at the time the vote was taken concurring, each accused was sentenced to be hanged by the neck until dead.

The reviewing authority, the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, with respect to accused Rudesal approved the findings and sentence and forwarded the record of trial for action under Article of War 48. With respect to accused Biles he approved the findings and sentence, recommended to the confirming authority that the sentence be commuted to life imprisonment, and forwarded the record of trial for action under Article of War 48.

On 20 December 1944 the court reconvened at Cherbourg, Department of Manche, Normandy, France, and in closed session amended and completed the record of trial in order to make it speak the full facts by adding thereto the following:

> 'The court declares and affirms that at the previous session of this court, on 25 October 1944, prior to the arraignment of each accused, the members of the court and the personnel of the prosecution were sworn'".

The confirming authority, the Commanding General, European Theater of Operations, disapproved the findings of guilty of Charge III and its Specification with respect to accused Rudesal, confirmed each of the sentences, but due to special circumstances in the case of accused Rudesal, and due to special circumstances and the recommendation by the reviewing authority for clemency in the case of accused Biles, commuted the sentence as to each accused 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 of each accused, and withheld the order directing execution of each of the sentences pursuant to the provisions of Article of War 50½.

3. With respect to the offenses, the findings of guilty of which were approved and confirmed, the evidence for the prosecution showed that on 26 August 1944 Monsieur Alfred Rollet, age 63, his wife Marie, age 59, Madame Lucie Duval and her son, age 8, lived in the village of Gosseville, Ste. Suzanne Sur Vire, France. Madame Duval's husband was then a prisoner of war (R37,44,49). They lived in separate, adjoining rooms in the same building. The Rollets lived in one room and were able to see through a small window with iron bars into the kitchen of Madame Duval which was on the first floor. Madam Duval's bedroom was on the second floor (R37,38,40,44-45, 49), but her bed was in the kitchen (R53). At the trial, both Rollets

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and Madame Duval positively identified accused Rudesal (the stout soldier) and accused Biles (the slender soldier) as the men involved in the incidents which occurred on the evening of 26 August 1944 (R39,42,46,50).

About 10 pm that evening, German time, Mesdames Rollet and Duval were in their respective homes and Rollet was out in the yard smoking. Accused Biles arrived and started to shoot "in all directions" with a rifle. The shooting continued for about an hour. He made Rollet follow him around the house looking for "bosche". About 11 pm accused Rudesal passed by and Biles called him. Rudesal entered the yard and both accused fired more shots. Rudesal had a "machine gun" (carbine), a large weapon, and Biles had a rifle, a small weapon. The Rollets and Madame Duval were apparently in the yard at the time. Both accused then came toward Madame Duval and the Rollets endeavored to hide her behind them. When Rudesal seized her by the arm she tried to get away, screamed, and said "No, leave me alone". Rudesal, carrying his gun, took her away "brutely" and threw her on the ground about 20 feet away in a field. It was "light enough to see two bodies" (R37-38,43-45,48,49-50,52). Madame Duval struggled, repeatedly asked Rudesal to leave her alone, and tried to get away. Whenever she attempted to arise he threw her back on the ground. She could not defend herself "because each time he took his rifle" and threatened her with the weapon. She called for help but the Rollets were unable to go to her aid because Biles stood guard over them with his rifle and bayonet. When Rollet attempted to go to Madame Duval, Biles held him by one hand and held his bayonet in the other. Rudesal also pointed his "machine gun" at Rollet when he saw the latter approach. Rudesal forcibly removed the woman's underclothing, penetrated her person with his penis and engaged in sexual intercourse with her. He kept her in the field about one and a half hours during which interval he violated her "All the time". She did not at any time decide to give in to him rather than to resist (R38,43-45,48,50-53). When the woman finally returned from the field she was crying. Both soldiers left about 1 am or 3 am German time (R38-39,45-46,48,50).

In about a half hour accused Biles returned alone to the house with a German overcoat, Madame Duval was in her kitchen with the Rollets. He knocked at Rollet's door, "fired more shots in all directions", forced the door open and entered Rollet's room. He searched "a little", drank from his canteen, went outside where he fired more shots and then broke one of Madam Duval's windows. He then smashed her door and Madame Duval, who was frightened, said he "will kill us" and told Rollet to open the door (R39-40,46,48,50-51). Biles entered and pointed his rifle at Rollet's chest. Rollet brushed it aside and said "American comrades, comrades". Accused drank from his canteen and then offered it to Rollet who "simulated accepting" and surreptitiously emptied the canteen behind him. Biles then lay on the floor and became "a little angry" when he saw that his canteen was empty. He complained

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he was injured (because he "hurt himself" when he forced open the door) and said "Mademoiselle, Mademoiselle". Rollet replied "No Mademoiselle" and said that there were "bosche" in the neighborhood (R40-41,46). Biles continually took Rollet outside and said "Bosche, Bosche, Bosche" (R40). He put his helmet on Rollet's head, his cartridge belt on Rollet's waist, and gave him his rifle. He made Madame Rollet put her head on the ground to listen for the bosche", and made Rollet crawl on the ground in the yard "like indians" for about an hour and a half (R41,43,46-47,51). Biles then entered the house and approached Madame Duval who was sitting near her small son who was in bed in the kitchen. When he "took her" she pushed him back and said "Leave me alone, my little child, my little child". Rollet, who had accused's rifle, remained at the door calling "bosche,bosche" in an effort to get him away from the woman (R41,43,47,51,53). Rollet heard accused and Madame Duval struggling (R47) and Madame Rollet heard her cry "Leave me alone" (R43).

Madame Duval testified as follows:

"Q. After he got to the bed what did he do?
A. He raped me.

Q. Did he put his private parts in your private parts?
A. Yes.
* * *
Q. Did you resist him?
A. I resisted him, but I could not keep on for fear for my child" (R51).

"Q. And you did not want your baby to be waked up * * *?
A. Yes, and for fear that he should do him harm.
* * *
Q. You were laying on the bed where the little boy was sleeping were you not?
A. I was sitting on the side of the bed to protect my boy.

Q. And when the soldier had intercourse with you you were lying on the bed, were you not?
A. Yes, on the side of the bed" (R52).

"Q. And you did not wake up the little boy while you were having intercourse did you?
A. No, I was afraid because the boy would have cried.

Q. So rather than have the boy cry you decided to give into the soldier, is that correct?
A. Yes, I struggled but at the end I preferred to give in rather than let my child cry" (R53).

Madame Duval further testified that accused violated her once, and that she "defended herself * * * pushed him away and escaped" (R54).

Madame Duval finally came out of the house crying. She and both Rollets spent the rest of the night sitting at the door while Biles slept in the bed with the boy. In the early morning Madame Rollet and her husband went to "the camp" (of both accused) and interviewed an officer (R41,47).

As a result of his conversation with the Rollets, Captain William Pite, commanding officer of both accused, went with some soldiers to the house which was about a quarter of a mile from the company area (R8). Biles and the Duval boy were found sleeping in Madame Duval's bed. Accused refused to obey Pite's order to rise and the first sergeant of his company pulled him from the bed. Accused wore no shoes, his coveralls were unbuttoned from top to bottom, and in Pite's opinion he "had obviously been drinking" (R9,19-20,24, 41-42). Leaning against the house was an "03 rifle with the bayonet fixed and the sheath off". At the base of the stock was a cartridge belt which contained "03 ammunition", a helmet, and scattered around the yard were "quite a number" of empty "03" shells (R8,11,19,22,25-26). At the trial Pite identified the rifle and it was admitted in evidence as Pros.Ex.A. He identified the bayonet, cartridge belt and clips, and testified that they were issued to accused Biles. They were admitted in evidence as Pros.Ex.B (R8-9). Also in the yard was a five gallon bucket with several bayonet thrusts through the bottom (R19), and a panel in a door of the house was found to be broken (R11). No carbine (Rudesal's weapon) was found at the scene (R22,25). The bed was not mussed and appeared to be in a fairly orderly condition (R22,25). The older woman (Madame Rollet) pointed to a bruise on her arm and the younger woman appeared to have a bruise on her left jaw (R20,25). As far as the first sergeant of accuseds' company knew, the two accused and a soldier named Flippin were the only men who were out of the company area the night of 26 August (R21). Flippin was "absolved entirely" by the three French people when he was brought to the house the morning of 27 August. (R11,16,23-24). They were also unable "positively" to identify accused Rudesal as having been at the house the previous evening (R11,15,22-23). They said that the man who was there was "a powerful man, walked with a slouch and had a bruise on his forehead"(R15). Captain Pite testified that Rudesal "walks in a rather slouchy manner, he is rather round shouldered, walks rather stooped over" (R14), that when witness questioned him about 7:30 am 27 August (R11), he noticed a slight bruise on Rudesal's forehead (R12). Rollet testified that he could not identify Rudesal the following morning but testified that he could identify him at the trial because "I see exactly the shape and features of the man" (R47).

About 7 pm 26 August, the evening of the incident alleged, accused Rudesal came to the tent of Corporal Anthony Silaco of his company and asked "what kind of a gun I had". When Silaco told him a carbine, accused asked him for ammunition. Silaco gave him two clips each of which contained 15 bullets and accused said "that will do" (R34-35). About 9 pm that evening Rudesal borrowed the carbine of Technician Fifth Grade Kenneth E.Arnold of his organization. No clips or ammunition were in the rifle at the time (R32). On the morning of 27 August a carbine was brought to the supply tent, "was checked" by both Captain Pite and the supply sergeant and found to belong to Arnold. It was identified by Pite at the trial and admitted in evidence (R12; Pros.Ex.C). At the trial Arnold identified this carbine and testified that it belonged to him (R33).

With reference to the offense of absence without leave charged against Biles (Charge I and Specification), extract copies of the morning reports of accused's company, the entries of which showed his absence without leave therefrom at the time and place and for the period alleged, were identified by Pite, the company commander, and admitted in evidence (R36-37; Pros.Exs.D,E).

4. For the defense, Private James A. Flippin, of accuseds' company, testified that about 9 pm he and Rudesal left the camp in a truck to empty some garbage. Witness did not notice if Rudesal had Arnold's carbine with him at the time. Flippin left accused at the house of a Frenchman where they emptied the garbage and then drove down the road to empty some "trash". Flippin was to call for accused when he returned but failed to do so (R54-55). Arnold's carbine was found in the truck the following morning (R56). Witness further testified that he was present the following morning at the Rollet-Duval home and the questioning of the three French people was conducted through an interpreter, a Corporal Gross. The French people indicated that accused Rudesal was not present at their home (the night before) and said that the man was "a bushy short guy, big face". Further "this woman" stated that it was not accused Biles who raped her, that Biles was drunk, slept there all night, but "That was all he did". The French home where the garbage was emptied was about three quarters of a mile from the company area and was in the direction of the Rollet-Duval house. Witness let Rudesal out of the vehicle at "The first house below" the Rollet-Duval house, and these two houses were about a half mile apart (R56-60).

Upon being advised of his rights each accused elected to remain silent (R60).

5. Called as a witness by the prosecution in rebuttal, Captain Pite testified that both Flippin and Rudesal were present at the Rollet-Duval home the following morning for the purposes of identification. Witness did not recall Madame Duval saying that Biles was

drunk and did not rape her. Madame Rollet did about 95 percent of the talking and, to Pite's knowledge, Madame Duval did not say anything. When asked if Rudesal was the man who raped Madame Duval, the three French people, according to witness' recollection, "were not certain". They were positive "it wasn't Flippin". Witness examined both the "03" rifle and the carbine on the morning of 27 August and discovered that both "were fired". Flippin came to camp "by himself" that morning but Pite did not know when Rudesal returned to camp. The carbine was on Flippin's truck the morning of 27 August (R61-62).

6. It was stipulated by the prosecution and defense that if Major Morris W. Greenberg, Medical Corps, 7th Field Hospital, were present in court he would testify as follows:

"28 August, 1944

To Whom it May Concern:

Mrs. Luceu Duval was examined by me today. There were no contusions or abrasions about her body or genitalia. Vaginal examination showed no abrasions nor ecchymoses about the vulva and vaginal canal. Aspirated fluid from the posterior fornix showed epithelia cells and some leucocytes. No intra-cellular nor extra-cellular diplococci were found. No spermatozoa were found'" (R63).

7. With reference to accused Biles, there was testimony that on two occasions he drank drom his canteen after he returned to the house, and that when he offered Rollet a drink the latter surreptitiously emptied the canteen behind him. Pite testified that in his opinion Biles, when found the following morning, "had obviously been drinking". The only other indication of intoxication on the part of this accused was that which might be possibly inferred from his indiscriminate firing of shots "in all directions", the antics which he forced the Rollets to perform for about one and one half hours, and the fact that he was found the next morning sleeping with Madame Duval's son on her bed at the scene of the crime. There was no evidence as to any intoxication on the part of accused Rudesal, who participated with Biles in the indiscriminate shooting prior to the former's alleged commission of the first attack upon the woman. The question of intoxication and the effect thereof upon the specific intent requisite to constitute the offense of housebreaking (accused Biles) and on the general criminal intent involved in the offense of rape (both accused), were issues of fact for the sole determination of the court. Such determination against each accused, reflected in the findings of guilty, will not be disturbed upon appellate review as it was fully supported by evidence of a competent and substantial

character (CM ETO 3475, Blackwell et al and authorities cited therein; CM ETO 3859, Watson and Wimberly).

8. (a) With reference to accused Biles, the evidence is legally sufficient to support the findings of guilty of absence without leave at the time and place and for the period alleged (Charge I and Specification).

(b) Both accused were charged with the offense of rape of Madame Duval (Charge II and its Specification - Rudesal; Charge III and its Specification - Biles).

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent.
> * * *
> Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.
> * * *
> Proof.--(a) That the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent" (MCM, 1928, par.148b, p.165).

The evidence showed that Biles first arrived at the house, fired shots "in all directions" with a rifle (an "03"), and made Rollet follow him around the house, looking for Germans. When Rudesal arrived both accused fired more shots in the yard. Each was armed. They then approached Madame Duval and the elderly Rollets tried to hide her behind them. Rudesal seized her by the arm and despite her screams, protests and attempts to get away, dragged her away "brutely" and threw her on the ground about 20 feet away in the field. Madame Duval struggled, repeatedly asked Rudesal to leave her alone and tried to escape. Whenever she attempted to arise he threw her back on the ground. He continually threatened her with his "machine gun" (carbine) which he kept in his possession. He forcibly removed her underclothing, inserted his penis in her person and engaged in sexual intercourse with her. He kept her in the field for about one and one half hours, during which time he violated her "All the time". At no time did the woman decide to submit voluntarily to the act of intercourse. It was sufficiently light so that the Rollets could observe the entire incident. Although the victim cried for help, the Rollets were prevented from going to her aid by Biles who stood guard over them with his rifle and bayonet. When Rollet attempted to go to the woman, Biles held him by one hand and held his bayonet with the other. Rudesal also pointed his own weapon at Rollet when he saw the latter approach. When the woman finally returned from the field she was sobbing.

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Based upon the facts involved solely in this first incident of the evening, the findings of the court that both accused were guilty of rape were thus abundantly supported by evidence of the most substantial character. The fact that only Rudesal accomplished penetration is immaterial. It is clear that Biles aided and abetted Rudesal in the successful fulfillment of the latter's purpose. One who aids and abets the commission of rape by another person is chargeable as a principal whether or not the aider or abetter engages in sexual intercourse with the victim (CM ETO 3740, Sanders et al; CM ETO 3859, Watson and Wimberly). The Board of Review is of the opinion that as to each accused the foregoing evidence fully supported the findings of guilty of rape (CM ETO 2686, Brinson and Smith; CM ETO 3197, Colson and Brown; CM ETO 3740 Sanders et al; CM ETO 3859 Watson and Wimberly; CM ETO 3141 Whitfield).

The Board of Review is of the further opinion that the evidence concerning Biles' subsequent and personal attack on the woman also fully justified the court's findings that he was guilty of rape.

> "Carnal knowledge of the female with her consent is not rape, provided she is above the age of consent, or is capable in the eyes of the law of giving consent, or her consent is not extorted by threats and fear of immediate bodily harm. * * * There is a difference between consent and submission: every consent involves submission, but it by no means follows that a mere submission involves consent" (52 CJ, sec.26, pp.1016,1017) (Underscoring supplied).

> "The female need not resist so long as either strength endures or consciousness continues. Rather the resistance must be proportioned to the outrage; and the amount of resistance required necessarily depends on the circumstances, such as the relative strength of the parties, the age and condition of the female, the uselessness of resistance, and the degree of force manifested, * * * Stated in another way, the resistance of the female to support a charge of rape need only be such as to make nonconsent and actual resistance reasonably manifest" (52 CJ, sec.29, pp.1019,1020).

> "The force. The force implied in the term 'rape' may be of any sort, if sufficient to overcome resistance. * * * It is not essential that the force employed consist in physical violence; it may be exerted in part or entirely by means of other forms of duress, or by threats

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of killing or of grievous bodily harm or other injury * * *.

Non-consent. Absence of free will, or non-consent, on the part of the female, may consist and appear * * * in her yielding through reasonable fear of death or extreme injury impending or threatened: * * * in the fact that her will has been constrained, or her passive acquiescence obtained, by * * * other controlling means or influence" (Winthrop's Military Law and Precedents - Reprint, pp.677-678) (Underscoring supplied).

"Acquiescence through fear not consent. Consent however reluctant, negatives rape; but when the woman is insensible through fright or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape" (1 Wharton's Criminal Law, 12th Ed., sec.701, p.942) (Underscoring supplied).

"The extent and character of the resistance required of a woman to establish her lack of consent depend upon the circumstances and relative strength of the parties, and not upon the presence or absence of bruises or other physical injuries" (CM 236801 (1943) 23 B.R. 129, Bull. JAG. Vol.II, No.8, Aug 1943, sec. 450, p.310).

Biles returned to the house in about a half hour. He again fired shots "in all directions", broke open the Rollets' door, entered their home, drank from his canteen and then went outside where he fired more shots. He broke one of Madame Duval's windows and then smashed her door. Terrified, the woman told Rollet to open the door, that accused "will kill us". Biles entered and pointed his rifle at Rollet's chest. He took another drink from his canteen and then for about an hour and a half forced Rollet to crawl on the ground in the yard "like indians", and Mrs. Rollet to keep her head on the ground to listen for "bosche". When accused re-entered the house and approached Madame Duval who was sitting near her son who was in bed, she said "Leave me alone, my little child, my little child". Rollet heard Biles and the woman struggling and Mrs. Rollet heard her tell him to leave her alone. Madame Duval testified that she resisted him and struggled, but that because she feared her child would awake and accused would harm him, she finally "preferred to give in".

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There were ample and cogent reasons for the woman's terror. She had already witnessed indiscriminate gun fire by both accused and had then undergone a forcible and brutal attack upon her person by Rudesal, who was armed at the time and who was aided by Biles in the accomplishment of his purpose. Similar gun fire by Biles attended his return to the house and his forcible entry into the Rollets' and her own living quarters. Madame Duval's fright was further evidenced by her remark that he would kill them and her request that Rollet open the door. The evidence indicated that she remained indoors guarding her child during the time accused forced his unwelcome attention on the Rollets who were obliged to obey his whims. Her fear for her child's safety and her terror were also evidenced by her emphatic remonstrances when Biles approached them in the kitchen. She pushed him away, told him to leave them alone and moaned "my little child, my little child". Although Rollet at this time possessed accused's gun and cartridge belt, he gave the woman no effectual aid whatsoever and limited his activities to remaining at the door calling "bosche, bosche". After struggling with and protesting to accused the woman finally submitted to intercourse, induced by fear for her child's safety. The Board of Review is of the opinion that the circumstances surrounding her ultimate submission bring the case squarely within the ambit of the foregoing authorities, and that her submission did not involve consent. The evidence clearly showed that she was thoroughly frightened, and that her passive acquiescence was directly induced by a "reasonable fear of death or extreme injury impending or threatened", to her child and, it may be added, to herself (CM ETO 3141, Whitfield; CM ETO 3740 Sanders et al; CM ETO 4017, Pennyfeather; CM ETO 4194, Scott).

(c) With respect to accused Biles the evidence also fully supported the findings of guilty of housebreaking (Charge II and Specification). The fact that it was alleged in the Specification that he unlawfully entered the house of Monsieur Rollet does not affect the validity of the findings. The Rollet and Duval living quarters were in the same building and the three French people were in the Duval kitchen at the time of the initial entry. Accused searched the Rollet premises, found no one there and then went outside and smashed the Duval window and door. He was admitted by Rollet who opened the door when requested to do so by Madame Duval who was terrorized (CM ETO 3707, Manning and authorities cited therein.)

9. The charge sheet shows that accused Rudesal is 30 years and seven months of age and was inducted at Fort McPherson, Georgia, 31 March 1941. Accused Biles is 23 years and two months of age and enlisted at Fort McPherson, Georgia, 7 January 1941. Neither accused had prior service and each was to serve for the duration of the war plus six months.

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

11. The penalty for rape is death or life imprisonment, as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized for the offense of rape by Article of War 42 and sections 278,330, Federal Criminal Code (18 USCA 457,567) Inasmuch as each of the sentences included confinement for more than ten years, i.e. life, confinement in the United States Penitentiary, Lewisburg, Pennsylvania, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b (4) and 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 5 JAN 1945 TO: Commanding General, European Theater of Operations, APO 887, US. Army.

1. In the case of Sergeant JAMES P. RUDESAL (34080716), and Private JAMES L. BILES (14043066), both of 378th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review as to each accused the record of trial is legally sufficient to support the findings of guilty as approved and the sentence as confirmed and commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have the 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 5170. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5170).

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

(Sentences as commuted ordered executed. GCMO 14, 15, ETO, 12 Jan 1945)

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

BOARD OF REVIEW NO. 1

12 DEC 1944

CM ETO 5179

U N I T E D S T A T E S	9TH INFANTRY DIVISION
v.	Trial by GCM, convened at Mulartschutte, Germany, 20 October 1944.
Second Lieutenant MAX H. HAMLIN (O-1296852), 60th Infantry	Sentence: Dismissal, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that 2nd Lieut. Max H. Hamlin, 60th Infantry, Platoon Leader, Weapons Platoon, Company "K", 60th Infantry, being present with his platoon, while it was engaged with the enemy, did near Hofen, Germany, on or about September 17, 1944, shamefully abandon the said platoon and seek safety in the rear, and did fail to rejoin it until the engagement was concluded.

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. Two-thirds 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 ten years. The reviewing authority, the Commanding General, 9th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, though deemed inadequate punishment for the shocking cowardice manifested by accused with selfish disregard for the consequences of his conduct under such critical circumstances, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution's evidence was as follows:

On 17 September 1944 accused was platoon leader of the weapons platoon, Company K, 3rd Battalion, 60th Infantry (R6,9,15). On the preceding night and on the morning of the 17th, Company K, which was in close contact with the enemy in or near the town of Hofen, Germany, received enemy counterattacks (R6,7,15), during which the enemy "threw everything they had" at the company, which suffered heavy casualties (R10). Accused was last seen with his platoon by the platoon sergeant at about 1430 hours. Although accused gave no order for the platoon to move out, it went forward in an attack to the southeast about 1500 hours as planned (R9-10). Although he did not tell the sergeant he was leaving or direct him to assume command of the platoon, the latter did not see him again until the following afternoon (18 September) (R9). His normal position was forward with his men and company commander and he was not authorized to be absent from his company. The battalion commander testified that it was accused's duty to remain with his platoon so long as he had one man left (R6,7,9,15).

Sometime thereafter accused, accompanied by an acting first sergeant and a runner, came to the battalion forward aid station "near the troops" and stated to the first sergeant in charge of the station that a litter squad was needed for a casualty from the company. It was not the normal procedure for an officer himself to summon medical aid from the station. Communication by means of telephone, radio, vehicle and runner was available (R6,13). Accused did not accompany the medical aid sergeant forward to show him the location of the wounded man, who was actually a member of Company L and not Company K, accused's organization. After some difficulty the injured man was eventually discovered a considerable distance from the place where he was expected to be found (R13-14).

Captain Clem M. Carrithers, Medical Department, 3rd Battalion

ganized my Platoon and we stayed there that day and the morning after. That day we had considerable artillery and I believe that we lost thirty-three men. We found out later that the casualties were due to our own artillery and not to enemy action. I got five replacements for my Platoon and lost one of my machine guns. We did not have enough men at the time. The same was true for one of the mortars. We also had to have a bazooka team and we made bazooka teams out of our mortar men. We had two bazooka teams. We moved out of the area across the road and were attacking southeast from Hofen, Germany. Sergeant Russell said that I was in the rear of my Platoon. My machine guns were attached to the 2nd Platoon, my bazookas were attached to the 2nd team, and this left me with only my mortars. The day before this my runner had been wounded. That morning, during the attack, something happened to the 1st Platoon radio man and I took my radio man/and gave him to the 1st Platoon. This left me without a radio man or runner. I just had my two mortars under my control. Furthermore, each of the men were loaded with ammunition as we were short of men. Actually, I wasn't to the rear of my Platoon. When Sergeant Russell said that I was in the rear of my Platoon, I believe that I asked my defense counsel to object, but he said that it was not so important. We were, at that time, just following the 2nd Platoon. There is no special command to move out. We just followed the first column. I was right behind my machine gun section. My Platoon Sergeant was ahead of the machine guns, which were attached and not under my control. We moved up into this area and the machine guns went one way and we set up for mortar firing. I was there at that time with the Platoon and I directed the setting up of the mortars. My Mortar Sergeant went up ahead to observe for fire and moved from another position. At that time they were calling for litter bearers. The statement was made that we were suppose to be in contact with radio, runners, telephone and so forth. Actually, we had no telephone communication. Our radio wasn't working

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for us. I had no runners and no radio. All I had was the men to operate the mortars. My Section Sergeant was operating the mortars. I was supervising. Then, the call came through for litter bearers and there wasn't anyone I could send as I was actually shorthanded. I needed all my men there and I told Sergeant Stoker that there wasn't much that I could do back there and I said that I would go. I took off and ran most of the way to the Battalion Aid Station. The Sergeant said that I came in with Sergeant Droney and a runner with the name of Murphy. Private Murphy wasn't with my Platoon. Both of these men were there when I got there. They were actually taking prisoners back. I hadn't come with them at all. I told them about needing a litter team for "K" Company and I told them how to get to the Company. Droney said, 'I am going right back up'. I ran most of the way back. The Medical Sergeant said he could get there by jeep by crossing only about a hundred yards. He wanted to know whether he should wait or go for a litter team. I said for him to take the jeep up. About that time they started to shell the Battalion C.P. with artillery and everyone went into the jeep and I with them. When I came back up, Droney and the litter bearers were gone. They were up at the Forward Battalion C.P. in the town of Hofen. I told Captain Carrithers that I was not fit to lead a Weapons Platoon feeling the way I did and I asked him if there was anything he could do about it. I told him that when they wanted the weapons they wanted them right away. If I couldn't lead them, it would be better if I weren't sent back there. I didn't take two men with me to the Aid Station. Also, Captain Carrithers wasn't in the Aid Station when I got there. Captain Carrithers talked to me and felt my pulse and I told him how I felt and he said that mine was a hard case. He didn't make any statement about not being able to evacuate me. Neither did he tell me to go back. After talking with

Surgeon, testified that accused and the two enlisted men came "rather late in the afternoon" to the battalion rear aid station at Monchau, Germany, about two miles behind the battalion's front line.

> "All three of them said that they couldn't take it up at the front any longer. One of the enlisted men was an exhaustion case. Lt. Hamlin was not an exhaustion case and I told him that I could not evacuate him as a patient and that I would not evacuate him. I told him that he either had to be on duty or else sick in the hospital" (R11).

Witness took accused's pulse, examined him generally and found him "in fairly normal condition for a person going through the front lines".

As accused "showed no inclination at all to return to his Company", the surgeon summoned Major Albert E. Bruchac, Executive Officer, 3rd Battalion, and informed him of the facts. Major Bruchac thereupon engaged in a lengthy discussion with accused in an attempt to persuade him to return to his unit. He refused to return, explaining that

> "he wanted to be evacuated. * * * He stated that he couldn't stand it up there any longer and that he wanted to get out of there" (R16).

Major Bruchac ordered him to return to his company "by dark", but he did not return until the next morning (R15-16). He passed the night in the building where the rear aid station was located (R12). During accused's absence his company and platoon were engaged in combat with the enemy (R15,16). When he returned on the morning of 18 September, the company had moved and its combat engagement was concluded (R8,9,16).

4. After the defense counsel stated that the rights of accused had been explained to him, accused elected to make the following unsworn statement:

> "* * * I have been in the Army for four years in Headquarters Company till I was commissioned, then went to school as a Maintenance Officer. Then, I came overseas and was given a Rifle Platoon instead of maintenance work. One thing there is that I would like to show and that is that I have had no experience in leading a Weapons Platoon or a Rifle Platoon. Back towards the 15th we moved into Hofen, Germany and stayed there for the night. The next morning there was a counterattack. There was a counterattack that night, too. There was a counterattack in our immediate area and we moved back about two hundred yards. I reor-

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me Captain Carrithers went back into his office and I was called into the office. Major Bruchac was there with the Captain and he said to get back to the Company there and fight and I explained my situation and he said, Major Bruchac then said, that the hard part was gone and that the easy part was coming up, so he said, 'Why quit?'. The next day I rode back to my Company. That is all that I have to say."

5. The uncontradicted evidence, including accused's admissions against interest contained in his unsworn statement, leaves no doubt that he was with his platoon while it was engaged with the enemy at the time and place alleged and that he left the platoon and went to the rear. The only possible question presented was whether or not his leaving was justified, so as not to constitute abandonment and hence misbehavior under Article of War 75. Accused attempted to justify his conduct on the ground that lack of available personnel and means of communication necessitated his going to the rear for medical aid for his unit. Such explanation is belied not only by reliable and persuasive testimony that personnel and means of communication were available but also by accused's own admission in his unsworn statement:

"* * * I have had no experience in leading a Weapons Platoon or a Rifle Platoon * * * I told Captain Carrithers that I was not fit to lead a Weapons Platoon feeling the way I did and I asked him if there was anything I could do about it. * * * If I couldn't lead them, it would be better if I weren't sent back there" (R17,18,19).

Accused did not deny Major Bruchac's testimony that he told the latter "he wanted to be evacuated" and stated that the Major asked, "Why quit?" (R19). It thus appears that, using an alleged necessity as a pretext, he did shamefully abandon his platoon and seek safety in the rear, as alleged. Both elements of the offense were established by convincing evidence (CM ETO 4783, Duff).

6. (a) The record shows (R2) that the trial took place only one day after the charges were served on accused. Neither accused nor his counsel objected to trial at this time and it appears from the detailed character of accused's unsworn statement that he not only was well aware of the nature of the charge against him but had adequate opportunity to prepare his defense thereto. In the absence of indication that any of his substantial right were prejudiced, the irregularity may be regarded as harmless (CM ETO 3937, Bigrow; CM ETO 4095, Delre).

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(b) The record shows (R2) that the assistant defense counsel was absent from the trial. The record reads "Assistant Defense Counsel: Services are desired" (R3). Neither accused nor the defense counsel pursued the matter further and, so far as appears from the record, accused's substantial rights were not injuriously affected by the absence of assistant defense counsel. That irregularity may therefore be regarded as harmless.

(c) The record contains some hearsay evidence, notably the testimony of accused's battalion commander concerning Major Bruchac's report to him of accused's departure and Major Bruchac's order to accused to return to his company. The injection of this evidence, in view of the convincing nature of the competent evidence in the record above noted, could not have injured accused's substantial rights and was thus immaterial.

7. The charge sheet shows that accused is 22 years eleven months of age. He was commissioned and entered on extended active duty 16 October 1942. His prior service is thus recorded

"La. N.G. (Enl) 9 July 1940 to 24 Nov 1940.
Feder (Enl) 25 Nov. 1940 to 15 Oct. 1942".

According to his unsworn statement, he served for four years in "Headquarters Company" prior to receiving his commission (R17).

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. A sentence of dismissal from the service, total forfeitures and confinement at hard labor is authorized upon conviction of a violation of Article of War 75. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sep. 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 12 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Second Lieutenant MAX H. HAMLIN (O-1296852), 60th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5179. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5179).

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

(Sentence ordered executed. GCMO 147, ETO, 21 Dec 1944)

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

BOARD OR REVIEW NO. 1

16 FEB 1945

CM ETO 5196

U N I T E D S T A T E S	)	36TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Headquarters 36th Infantry Division, APO 36, U.S. Army (France), 20 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private FRED G. FORD (36475028), Company B, 143rd Infantry	)	

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

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

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

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

Specification 1: In that Private Fred G. Ford, Company B, 143rd Infantry, did, at or near Salerno, Italy, on or about 18 May 1944 desert the service of the United States and did remain absent in desertion until on or about 16 June 1944.

Specification 2: In that * * * did, at or near La Fomce, France, on or about 8 October 1944 desert the service of the United States and did remain absent in desertion until on or about 10 November 1944.

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

Specification: In that * ** having received a lawful command from Robert L. O'Brien, Jr., Major, Headquarters, 143rd Infantry, his superior officer, to return to his company, did, in the vicinity of Deycimont, France, on or about 10 November 1944, willfully disobey the same.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and their specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 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 charge sheet, dated 11 November 1944, contains two charges: Charge I under Article of War 58 with two specifications each alleging an act of desertion, and Charge II under Article of War 64 with one Specification alleging the disobedience by accused of a lawful command of his superior officer. It was signed by Major Robert L. O'Brien, Jr., 143rd Infantry, and was sworn to on the same date before First Lieutenant Herman L. Tepp, 143rd Infantry, Assistant Adjutant. On 12 November 1944, the charges were referred to the investigating officer, who completed his investigation on 13 November 1944. The charges and their specifications, beside which appear the initials "SJB", were typed upon a separate piece of paper which was pasted over the original charge. A partial removal of this paper discloses that it covered a previously prepared charge under Article of War 64 and a specification in language identical with that in the Specification of Charge II. An office stamp underneath this paper reading "RECEIVED 12 November 1944 JAGD 36th Inf Div" indicates that it was a substitution for the original charge and specification made on 12 November 1944, since it was on that date that they were referred by 1st indorsement to the investigating officer, and that Charge I and its specifications were therefore not signed and sworn to by the accuser.

4. Following the arraignment, the defense pleaded, as regards Specifiaction 1 of Charge I, "constructive condonation of the offense of desertion in bar of trial" and evidence was introduced in support of the plea as follows:

Accused testified that he was a member of Company B, 143rd Infantry, and that on 13 June 1944 he was interviewed by Lieutenant

Colonel J. Trimble Brown (R5) who asked him if he would return to his company. Accused said he would. Colonel Brown said that if he would "all charges would be dropped, that included everything". Accused returned to his company and stayed with them "ever since until 8 October".

It was stipulated between the defense and the prosecution that "on or about the 13th of June 1944 Lieutenant Colonel J. Trimble Brown was commanding officer of Rear Echelon, 36th Infantry Division".

On cross-examination, accused again stated that the promise of Colonel Brown was made to him on 13 June 1944. The front line was "at Grosetto at that time" (R6). The Colonel asked him

> "Why I went AWOL and I told him that I just couldn't stay no longer. Then he asked if I would return to my company".

The Colonel said all charges would be dropped and that is all he said (R7).

First Lieutenant Raymond E. Bernberg, 143rd Infantry, testified that he was official custodian of the 143rd Infantry Regiment's morning reports and that accused was carried as present for duty with his company during the period 19 June to 8 October 1944 (R8). (The extract copy of morning reports of Company B, later received in evidence as Pros.Ex. 1 (the defense stating it had no objection, confirms this testimony (R14)).

Lieutenant Colonel David P. Faulkner, Headquarters Special Troops, 36th Division, testified that he was commander of Rear Echelon, 36th Division and had occasion to interview soldiers of the division who were in the stockade (R8-9). In the past he interviewed soldiers who were absent without leave to determine whether or not they would return to their organizations. In such instances he provided transportation to take them back to their units. The prosecution moved that the witness' testimony be stricken from the record as being irrelevant and immaterial. The motion was granted, to which defense took "exception". Following argument by prosecution and defense (R9-11), the court disallowed the plea in bar and the defense again noted its "exception" (R11).

5. a. Charge I and specifications.

The undisputed evidence showed that prior to 18 May 1944, accused was a squad leader of the third platoon, Company B, 143rd Infantry, during the period when the company was preparing to move to the Anzio beachhead and was undergoing "demolitions and training down at the beach" which included embarkation and debarkation

practice. At that time it was generally known that a move by boat was anticipated and the company did leave for the Anzio beachhead about 20 May 1944. Accused did not go with it (R12). The company morning report, an extract copy of which was received in evidence, the defense stating there was no objection, (R14; Pros. Ex.1) showed accused "Dy to AWOL as of 2000 hrs 18 May 44", "AWOL to Abs Conf Div Stockade" on 16 June 1944, "Abs Conf Div Stockade to dy as of 19 Jun 44", "Dy to AWOL as of 8 Oct 44" and "AWOL to Abs Conf Div Stockade" on 10 November 1944.

Staff Sergeant George Schoop, Company B, 143rd Infantry, was with the company on 8 October 1944 when

> "we left that hill and we were to go to an assembly area but we didn't go to an assembly area. We moved through Docelles, dropped our loads and kept moving. We were supposed to have another hill for our objective and we went on to that hill with no resistance and we sort of by-passed the enemy. The enemy at the moment was in the rear of us" (R15).

When the company "started this march" he saw accused. The "word was that we were going to an assembly area when we started to move". Whether the accused was with them the next morning, he "couldn't say for sure" and "didn't see him myself" (R15). Accused was with Company B when it landed on the southern shores of France and was also present when they crossed the Moselle and "was on the hill, yes Sir, that was where his best fried and my best friend got killed" (R17).

b. Charge II and Specification.

It was not disputed that on 10 November 1944, Major Robert L. O'Brien, Jr., Adjutant of the 143rd Infantry, ordered accused "to return to his company which was then in combat". Accused said that he would not obey the order and that he "would rather go to the stockade than to the lines or words to that effect". He was then "taken back to the stockade by the Division Military Police" (R18-19).

6. For the defense, the psychiatric report of Major Walter L. Ford, Division Psychiatrist, dated 11 September 1944, was received in evidence without objection (R19;Def.Ex.A). This consists of a two page mimeograph form entitled "Psychiatric Report in Disciplinary Cases". Opposite the heading "Name:" appears in pencil "Pvt. Fred G Ford", and below, following the words "In my opinion he suffering from: (Medical Diagnosis: with brief explanation of this condition in lay terminology)", a notation in pencil reads "Psychoneurosis, anxiety state, mild" and at the end of the form is written in pencil, "Walter Ford Maj MC".

Accused acknowledged that his rights had been explained to him by defense counsel and that he desired to remain silent (R19).

7. A brief examination of the pre-trial papers, the charge sheet and the procedure adopted in preparing and affixing thereto the charges and specifications leads to the conclusion that Charge I and its specifications, each alleging an offense for which the maximum punishment is death, were in fact not signed or sworn to as required by Article of War 70, which states:

> "Charges and specifications must be signed by a person subject to military law, and under oath either that he had personal knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief".

The circumstances surrounding the preparation of the charges overcome the presumption, that ordinarily may be indulged, of regularity in the performance of their duties by the officers responsible for their fulfillment (MCM, 1928, par.112a, p.110). However, no substantial right of accused was thereby injuriously affected as it has been held that the requirements of the passage quoted from Article of War 70 are directory only and failure to comply with them does not affect the legality of the proceedings (CM 172002, Nickerson; CM 229477, 17 B.R. 249, Floyd, and authorities therein cited; CM ETO 106, Orbon; CM ETO 4570, Hawkins).

It was plainly intended by Congress that these provisions of Article of War 70 should be strictly and carefully observed and the foregoing language is not to be construed as in any manner approving this improper violation of its mandatory requirement. The alteration of the charge sheet was also a direct violation of the provisions of the Manual for Courts-Martial, 1928, which states:

> "Charges forwarded or referred for trial and accompanying papers should be free from defect of form or substance * * * Obvious errors may be corrected and the charges may be redrafted over the signature thereon, provided the redraft does not involve any substantial change or include any person, offense, or matter not fairly included in the charges as received" (MCM, 1928, par.34, p.22) (Underscoring supplied).

The pasting of corrected or redrafted charges and specifications over the original charges so that the latter may not be read is improper.

The record of trial and accompanying papers also disclose further hurried and careless incompetence in the preparation of the case for trial, (as well as in the conduct of the trial) similar to

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those frequently noted heretofore in records for the 36th Division. This was particularly grievous since accused was charged with three serious offenses for each of which the maximum penalty was death and since, after being found guilty as charged, he was given a life sentence.

In spite of the foregoing criticisms, the Board of Review is under the adjudicated authorities, compelled to conclude that inasmuch as Article of War 70 is an administrative directive, intended primarily for the benefit of the referring authority, the foregoing deficiencies in the pre-trial procedure did not prejudice the substantial rights of accused.

8. With reference to the plea in bar of trial as to Specification 1 of Charge I, it is stated in the Manual for Courts-Martial

> "An unconditional restoration to duty without trial by an authority competent to order trial may be pleaded in bar of trial for the desertion to which such restoration relates" (MCM, 1928, par.69b, p.54).

The defense failed to show that accused's return to duty on 13 June 1944 resulted from action of any authority competent to order trial. The rule contemplates removal of the charge of desertion and the consequent restoration to duty through an administrative act by an authority competent to order trial for desertion. As trial for wartime desertion may be ordered only by an officer exercising general court-martial jurisdiction, there was here no evidence of such constructive condonation and as accused's burden of supporting the plea in bar by a preponderance of proof (MCM, 1928, par.64a, p.51) was not met, the plea was properly overruled by the court (CM ETO 2212, Coldiron, and authorities cited, pp.5-6;CM NATO 1869, Rodriquez (MJ);CM NATO 2139, Grabowski).

9. The specifications of Charge I, each alleging a separate act of desertion, followed the form in the Manual for Courts-Martial (MCM, 1928, Form 13, app.4, p.240), covering the offense of desertion under circumstances where the proof shows accused's absence without leave "accompanied by the intention not to return" to the military service (MCM, 1928, par.130a, p.142). It is an approved principle that in the absence of direct attack upon such a specification because of its vagueness or indefiniteness, the prosecution may prove an act of desertion under the 28th Article of War which includes absence without leave from an accused's organization or place of duty with intent to avoid hazardous duty or to shirk important service (CM 245568 (1943), Clancy, Bull. JAG, April 1944, Vol.III, No.4, sec.416, p.142, 29 B.R. 215; CM ETO 5117, DeFrank).

The evidence with respect to Specification 1 of Charge I shows that on 18 May 1944 accused went absent without leave when it was generally known in his company that a movement by boat was contemplated after the company had undergone practice in embarkation

and debarkation and training "down at the beach". On or about 20 May 1944 the company did leave for the Anzio beachhead. The inescapable conclusion is that accused consciously and deliberately avoided the combat incident to that engagement and the court was entitled to infer that he had full knowledge of the hazardous duty in which his organization was about to engage when he sought safety by going absent without leave. Proof of accused's guilt of the offense of absenting himself from his company at the time and place alleged with intent to avoid hazardous duty is complete (CM ETO 5117, DeFrank, and authorities therein cited). As regard Specification 2, Charge I, the evidence shows similar conduct of accused on 8 October 1944 when he again went absent without leave while his organization was engaged in operations against the enemy. That such operations were then hazardous is indicated in the testimony of Schoop and accused's statement to Major O'Brien, Jr., on 10 November 1944 to the effect that he "would rather go to the stockade than to the lines". His conduct again followed the pattern of that shown on 18 May 1944 and disclosed his intention to avoid hazardous duty (CM ETO 5117, DeFrank, and authorities therein cited). Under the rule of the Clancy case, supra, the prosecution sustained the burden of proving accused's guilt of two serious offenses of desertion.

10. Accused's violation of Article of War 64 as set forth in the Specification of Charge II was clearly shown and not disputed. The court's findings of guilty were fully warranted (CM ETO 4988, Fulton).

11. The charge sheet shows that accused is 21 years of age and was inducted 23 November 1943 at Peoria, Illinois. He had no prior service.

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

13. The penalty for desertion committed in time of war is death or such other punishment as the court-martial may direct (AW 58). The penalty for willfully disobeying the lawful command of his superior officer by a person subject to military law is also death or such other punishment as the court-martial may direct (AW 64). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (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 of Operations. 16 FEB 1945 TO: Commanding General, 36th Infantry Division, APO 36, U.S. Army.

1. In the case of Private FRED G. FORD (36475028), Company B, 143rd Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Charge I with two specifications alleging desertion were improperly added to the original Charge alleging disobedience of orders in violation of Article of War 64, and were not sworn to. The Manual for Courts-Martial clearly provides for additional charges and how they should be processed. Specification 1 alleges desertion from May 18 to June 16, 1944 in Italy, after which accused served with his company in combat for nearly four months. Although his prior offense was not condoned in a legal sense, it does seem that this later service deserves some consideration in respect to his sentence. It is recommended that you consider some reduction in the term of confinement.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5196. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5196).

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

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

BOARD OF REVIEW NO. 1 16 FEB 1945

CM ETO 5234

U N I T E D S T A T E S	)	36TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	Headquarters 36th Infantry
Private First Class MICHAEL STUBINSKI (33080126), Company K, 141st Infantry	)	Division, APO 36, U. S. Army (France), 25 November 1944. 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. 1
RITER, SHERMAN and STEVENS, Judge Advocates

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

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

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

Specification 1: In that Private First Class Michael Stubinski, Company K, 141st Infantry, did, at or near Biffontaine, France, on or about 8 October 1944, desert the service of the United States and did remain absent in desertion until he returned to military control on or about 28 October 1944.

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Specification 2: In that * * * did, at or near Biffontaine, France, on or about 4 November 1944, desert the service of the United States, and did remain absent in desertion until on or about 14 November 1944.

CHARGE II: Violation of the 75th Article of War. (Nolle Prosequi)

Specification: (Nolle Prosequi)

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 Charge I and its 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 reduced to the grade of private, 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. Specification 1: Undisputed evidence for the prosecution showed that accused joined Company K, 141st Infantry, in February or March 1944 (R7), since which time he has been with that unit, which campaigned in Italy and landed in France on 15 August (R8). On 8 October 1944 he absented himself without leave from the company and remained so absent until 28 October. On this date the company was located near Biffontaine, France (R5,6; Pros.Ex.1).

Specification 2: On 4 November 1944 accused again absented himself without leave from the company, still located near Biffontaine (R6; Pros.Ex.1). On 14 November the first sergeant of Company K saw him in the battalion area. On that day the company was on the front line near the town of Le Petite Tholoy in position for an anticipated attack against the enemy. The first sergeant asked accused "if he wanted to rejoin the organization", to which he replied "no", whereupon the sergeant requested the company commander to cause accused to be confined (R6-7). (The charge sheet shows accused as in the division stockade on 14 November 1944.)

4. a. There was admitted in evidence for the defense a report of psychiatric examination of accused on 29 October 1944 by the division psychiatrist on a mimeographed form filled out in pencil and, reading in pertinent part as follows:

> "This soldier came to the Div. in Feb. and was in combat at Cassino, Anzio, Villitri, Rome & France. During the fighting in France he became tense, tremulous & had difficulty in controlling himself. He felt that he could tolerate combat no longer & left his unit about Oct.11.
>
> In my opinion he is suffering from: * * * Psychoneurosis, anxiety, mild. This is an emotional condition which makes it difficult for this soldier to control his behavior in combat.
>
> * * * Recommend that the above condition be evaluated in conjunction with other evidence" (R9; Def.Ex.A).

b. After he was asked if he understood his rights, accused elected to remain silent (R9).

5. a. Accused was charged with desertion, i.e. absenting himself without leave from his organization with the intention not to return (MCM, 1928, par.130a, p.142), on two separate occasions. The only proof in the record of trial as to the first element of the offenses alleged, i.e. absence without leave from 8 to 28 October 1944 and from 4 to 14 November 1944, was as follows:

> "Trial Judge Advocate: The United States offers at this time what has been identified in the record as Government Exhibit 1, extract copy of the morning report of Company K, 141st Infantry, for the dates of 29 October, 10 October and 5 November 1944.
>
> Defense Counsel: No objection.
>
> Law Member: The document will be admitted as Government Exhibit 1" (R5).

The exhibit reads as follows:

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"COMPANY
MORNING REPORT

Ending
2400 10 October 1944
(Day)(Month)(Year)

Station Vicinity of Herplemont, France
Organization Co K 141st Inf
(Co.Det.etc.) (Parent unit)(Arm or service)

Serial Number	Name	Grade	Code
33080126	Stubinski, Michael	Pfc	

Fr duty to AWOL as of 8 October 1944

29 October 1944
GC 32.3 - 59.4
Vicinity of Biffontaine, France

33080126 Stubinski, Michael Pfc
Fr AWOL to confinement, 36th Div Stockade as of 1700, 28 Oct/44

5 November 1944
GC 33.6 - 59.1
Vicinity of Biffontaine, France

33080126 Stubinski, Michael Pfc
Fr conf, 36th Div. Stockade to duty as of 3 Nov/44 & fr duty to AWOL as of 4 Nov/44

'A TRUE COPY'
[signed]
[typed] Henry W Gomez
HENRY W. GOMEZ
1st Lt, 141st Inf
Asst Pers Officer" (Govt.Ex.1).

The question of the admissibility in evidence of the foregoing document is of vital concern, as the prosecution's case is fatally defective unless the document was properly admitted. Accused's affirmation on 14 November that he did not wish to rejoin his organization, unaccompanied by competent proof including the vital element of his absences without leave as alleged, would be clearly insufficient to sustain the findings of guilty of desertion (Winthrop's Military Law and Precedents - Reprint, p.637; MCM, 1928, par.130a, p.142).

As a general rule, the original of a writing must be introduced in evidence to prove its contents (MCM, 1928, par.116a, p.118; CM 231469, Marcellino (1943), II Bull. JAG, 184, 18 B.R. 217). However,

"In the case of a public record required by law, regulation, or custom to be preserved on file in a public office, a duly authenticated copy is admissible to the extent that the original would be, without either first proving that the original has been lost or destroyed, or without otherwise accounting for the original" (MCM, 1928, par.116a, p.119).

The following provisions of the Manual for Courts-Martial, 1928, and of the Army Regulations govern the authentication of copies of morning reports for introduction in evidence before a court-martial:

"A copy of any book, record, paper or document in the War Department, including its bureaus and branches, or in any command or unit in the Army may be duly authenticated by * * * a signed certificate or statement indicating that the paper in question is a true copy of the original and that the signer is the custodian of the original. Thus 'A true (extract) copy: (Sgd.) John Smith, Capt., 10th Inf. Comd'g., Co.A, 10th Inf.,' would be sufficient, prima facie, to authenticate a paper as a copy of an original company record of Company A, Tenth Infantry.

An objection to proffered evidence of the contents of a document based on any of the following grounds may be regarded as waived if not asserted when the proffer is made: * * * it does not appear that a purported copy of a public record is duly authenticated" (MCM, 1928, par.116a, pp. 119-120).

A morning report is a "public record" within the meaning of the provisions quoted above (CM 226521, Thomas; CM 231469, Marcellino, supra).

The third triplicate original copy of the company morning report, when initialed by the unit "personnel officer or other officer designated", becomes a record of the unit personnel section (AR 345-400, 1 May 1944, sec.I, par.6c(1)).

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Thus the unit personnel officer is one of the official custodians of the original morning report, and as such is authorized to certify an extract copy thereof for introduction in evidence before a court-martial (AR 345-400, 1 May 1944, sec.VI, par.42b), under the above-quoted provisions of the Manual for Courts-Martial, 1928 (SPJGJ 1944/3281, 4 Apr. 1944, III Bull. JAG, 96). As a general proposition, officers having custody of, and the duty of safeguarding, original documents are deemed to have implied authority to make certified copies thereof. The manner in which copies of documents, particularly public records, are to be authenticated is normally prescribed by statute and in such cases the prescribed mode must appear to have been followed in order to make the copy admissible. In the case of a record the copy must be certified by the official custodian thereof (20 Am.Jur., sec.1038, p.876; 2 Wharton's Criminal Evidence, 11th Ed., sec.784, p.1351).

Government Exhibit 1 bears the following purported authentication:

"'A TRUE COPY'
/signed/ Henry W Gomez
/typed/ HENRY W. GOMEZ
1st Lt, 141st Inf
Asst Pers Officer"

The last three words obviously mean "Assistant Personnel Officer". The first question here for determination, therefore, is whether an assistant unit personnel officer, as well as the unit personnel officer himself, is one of the official custodians of the company morning report. This is a question of law and neither the presumption of regularity of official acts nor his own declaration can make an officer who purports to authenticate a copy the custodian of the original document (Cf: CM 218201, Witkowski (1941) 12 B.R. 11).

Army Regulations 345-5, 5 August 1944, section II, Unit Personnel Sections, provide in pertinent part as follows:

"11. Personnel.--a. Personnel officers.
* * *
(2) * * * Inexperienced officers should be given suitable training as assistants prior to being assigned the full responsibilities of personnel officer.
* * *
13. Operation.--a. Records.

(1) Company forms and reports.--The unit personnel officer is the custodian of all company records * * * except the following which will be retained by the company commander as basic records:

(a) W.D., A.G.O. forms.

* * *

1 Morning Report.

* * *

(2) Unit personnel section forms and reports.--The following forms and reports will be administered at unit personnel section:

(a) W.D., A.G.O. forms.

* * *

44 Extract Copy of Morning Report".

It is evident that paragraph 13 might well have been specifically amended, consistent with the new provisions making the third triplicate original copy of the morning report a record of the unit personnel section (AR 345-400, supra), so as to designate the unit personnel officer as the custodian of such original copy. The lack of such amendment, however, cannot be held to warrant the conclusion from the provisions of paragraph 13 that the assistant personnel officer is the duly constituted official custodian thereof. It is noted that in the case of payrolls, correspondence relating to companies or components thereof, copies of rosters from the machine records unit, and reports or records for which regulations do not prescribe a written signature (none of which is excepted from the forms of which the personnel officer is custodian; see supra), authentication by the personnel officer is specifically prescribed (AR 345-5, 5 Aug. 1944, par.13b(3),(5),(6)). The foregoing indicates that if and when paragraph 13 is amended as above indicated it will very probably not designate an officer other than the unit personnel officer as custodian of the third triplicate original copy of the morning report. It may be inferred from the provisions even as they stand now, as a whole, however, that the only officer in the unit personnel section who is the official custodian of such original copy is the personnel officer himself and not some other officer, who may be completely unfamiliar with the functions of the personnel section and merely undergoing a period of indoctrination as an assistant (supra). It follows that the personnel officer and not the assistant personnel officer is the proper person to certify copies of such original copy and that the purported authentication upon Government Exhibit 1, supra, was improper.

The question next arises whether such improper authentication is fatal to the admissibility in evidence of the extract copy.

> "An objection to proffered evidence of the contents of a document based on any of the following grounds may be regarded as waived if not asserted when the proffer is made: * * * it does not appear that a purported copy of a public record is duly authenticated" (MCM, 1928, par.116a, p. 120).

The foregoing provision is not an arbitrary rule by which spurious documents may be admitted in evidence through the unwary silence of accused and his counsel. Its purpose is essentially the efficient administration of justice through dispensing with formalities of preliminary proof where the party against whom a document is offered does not require such proof. The practical basis for the rule is well described in Manual for Courts-Martial, 1921 (par.236b, p.198) as follows:

> "Writings Not in Dispute.—Where a document is offered in evidence, the application of the foregoing principles, viz, that the original be produced if available; that a testimonial writing be verified on the stand, or, if not, that the document or entry be made by an officer having a duty to make it; that an official copy be shown to have been made by an officer having custody of the original; and that the signature be authenticated; should not be rigorously enforced where it appears to the court there is no real issue or dispute as to the correctness or authenticity of the document or entry. Unless such strict proof is called for, on the request of the accused, or by reason of necessity of showing in the record the facts giving jurisdiction or involving the substance of the offense, the observance of the general rules in every detail will not ordinarily be deemed a requisite" (Underscoring supplied).

In the instant case defense counsel expressly stated there was no objection to the proffered document and did not insist upon a showing that the "official copy" was "made by an officer having custody of the original". He accepted the document as offered.

There was "no real issue or dispute as to the correctness or authenticity of the document" and the law member's action in admitting it in evidence accorded with the provision that in such cases the requirement of such showing "should not be rigorously enforced". It has repeatedly been held that, under the provision of the 1928 Manual, improper authentication is waived unless an objection is made on that ground (CM 231469, Marcellino, supra; CM 231727, Walton (1943), 18 B.R. 289, 296; CM 236716, McCauley (1943), 23 B.R. 103,105). In the Marcellino case, supra, appears the following:

> "Sergeant Mork's testimony that he was the custodian of the morning report does not alter the situation. Whether a person is the custodian of a document within the meaning of the Manual is a question of law, and one does not become a custodian by his own declaration (CM 218201, Witkowski). It is thus apparent that the admission in evidence of the extract copy of the morning report was open to objection" (p.220).

The Board of Review (sitting in Washington) held that the objection was waived by the failure to raise it, citing CM 207264, Wilson (1937), 8 B.R. 337 (involving faulty authentication of a marriage certificate) and CM 210985, Bonner (1939), 9 B.R. 383 (holding oral evidence of contents of documents competent in the absence of objection). The Board of Review (sitting in the European Theater of Operations) has applied the principle of the Bonner case in CM ETO 739, Maxwell and recently in CM ETO 5765, Mack. The McCauley case, supra, is to the same effect as the Marcellino case. In the Walton case, supra, it did not appear that the officer who authenticated a copy of a blood test report was the custodian of the original, but it was held that the failure to object waived the improper authentication. The principle of waiver of objections by failure to raise them has been generally applied in the case of documentary evidence in the Federal courts (Collins v. Streitz, CCA, 9th Cir., 1938, 95 F (2d) 430,436, cert. den., 305 U.S. 608, 83 L.Ed. 387). In view of the foregoing, the Board of Review is of the opinion that the improper authentication of Government Exhibit 1 was waived by failure to object thereto.

b. The extract copy, which purports to be "A TRUE COPY" of the original morning report, does not show the signature of the commanding officer of Company K, 141st Infantry, or of the officer acting in command, or any other signature. Army Regulations 345-400, 1 May 1944, sec.VI, par.42, in effect at all times

material herein, provide in pertinent part:

> "a. Morning reports will be signed by the commanding officer of the reporting unit, or, in his absence, by the officer acting in command. * * * If more than one set of forms is required, only the last set of forms will bear a signature or carbon impression thereof".

Exhibits C and D, examples of morning reports set forth in sec.VII, par.43 of the foregoing regulations, indicate that as above provided, only the last page or form of a morning report consisting of more than one page or form is signed. The question arises whether the failure of the extract copy to indicate the presence of the required signature on the original is fatal to the admissibility of the copy in evidence.

"True copy" is thus defined in two standard legal dictionaries:

> "A true copy, does not mean an absolutely exact copy but means that the copy shall be so true that anybody can understand it. It may contain an error or omission. 51 L. J. Ch.905" (Bouvier's Law Dictionary, 3rd Rev., p.3328; Black's Law Dictionary, 3rd Ed., p.1759).

Patently, the document is not a complete copy of the original morning report, but a copy of only so much thereof as pertains to accused. The typewritten copy of the entries appears on WD, AGO Form No. 1, March 25, 1943, which was formerly in use for original morning reports, and the authentication directly follows the entries half-way down the page and a half-page above the line which on the original would bear the authenticating signature. This indicates that the authenticating officer may not necessarily have intended to show whether or not the original morning report was signed, but may have intended to authenticate merely the entries themselves as correctly copied. Moreover, the entries may have appeared on the first unsigned page of a series of pages comprising the original morning report, in which case the omission of an authenticating signature from the copy would be readily understandable. It thus cannot be assumed that the document offered in evidence was a copy of

an unsigned original morning report. The most that can be said is that the copy fails to show affirmatively whether the original morning report was signed by an authorized officer, by an unauthorized officer or by any one at all. This question, however, is resolved by the presumption, in the absence of evidence to the contrary, that entries in a morning report were made by the proper officer (CM 233121, Patton; Cf: CM 254182, Roessel (1944), III Bull. JAG, 337-338, 35 B.R. 179), which is but an application of the familiar presumption that official acts and duties have been properly performed (MCM, 1928, par.112a, p.110; 22 CJ, sec.69, pp.130-134; 20 Am.Jur., sec.170, pp.174-177). As indicated above, there is nothing in Government Exhibit 1 to indicate that the original report, of which it was an extract copy, was not properly authenticated. The failure of the defense to exercise its privilege of introducing evidence that the original report was either signed by an unauthorized officer or not signed at all, left in full force and effect the presumption that either the commanding officer of Company K, 141st Infantry, or the officer acting in command thereof, duly signed such original and that it was therefore properly authenticated.

c. In view of the foregoing the Board of Review is of the opinion that Government Exhibit 1 was properly admitted in evidence.

6. Specification 1 alleges desertion continuing for 20 days (8-28 October) and Specification 2 alleges desertion continuing for ten days (4-14 November). Absence without leave during the first period alleged was established by the extract copy of the morning report. The latter shows that accused again absented himself without leave on 4 November and it may be inferred from his presence and statement in the battalion area on 14 November that the second absence continued until that date. The only other evidence bearing upon accused's guilt of desertion is the fact that after the termination of his second absence he indicated to his first sergeant that he did not wish to rejoin his organization. While such a statement might, under some circumstances, be probative of an intention not to return to military service, such an inference is negatived in this case by the fact that he did in fact return voluntarily at the end of each absence. The duration of his absences alone is insufficient, in view of the fact that each was terminated by such voluntary return, to justify an inference of an intention to remain away permanently. The principle of CM ETO 1629, O'Donnell, is not here applicable. In that case accused was absent for 37 days and, although he ultimately surrendered to military police, it was apparent that he might easily have surrendered prior to the end of such period.

The record herein is utterly devoid of evidence of any of the circumstances surrounding the absences and is legally insufficient to support the inference that accused had any of the intents requisite to constitute desertion. In view, however, of the sufficiency of the record to support findings of guilty of absence without leave for the periods alleged in the specifications, the law member properly overruled the defense motion "for a directed verdict of acquittal" of Charge I and its specifications (R8), which properly may be regarded as a motion for findings of not guilty (MCM, 1928, par.71d, p.56).

7. Immediately prior to the arraignment the trial judge advocate made the following statement:

> "The United States takes a Nolle Prosequi on Specification and Charge II" (R4).

A nolle prosequi is defined as

> "a declaration of record by the prosecution to the effect that by direction of the appointing authority the prosecution withdraws a certain specification, or a certain specification and charge, and will not pursue the same further at the present trial. A nolle prosequi will be entered only when directed by the appointing authority" (MCM, 1928, par.72, p.56; see also Winthrop's Military Law and Precedents - Reprint, pp.192,246-247).

There is no indication in the record of trial that the nolle prosequi herein was directed by the appointing authority. It is not apparent whether the appointing authority did not direct the entry of a nolle prosequi or whether, on the other hand, he did so but his direction merely does not appear. In either event the irregularity was ratified and cured by the subsequent action of the reviewing authority (who was the same officer as the appointing authority), approving the sentence (CM ETO 1606, Sayre, and authority there cited), and thus approving the proceedings upon which it was based (Winthrop's Military Law and Precedents - Reprint, pp.448-449). It is to be noted in this connection that a nolle prosequi may legally be entered after the taking of testimony (Ibid., p.248).

8. The charge sheet shows that accused is 26 years of age and was inducted at Phoenixville, Pennsylvania, 6 June 1941.

(His service period is governed by the Service Extension Act of 1941.) He had no prior service.

9. 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. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and specifications as involves findings that accused did at the times and place alleged absent himself without leave from his organization and did remain absent without leave until the times alleged in violation of Article of War 61 and legally sufficient to support the sentence.

10. 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 Sep. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 22 FEB 1945 TO: Commanding General, 36th Infantry Division, APO 36, U. S. Army.

1. In the case of Private First Class MICHAEL STUBINSKI (33080126), Company K, 141st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and specifications as involves findings that accused did at the times and place alleged absent himself without leave from his organization and did remain absent without leave until the times alleged in violation of Article of War 61 and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. In view of the reduction of the grade of the offenses, I believe there should be a substantial reduction in the period of confinement. The average period of confinement imposed for absence from actual combat under the 75th or 58-28th Article of War is considerably less than life. There is no evidence of previous convictions of this soldier. I do not believe that he should be separated from military service and freed from the hazards and dangers of combat by incarceration until all possibilities of salvaging his value as a soldier have been exhausted. The Government should preserve its right to use his services in a combat area. In view of the prevailing policy in this theater of conserving manpower, I recommend the designation of an appropriate disciplinary training center as the place of confinement for the reduced period, with suspension of the dishonorable discharge until the soldier's release from confinement. In the event that you are in accord with this recommendation, supplemental action should be forwarded to this office for attachment to the record of trial.

3. Absence without leave, always the most common military offense, still exists even in a combat area. In order to convict of desertion, the specific intent required must be proved. It is not enough to prove only that accused was absent and even that his organization participated in battle while he was gone. Evidence sufficient to justify the inference of the necessary specific intent may have existed in this case, but the record of trial is utterly devoid thereof.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5234. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5234).

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

5234

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

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BOARD OF REVIEW NO. 1

27 DEC 1944

CM ETO 5255

U N I T E D S T A T E S	79TH INFANTRY DIVISION
v.	Trial by GCM, convened at Luneville, Department of Meurthe et Moselle, France, 8 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JOHN DUNCAN (37515503), Headquarters Company, 3rd Battalion, 313th Infantry	

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

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

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

CHARGE: Violation of the 86th Article of War.

Specification: In that Private John Duncan, Headquarters Company Third Battalion, 313th Infantry, being on guard and posted as a sentinel at St Martin La Garenne, Seine-et-Oise, France, on or about 28 August 1944, did leave his post before he was regularly relieved.

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

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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, directed that pending the transfer of the prisoner he be confined in the Seine Disciplinary Training Center, Paris, France, and forwarded the record of trial for action pursuant to Article of War 50½.

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

On 27 August 1944, the 3rd Battalion, 313th Infantry, was in a reserve position near St. Martin La Garenne, Department of Seine-et-Oise, France (R8,16-17,21). The procedure in effect with respect to guard duty in the battalion area at this time was as follows: The sergeant of the guard would "post" three guards on each post, who were on continuous 24-hour duty (R6,20). The arrangement of the order and duration of reliefs during their tour of duty was left to the discretion of the three. Captain William T. Drake, Company Commander, testified as follows: One man would actually be on watch during his "shift" while the other two remained on the post or in their foxholes or "on top of the ground where the post was located", so that the sentinel then actively on watch might summon them when their assistance was needed or when there was a message to be delivered to the battalion command post. While the third was actually on watch, the other two were under no responsibility to watch as sentinels and were permitted to sleep but they were not off duty. The man on watch was charged with the duty of awakening the others if an occasion therefor arose such, for example, as the approach of an enemy (R22,24). Guards were permitted to leave their post only for the purposes of going to meals or the latrine or delivering a message to the battalion command post (R20).

On 27 August the sergeant of the guard of Headquarters Company, 3rd Battalion, posted accused who had performed this type of guard duty before, and two other members of the company as guards. Their post comprised the area adjoining a 50-yard long wall on the right flank of the battalion command post (R6,11-12,16,20), and was about a mile from the enemy, whose artillery fire was falling about 250-400 yards from the post (R8,17). Enemy troops were infiltrating through the lines (R6,17,21), and there was continuous enemy aerial activity overhead (R17,21). When the sergeant of the guard posted them he informed them that they were "on twenty-four hour guard post" and "that they would stay there until they were relieved" or otherwise directed. He directed them to be on the alert for enemy infiltration through the lines and instructed them, in accordance with the above mentioned procedure, as to when they might leave their post (R6,12).

He checked the post between 2100 and 2400 hours 27 August (R13) and about 1700 hours 28 August (R12) and found it occupied by the guard on each occasion (R12,13). When he again checked it between 2000 and 2100 hours 28 August neither accused nor the other two guards were on the post or in its vicinity. A search of the surrounding area failed to reveal accused's presence (R7,9-10,14,16,17-18). No permission was given to him to leave the post (R8-9,16,21). He was returned to his organization about 1 November (R7,16).

4. After his rights were explained to him, accused elected to remain silent. No evidence was introduced for the defense (R25).

5. Article of War 86 provides punishment for any sentinel who is found drunk or sleeping upon his post, or who leaves his post before he is regularly relieved. The Specification charges that accused,

> "being on guard and posted as a sentinel * * * did leave his post before he was regularly relieved" (Underscoring supplied).

That accused and the two other soldiers were initially on guard and posted as members of an outpost on 27 August 1944 at the place alleged is established by the clear testimony of the sergeant of the guard of their company. The evidence, furthermore, shows without contradiction that sometime before 2100 hours on the evening in question, 28 August, accused, as well as the other two guards, left the post and its vicinity before being properly relieved. The record affords no clue, however, as to whether accused at the time of his departure was actively on watch, leaving the other two in reserve, so to speak, in accordance with the usual procedure, or was himself in reserve, subject to being summoned by the sentinel who was then actively on watch. The Board of Review cannot assume, in the absence of evidence to that effect, that accused was the guard actively on watch at the time of his departure, rather than in the reserve position. The vital question, therefore, arises whether the evidence warranted the court in finding that at the time accused left the area he was posted as a sentinel, within the meaning of the article.

The noun "sentinel", derived from the Latin verb meaning "to perceive by the senses", is defined as

> "One who watches or guards; specif., Mil., a soldier set to guard an army, camp, or the like, from surprise, to observe and give notice of danger" (Underscoring supplied). (Webster's New International Dictionary, 2nd Ed., unabridged, p.2280).

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Winthrop comments as follows:

> "The purpose of this provision [now AW 86], (which may be traced to Art. 32 of the Code of James II, as derived from Art. 50 of Gustavus Adolphus) is to secure on the part of sentinels that alert watchfulness and steadfastness which are the very essence of their service. These qualities * * * are, in time of war, absolutely essential to insure a camp or post against the danger of surprise and capture by a hostile force" (Winthrop's Military Law and Precedents - Reprint, p.616). (First underscoring supplied).

The modern military definition of "sentinel" is as follows:

> "sentinel. See sentry.
> sentry, soldier assigned to duty as a member of a guard, to keep watch, maintain order, protect persons or places against surprise, or warn of enemy attack; sentinel" (TM 20-205, WD, 18 Jan. 1944, Dictionary of United States Army Terms, p.248).(Underscoring supplied).

The phraseology of Article of War 86 confirms the conclusion, which is manifest from the foregoing definitions, that a sentinel is a soldier of the guard who is actively on watch for danger and thus in a position to give immediate notice thereof. A sentinel may be punished under the article for any one of three types of misconduct: (a) being found drunk on his post, (b) being found sleeping on his post, or (c) leaving his post before he is regularly relieved. Official permission to a soldier on guard duty to sleep is inconsistent with his status as a sentinel. One of his paramount duties is to remain awake. The essence of his status is alertness. The general orders applicable to all sentinels, and required to be committed to memory by all soldiers who are to perform duty as such, impose various active duties which require extreme alertness and watchfulness for their performance (FM 26-5, WD, 2 Jan. 1940, Interior Guard Duty, ch.2, sec.IV, par.26, pp.14-15).

It is apparent from the foregoing that unless and until accused was on his tour of active watch and not in the reserve position described above, he was not posted as a sentinel. The record does not indicate that he was posted as a sentinel when the sergeant of the guard posted him and the other two soldiers at the outpost. The determination of who would assume the active, watchful duties of sentinel at first and in turn thereafter and of the duration of the respective tours of active watch duty was specifically left to the three. The duty which characterized accused's status while in reserve was to be available if needed to assist the sentinel; this was not the duty of a sentinel. Until accused's turn to watch came, he was not posted as a sentinel within the meaning of Article of War 86 and hence there was a failure of proof as to so much of the Specification as alleged that he was posted as a sentinel. To the extent

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that the conclusions of the Board of Review herein expressed conflict with CM NATO 1757 (1944), Bull, JAG, April 1944, Vol.III, No. 4, sec.444, pp.146-147, the Board respectfully elects not to follow that authority. Had the evidence shown that the three guards were simultaneously posted as sentinels on the same post, each being under the continuous duty of remaining alert and on watch, it would support a conviction of accused under Article of War 86. As indicated, however, the evidence herein presents an entirely different picture.

It does not follow from the foregoing that accused is guiltless. It was clearly established that "being on guard" and posted as a member of an outpost, he did "leave his post before he was regularly relieved". Such conduct on his part manifestly constituted a violation of Article of War 96 as a serious military offense - a disorder and neglect to the prejudice of good order and military discipline. The offense committed by accused should have been so charged in the first instance. The inclusion in the Specification of the words "and posted as a sentinel" was not warranted by the evidence, but the findings of guilty of the Specification were proved as to every other allegation thereof. When another offense is necessarily included in the phraseology of a specification under a certain article of war, the record of trial may properly be held legally sufficient to support so much of the findings of guilty as involves guilt of the other offense (CM ETO 2212, Coldiron, and authorities therein cited). The fact that the draughtsman of the Charge and Specification was of the opinion that the offense committed constituted a violation of Article of War 86 and so pleaded and designated it does not preclude a holding that the record proves accused guilty of an offense in violation of another article of war (CM ETO 2005, Wilkins and Williams, and authorities therein cited). It is elementary that the designation of a wrong article of war is not ordinarily material provided the offense alleged and proved is one denounced by the Articles of War and of which courts-martial have jurisdiction (MCM, 1928, par.28, p.18; CM ETO 1057, Redmond).

Had the Specification included the words "before the enemy" it would have charged a clear violation of Article of War 75, and such charge would have been supported by the evidence. Had the proof shown that accused was actively on watch at the time of his departure, a clear violation of Article of War 86 would have been established. Of the gravity of accused's offense there can be no doubt. The offense of leaving post or outpost by a guard, not posted as a sentinel, before being properly relieved, is not included in the Table of Maximum Punishments set forth in the Manual for Courts-Martial. The most closely related offense included therein is absence without leave from guard, in violation of Article of War 61. However, the limitations upon punishments for absence without leave from (among other places) guard in violation of that article are not now operative (Executive Order 9267, Nov. 9, 1942 (Sec.I, Bull.57, WD, Nov. 19, 1942) MCM, 1928, par.104c, p.97, note). The only limitation on the maximum permissible punishment

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is that the death penalty may not be imposed inasmuch as the offense involves a violation of the 96th Article of War (AW 43; CM ETO 1920, Horton). The Board of Review is therefore of the opinion that the record of trial is legally sufficient to support the sentence.

6. The record shows (R1) that the trial took place at 1311 hours on the day after the charges were served on accused. Defense counsel stated in open court that accused had sufficient time in which to prepare his defense in the case (R4). There is thus no indication of prejudice to any of accused's substantial rights and the irregularity may be regarded as harmless (CM ETO 5004, Scheck, and authorities therein cited).

7. The charge sheet shows that accused is 20 years eight months of age and was inducted at Fort Leavenworth, Kansas, 12 March 1943, to serve for the duration of the war plus six months. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offense. 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 so much of the findings of guilty as involves findings that accused, being on guard at the time and place alleged, did leave his post before he was regularly relieved, in violation of Article of War 96, and legally sufficient to support the sentence.

9. 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

1st Ind. (279)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 27 DEC 1944 TO: Commanding General, 79th Infantry Division, APO 79, U. S. Army.

1. In the case of Private JOHN DUNCAN (37515503), Headquarters Company, 3rd Battalion, 313th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support so much of the findings of guilty as involves findings that accused, being on guard at the time and place alleged, did leave his post before he was regularly relieved, in violation of Article of War 96, and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Attention is invited to the fact that the Seine Disciplinary Training Center, Paris, France, designated in your action as the place of confinement for this accused pending his transfer to the Disciplinary Barracks, is no longer authorized. The designation should be changed to the Loire Disciplinary Training Center, Le Mans, France (ltr., Hq. European Theater of Operations, AG 252 Op TPM, 19 Dec.1944, par.3). This may be done in the published court-martial order.

3. The difficulty with this case is that the charge as drawn and referred for trial was not supported by the evidence. A case of misbehavior before the enemy by willfully abandoning his outpost was clearly indicated. Desertion also was a proper charge as accused was absent from August 28 until he was apprehended on September 22. Fortunately the sentence can be sustained.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5255. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5255).

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

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

BOARD OF REVIEW NO. 2

6 JAN 1945

CM ETO 5261

U N I T E D S T A T E S	30TH INFANTRY DIVISION
v.	Trial by GCM, convened at Kerkrade, Holland, 1 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private HERBERT J. THORNTON, (12008492), Company K, 120th Infantry.	

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

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

2. Accused was found guilty of attempted rape. The only matter requiring consideration is the legality of that portion of the sentence which imposes confinement at hard labor for life. The maximum penalty for attempted rape is the maximum for the most closely related offense listed in the Table of maximum punishments, viz., assault with intent to commit rape (MCM, 1928, par.104c, p.99; CM ETO 3947, Whitehead et al; CM 229156, Bradford). The maximum period of confinement authorized for assault with intent to commit rape is 20 years. Accordingly, so much of the sentence as provides for confinement in excess of 20 years is illegal.

3. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty and so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years.

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 6 JAN 1945 TO: Commanding General, 30th Infantry Division, APO 30, U. S. Army.

1. In the case of Private HERBERT J. THORNTON (12008492), Company K, 120th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the finding of guilty and so much of the sentence as imposes dishonorable discharge, total forfeitures and confinement at hard labor for 20 years, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. I particularly invite your attention to the fact that the period of confinement in the approved sentence is excessive. The maximum period of confinement for attempted rape is 20 years (MCM, 1928, par.104c, p.99; CM ETO 3947, Whitehead et al; CM 229156, Bradford). Accordingly, by supplementary action, which should be forwarded to this office for attachment to the record, you should reduce the period of confinement to 20 years, which reduction will be recited in the general court-martial order.

3. The appropriate charge against Thornton was assault with intent to commit rape on conviction of which he could have been confined in a penitentiary.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5261. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5261).

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

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

BOARD OF REVIEW NO. 2

6 JAN 1945

CM ETO 5287

U N I T E D S T A T E S	)	9th INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Camp
	)	d'Elsenborn, Belgium, 29 November
Private FRANK B. PEMBERTON	)	1944. Sentence: Dishonorable
(35219682), Company B,	)	discharge, total forfeitures, and
39th Infantry.	)	confinement at hard labor for life.
	)	United States Penitentiary, Lewisburg,
	)	Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Frank B. Pemberton, Company "B", 39th Infantry, did, near Lammersdorf, Germany, on or about 14 September 1944, desert the military service of the United States by absenting himself without proper leave from his organization located near Lammersdorf, Germany, with intent to avoid hazardous duty, to wit: "Action against the enemy", and did remain absent in desertion until he was apprehended, on or about 11 November 1944, at Verviers, Belgium.

He pleaded not guilty and all the members of the court concurring was found guilty of the Charge and its Specification. Evidence was intro-

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duced of one previous conviction by special court martial for absence on 18 November 1943 at time of shipment to port of embarkation for overseas duty, in violation of Article of War 96. All 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 for action pursuant to Article of War 50½.

3. The evidence introduced by the prosecution completely supports the findings of guilty by the court. On 14 September 1944, accused's company was attacking German pillboxes near Lammersdorf, Germany. About 1530 hours on that day accused was seen by his first sergeant going down a firebreak in the rear area. Accused, questioned as to where he was going, said that he was lost. He was returned to the vicinity of his platoon,but later was again seen going to the rear. That was the last accused was seen by his organization until after his apprehension at Verviers, Belgium, on 11 November 1944. This absence was unauthorized (R5-10).

4. Accused, advised of his rights as a witness, made an unsworn statement, as follows:

> "We were waiting for the attack on these German pillboxes and the shells were dropping back in there until I couldn't stand it in there any longer. I never could fire a rifle when the shells were falling around me. I was always scared and nervous and excited and the artillery would make me that way much more so. And that's what happened to me that day" (R10).

5. The conduct thus proved by the prosecution and admitted by accused constituted a violation of Article of War 58, as charged (CM ETO 3473, Ayllon; CM ETO 3380, Silberschmidt).

6. Accused is 24 years old. He was inducted at Columbus, Ohio, 12 May 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. 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 offense of desertion, in violation of Article of War 58, is punishable as a court-martial may direct including death if committed in time of war. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, is authorized (AW 42, Cir. 229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 6 JAN 1945 TO: Commanding General, 9th Infantry Division, APO 9, U.S. Army.

1. In the case of Private FRANK B. PEMBERTON (35219682), Company B, 39th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 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 of trial in this office is CM ETO 5287. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5287).

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

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

BOARD OF REVIEW NO. 2

6 JAN 1945

CM ETO 5291

U N I T E D S T A T E S	3D INFANTRY DIVISION
v.	Trial by GCM, convened at Luxeuil Les Bains, France, 19 October 1944.
Private ALEXANDER PIANTEDOSI (31232345), Company F, 30th Infantry	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, HILL and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Alexander (NMI) Piantedosi, Company "F", 30th Infantry, did, at or near Baison, France, on or about 26 August 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 or near Besancon, France, on or about 1500, 10 September 1944.

Specification 2: In that * * * did, at or near Besancon, France, on or about 11 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 was apprehended at or near Caserta, Italy, on or about 20 September 1944.

He pleaded not guilty and was found guilty of Specification 1; guilty of Specification 2, except the words "was apprehended", substituting therefor the words "surrendered himself", of the excepted words not guilty, and of the substituted words, guilty; and guilty of the Charge. Evidence was introduced of one previous conviction by summary court for absence without leave for about 13 days, in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, 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 introduced by the prosecution supports the findings of the court. On 26 August 1944, Company F, 30th Infantry, accused's organization, was going into an attack, during the course of which enemy artillery opened up and the whole company dispersed (R7,8). Later, accused went to his platoon sergeant and asked leave to go down to a place, half a mile distant, where the platoon had been at the time of the artillery shelling, to recover his ammunition which he had left there (R8,9). This request was granted, and accused was told to return to the platoon. Accused did not return to his organization that night, and was absent without permission (R9) until 11 September when his company supply sergeant received accused from another outfit with instructions to return accused to his company. Accused was being so returned in a vehicle in a convoy when enemy shelling stopped the convoy. The supply sergeant left accused for about ten minutes and when he returned accused was gone. This latter incident occurred near Besancon, France (R11,12). Accused returned to military control at Caserta, Italy, on 20 September 1944 (R15,16). Accused voluntarily made and signed a statement to an investigating officer which was transcribed (R12,13), as follows:

"I came to the U.S. in 1937. I studied the English language very hard wanting to become a citizen. When war was declared, I wanted to get in the Air Corps and went to Boston University, but I could not make the Air Corps because I was called up before I could finish. I was put in the Infantry which I did not want and was disgusted all the time. I was put in the 88th Division which was on maneauvers. I never did

soldier for them and got out of the hikes and they had me digging pits, and latrines for the 3 months. In Africa I acquired my Citizenship Papers and was transferred to the 3rd Division. We got to Italy. I couldn't take the shell fire at any time, I just couldn't stay up there. Even at Anzio, I took off when shells came in.

When we got to France, I was a ammunition carrier for the mortars. Near Neon France a small town, shells came in and I had to run away. After it was over, I came back up and the Sgt. told me to get out and get back my ammunition which I had dropped when I ran. I went back, coming back, they shelled the ridge and I couldn't get back.

I stayed down at a bridge. I intended to stay there that night. A Frenchman called me into his house. I stayed there. A Captain from the 30th Inf. found me there and brought me into a town, and told me to to get into another jeep. In the morning the driver told me to go to Service Company. I got on the wrong road, No G.I.'s were back at the town which I left, when I returned. Then I took off.

After several days, I finally found Service Company. I was sent to the Motor Pool. I got on a jeep at the motor pool and started up to the company which I thought was in reserve. While going up the convoy was stopped. I got off the jeep. I knew we were going up to the front then. I didn't want to go up there so I took off. I went to Italy but I do not care to say how I got to Italy. From Italy they sent back here" (R14,15).

4. Accused, advised of his rights as a witness, elected to remain silent and called no witnesses.

5. The evidence thus introduced supported the findings of guilty by the court of Specifications 1 and 2, and showed accused guilty of the Charge, in violation of Article of War 58 (CM ETO 5287, Pemberton).

6. The charge sheet shows that accused is 22 years of age and that he was inducted 12 November 1942 to serve for the duration of the war plus six months, without having had prior service.

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7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of 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 offense of desertion, in violation of Article of War 58, is punishable as a court-martial may direct, including death if committed in time of war. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, is authorized (AW 42, Cir.229, WD, 8 Jun 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

CONFIDENTIAL

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 6 JAN 1945 TO: Commanding General, 3d Infantry Division, APO 3, U. S. Army.

1. In the case of Private ALEXANDER PIANTEDOSI (31232345), Company F, 30th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5291. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5291).

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

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

17 FEB 1945

BOARD OF REVIEW NO. 1

CM ETO 5292

U N I T E D S T A T E S	)	35TH INFANTRY DIVISION.
	)	
v.	)	Trial by GCM, convened at Oriocourt,
	)	France, 5 December 1944. Sentence:
Private LEE J. WOOD (37533661),	)	Dishonorable discharge, total for-
Company I, 137th Infantry.	)	feitures and confinement at hard
	)	labor for life. United States
	)	Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Lee J Wood, Company "I", 137th Infantry, did, in the vicinity of Alincourt, France, on or about 8 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 returned to his organization on or about 11 October 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

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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 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 shows without contradiction that on 8 October 1944 Companies K and L, 137th Infantry, were engaged in an attack upon an enemy detachment which was located in Fossieux, France. Company I simultaneously attacked Fossieux Ridge. The enemy directed small arms and artillery fire upon the attacking force (R8,12). Accused was a rifleman in the second platoon of Company I (R8,11). It commenced the advance at 0600 hours on said date and accused accompanied it into the attack. About 0830 hours, without authority (R9, 12), he ran away from the fight. His platoon sergeant saw him as he left the field of battle and ordered him to return to his platoon. He ignored the order (R9,10). On 11 October accused voluntarily returned to his command (R12; Pros.Ex.A).

4. In an unsworn statement made through his counsel, accused admitted he left the engagement as stated above, and went to a town in the rear where he spent the night with other members of his company who were there. The next day he and the other delinquent soldiers were collected by the first sergeant of the company, who brought them back to it. Accused asserted that he ran away because he was "not able to stand the sound of heavy guns going off in his vicinity"(R6).

5. A mere recital of the facts is all that is required to prove that accused with full knowledge that his platoon was engaged in hazardous duty, viz., a direct assault upon an enemy position, without permission or leave, deliberately ran from the field of battle. The inference is clear beyond all doubt that his conduct was motivated by the desire to escape from the perils and hazard confronting him. Such conduct constitutes absence without leave to avoid hazardous duty (CM ETO 4570, Hawkins, and authorities therein cited).

6. The charge sheet shows that accused is 19 years of age. He was inducted 12 July 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 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, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b, as amended).

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 FEB 1945 TO: Commanding General, 35th Infantry Division, APO 35, U. S. Army.

1. In the case of Private LEE J. WOOD (37533661), Company I, 137th Infantry, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Accused is 19 years of age. He voluntarily returned after three days. The charges were preferred as a violation of AW 75 but were rewritten on recommendation of the Staff Judge Advocate, under AW 58, thus permitting confinement in a penitentiary. It is recommended that the place of confinement be changed to a disciplinary barracks as was done in the case of Nursement, who was absent over two months and is 22 years of age. This may be done in the published court-martial order. An accusation of forgery should not influence the place of confinement of this young soldier.

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 5292. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5292).

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

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

BOARD OF REVIEW NO. 1 20 DEC 1944

CM ETO 5293

U N I T E D S T A T E S	35TH INFANTRY DIVISION
v.	Trial by GCM, convened at Oriocourt, France, 5 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class RALPH C. KILLEN (35648093), Company L, 137th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Ralph C Killen, Company L, 137th Infantry, did, at Jarville, France on or about 17 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 returned to his organization on or about 6 November 1944.

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 Charge and Specification. Evidence was introduced of one

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previous conviction by special court-martial for absence without leave for five days in violation of the 61st Article of War. 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 under Article of War 50½.

3. Prosecution's evidence shows that accused's company had crossed the Moselle River and on 17 September 1944 was bivouacked between the Moselle and Meurthe Rivers near the town of Monocourt (Moncourt), France. It was then engaged in reorganizing its squads and platoons and was not under enemy fire. The enemy was six or eight miles distant from it (R8-9,11). While the company was thus engaged accused was on said date ordered on a reconnaissance patrol with a Lieutenant Casey. During the course of its movements the patrol encountered enemy artillery fire. Accused became separated from Lieutenant Casey, and did not return with him to the company. Accused admitted that he was absent without leave from his organization for about 54 days thereafter and that he went absent because he "just couldn't take the shelling any more" (R9,10-11; Pros.Ex.B). All of the foregoing facts are proved by substantial evidence independent of the morning report which will not be considered by the Board of Review in passing upon the legal sufficiency of the record of trial.

4. After his rights were explained to him, accused elected to remain silent and no evidence in defense was presented (R12-13).

5. The evidence in this case would beyond peradventure have sustained a charge under the 75th Article of War alleging that accused shamefully abandoned his patrol and sought safety in the rear (CM ETO 4783, Duff, and authorities therein cited; CM ETO 5179, Hamlin). Accused's conduct was of the typical pattern denounced by the 75th Article of War. Had the charge been so laid it would have been easily proved and complicated legal questions would have thus been avoided.

6. There is therefore presented the problem whether the evidence also supports the charge as laid, viz "58-28 desertion." The elements of the offense have been stated thus:

> "The gravamen of the offense with which accused is charged is that he absented himself without leave to avoid hazardous duty * * * (Articles of War 28 and 58).

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The burden was on the prosecution to prove beyond reasonable doubt the four elements of the offense:

(a) that accused was absent without leave;
(b) that accused's unit 'was under orders or anticipated orders involving * * * (a) hazardous duty * * *' (MCM, 1921 par.409, p.344);
(c) that notice of such order was actually brought home to accused and that he received due and timely notice of probable results of unauthorized absence of military personnel at that time; and
(d) that at the time he absented himself from his command he entertained the specific intent to avoid hazardous duty * * * (CM ETO 2432, Durie; CM ETO 2473, Cantwell; CM ETO 2481, Newton)" (CM ETO 2396, Pennington).

Accused's prolonged absence is admitted by him. Therefore element (a) supra was fully proved. The determination of the question whether the evidence proves the three remaining elements (b), (c) and (d), supra, requires that it be viewed as a whole rather than by piecemeal allocation of certain proof to a specific element.

Company L had been engaged in active combat at St. Lo, Mortain and at the crossing of the Moselle River (R10). Immediately prior to 17 September 1944 it had completed the crossing of the Moselle and was bivouacked between that river and the Meurthe River (R8).

Accused for a considerable period of time prior to his dereliction had been with his company; engaged in vigorous, continuous combat, including action at the places above stated. The company had temporarily halted in order to reorganize. The inference is definite and almost beyond denial that the halt was but a temporary one made for the purpose of preparing to go forward in further combat. These are facts of which accused had knowledge. His statement,

"I left because I just couldn't take the shelling any more. I do not believe I could go up and take it again" (Pros.Ex.B),

fully supports this conclusion. With this situation prevailing, accused on 17 September accompanied Lieutenant Casey on the patrol and in the course thereof encountered enemy fire. This was the critical point in his military career. He broke under the demand for the exercise of additional moral and physical courage. He

disregarded his obligations as a soldier and absented himself without leave. Fromthis matrix of evidence the court was justified in inferring that his departure was prompted not only by an urge to avoid the immediate perils of the patrol but also by the even greater desire to avoid further battle combat with his company, which he knew was to follow in a few days. When he became separated from Lieutenant Casey, he was freed from the perils encountered on the patrol. Had the avoidance only of this immediate hazard been the motivating force behind his conduct it would naturally be expected that he would return to his company. He did not do that. Instead he continued absent from his organization for 54 days. The length of this absence emphasizes the conclusion that accused intended to avoid further action with his company when it resumed its offensive. The patrol hazard was but an acute experience which activated his fear of further combat and his determination to avoid its perils and hazards. Under this view of the evidence, which the court was fully justified in taking, the Board of Review believes that proof of elements (b), (c) and (d) supra of the offense was accomplished by the evidence and the record of trial is legally sufficient to support the findings of guilty. As supporting this conclusion reference is made toholdings in the following cases in addition to those hereinbefore cited: CM ETO 455, Rigg; CM ETO 564, Neville; CM ETO 3641 Roth, and authorities therein cited; CM ETO 4138 Urban; CM ETO 4165, Fecica.

7. The charge sheet shows that accused is 21 years of age and that he was inducted into the military service on 16 January 1943 to serve for the duration of the war plus six months. 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.

9. The penalty for desertion committed in time of war is death or such other punishment as the court-martial may direct (AW 58). Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized by Article of War 42 and Circular 210, War Department, 14 September 1943, section VI, as amended.

O. Franklin Kelley Judge Advocate

Edward K. Harpur Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 20 DEC 1944 To: Commanding General, 35th Infantry Division, APO 35, U.S. Army.

1. In the case of Private First Class RALPH C. KILLEN (35648093), Company L, 137th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5293. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5293).

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

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

BOARD OF REVIEW NO. 1 21 FEB 1945

CM ETO 5304

UNITED STATES	)	V CORPS
	)	
v.	)	Trial by GCM, convened at Headquarters V Corps, Rear Echelon Command Post, in the vicinity of Limbourg, Belgium, 6 December 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Privates WILMER L. LAWSON (33525883) and PAUL W. WEITKAMP (20320378), both of Troop A, 38th Cavalry Reconnaissance Squadron (Mechanized)	)	

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

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

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

LAWSON

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Wilmer L. Lawson, Troop A, 38th Cavalry Reconnaissance Squadron (Mecz) did, in the vicinity of Winterscheid, Germany, on or about 19 September 1944, desert the service of the United States by quitting and absenting himself without proper leave from his organization and place of duty with intent to avoid hazardous duty and shirk important service, to wit: front line combat duty against the enemy, and did remain absent in desertion until he surrendered himself at Bastogne, Belgium, on or about 25 November 1944.

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WEITKAMP

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Paul W. Weitkamp, Troop A, 38th Cavalry Reconnaissance Squadron (Mecz) did, in the vicinity of Winterscheid, Germany, on or about 19 September 1944, desert the service of the United States by quitting and absenting himself without proper leave from his organization and place of duty with intent to avoid hazardous duty and shirk important service, to wit: front line combat duty against the enemy, and did remain absent in desertion until he surrendered himself at Bastogne, Belgium, on or about 25 November 1944.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the votes were taken concurring, each was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions of either accused was introduced. 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, as to each accused, 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 in this case shows that prior to 18 September 1944 both accused, members of Troop A, 38th Cavalry Reconnaissance Squadron (Mechanized), guarded a damaged armored car at Willerzie, Belgium. On that date they were brought to the rear echelon of the troop in the proximity of Schoenberg, Belgium (R8,9). Sergeant Joseph J. McGough, of the aforesaid unit, had received instructions from the troop commander to return them to their troop (R8,10) which was then in combat with the enemy at Winterscheid, Germany, on the Siegfried Line 12 miles distant from Schoenberg (R8,16,18). The troop had preceded the advance of the 4th Infantry Division across Belgium and to its first contact with the Siegfried Line (R18). On the morning of 19 September McGough ordered the two accused to report to an armored car then undergoing repairs and informed them that as soon as repairs were completed he (McGough) would take them to their troop. He also informed them that the troop was at Winterscheid, Germany, on the Siegfried Line. When the time for departure arrived, both accused had disappeared and could not

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be found in the rear echelon area (R10). The accused had never been forward to Winterscheid (R11).

In an extra-judicial voluntary statement (R25; Pros. Ex.C) made on 27 November 1944, accused Lawson stated he left his troop on 19 September because he was scared.

> "That day we came into Willerzie I was with the guys and one of my best friends got killed and it just sort of got my nerves".

He admitted he had been in Belgium for over two months "going from place to place". He started to return on one occasion but changed his mind. He came back because he thought of his wife and baby. When asked if he would like to go back to his outfit and "try to live the thing down" he replied, "I don't know sir, the front line doesn't appeal to me". A similar statement (R25; Pros.Ex.D) was secured from accused Weitkamp on the same date. He stated he left his unit on 19 September because

> "I just couldn't stand it back up in the front line. * * * When we were in Willerzie, I was driving an armored car and a boy got killed in there, and it sort or scared me".

He stated he had been in Libermount, Belgium, for over two months and during that period he lived in the house of a civilian. He turned himself in because he thought of his wife and boy back home. He made no reply to the question, "Do you want to go back to your outfit and try to live this thing down?"

4. After their rights were explained to them, each accused elected to remain silent (R25-26).

5. Without contradiction the evidence shows that, when each accused knew that immediate front-line duty against the enemy was a certainty, each of them deliberately and willfully left his organization without permission and remained absent for over two months. Each accused thereby avoided the hazards and perils of battle to which his fellow soldiers were exposed. The facts of this case form the classical pattern of the offense with which each accused was charged. All of the elements thereof were substantially proved (CM ETO 2473, Cantwell and authorities therein cited; CM ETO 4570, Hawkins and authorities therein cited; CM ETO 5293, Killen).

6. The charge sheet shows the following with respect to the service of the respective accused:

Lawson is 21 years and two months of age. He was inducted 15 February 1943 at Richmond, Virginia, to serve for the duration [illegible] 304

the war plus six months. He had no prior service.

Weitkamp is 25 years and seven months of age. He enlisted 18 January 1941 at York, Pennsylvania, to serve for the duration of the war plus six months. He had prior service from 21 June 1937 to 20 June 1940. Character rating - excellent.

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

8. The 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) and 3b).

_____ Judge Advocate

Malcolm C. Sherman Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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(307)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 21 FEB 1945 TO: Commanding General, V Corps, APO 305, U.S. Army.

1. In the case of Privates WILMER L. LAWSON (33525883) and PAUL W. WEITKAMP (20320378), both of Troop A, 38th Cavalry Reconnaissance Squadron (Mechanized), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the 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 5304. For convenience of reference please place that number in brackets at the end of the orders: (CM ETO 5304).

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

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

BOARD OF REVIEW NO. 1

17 FEB 1945

CM ETO 5318

U N I T E D S T A T E S	)	35TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Oriocourt, France, 6 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private CHARLES G. BENDER (32800328), Company I, 137th Infantry.	)	

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

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

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

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

Specification: In that Private Charles G Bender, Company "I", 137th Infantry did, in the vicinity of Mononcourt, France on or about 15 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 returned to his organization on or about 18 November.1944.

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

Specification: In that * * * having received a lawful command from Captain William E. Sinex, his superior officer, to report to the Company Commander, Company "I", 137th Infantry, did, at Gros-Tenquin, France on or about 23 November 1944, willfully disobey the same.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of both charges and the specifications thereunder. Evidence was introduced of one previous conviction by summary court for absence without leave for six 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. Prosecution's evidence was as follows:

By extract copy of morning report of Company I, 137th Infantry, it was shown that accused was absent without leave from 15 September 1944 to 18 November 1944 (R7; Gov.Ex.A). Accused's voluntary statement given by him in the pre-trial investigation (R11; Gov.Ex.C) was introduced in evidence. In pertinent part it states:

"I went AWOL from the Bn aid station around the middle of September, 1944, We had crossed the Moselle, and I had swum back across the Moselle when I heard of a withdrawal. A medic gave me a blanket and sent me to the aid station where I was two days. When I left there I hung around the rear for a month and a half. I was with an engineer outfit part of the time I was gone. I then turned in to the MP's in Toul and was put in 38th Replacement Pool. I went AWOL from there and were caught by MP's near Bar le Duc. I went Awol because I couldn't take it anymore.

On 23 November, 1944 Capt Sinex at Service Co. told me to go to my Company. I refused.

I cannot stand it up there. I told him why I couldn't go. I get pains in my head from the artillery, and nothing to medics have given me does it any good".

Captain William E. Sinex testified that he was commander of the Service Company of the 157th Infantry on 23 November 1944. The company was then stationed in Abancourt, France. Accused had been in the Service Company for a time prior to that date under guard. Captain Sinex on said date gave accused a direct, oral order "to report to Company 'I' and to the Company Commander of Company 'I' for duty immediately"(R8). He then confirmed the oral order by an order in writing which was served on accused, who acknowledged receipt of the same (R8; Gov.Ex.B). Accused refused to obey the order and did not report to his company commander although transportation was available to carry him to his company (R8,9).

4. Through his counsel accused made an unsworn statement. With respect to the issues in the instant case the statement elaborated the recitals of accused's voluntary statement (Gov.Ex.C). In addition counsel asserted that accused had engaged in all of the campaigns on the European continent. After the battle of St. Lo he received four days treatment in the rear area for combat exhaustion. He rejoined his unit and fought at Mortain and was in the pursuit of the enemy across France to the crossing of the Moselle River (R12).

5. Charge I and Specification:

The corpus delicti (absence without leave) was sufficiently proved to permit the use of accused's statement (CM ETO 2185, Nelson). It is evident therefrom that upon the crossing of the Moselle River, accused's organization encountered enemy opposition of a severe nature (See CM ETO 5293, Killen). Accused when faced with this emergency recrossed the river to the rear and retreated to the aid station from which he went absent without leave. There is missing from the record proof of the place of accused's dereliction. However, his statement indicates that it occurred when his company crossed the Moselle River and hence the proof of geographical location of the offense was unnecessary. Accused's own version of his conduct was sufficient to permit the court to infer that his absence for one and a half months (by his own statement) before he voluntarily surrendered to the military police at Toul, France, was prompted by the desire to avoid the hazardous combat duty in which his company was then engaged (CM ETO 4570, Hawkins; CM ETO 4701, Minnetto).

Charge II and Specification:

Accused's deliberate disobedience of Captain Sinex' order to

report to his company commander was fully proved and it was admitted by accused. His guilt was established beyond doubt (CM ETO 3988, O'Berry and authorities therein cited).

6. The charge sheet shows that accused is 20 years of age. He was inducted 10 February 1943. 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 is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for both desertion in time of war (AW 58) and willful disobedience of the lawful command of a superior officer (AW 64; MCM, 1928, par.104c, p.98) is death or such other punishment as the court-martial may direct. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 FEB 1945 TO: Commanding General, 35th Infantry Division, APO 35, U. S. Army.

1. In the case of Private CHARLES G. BENDER (32800328), Company I, 137th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5318. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5318).

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

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

(315)

16 FEB 1945

BOARD OF REVIEW NO. 1

CM ETO 5341

U N I T E D S T A T E S	35TH INFANTRY DIVISION
v.	Trial by GCM, convened at Oriocourt, France, 6 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ELDRIDGE P. HICKS (34603199), Company D, 137th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Eldridge P. Hicks, Company "D", 137th Infantry, did, at Orleans, France, on or about 17 August 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 about 18 August 1944.

Specification 2: In that * * * did, in the vicinity of Ferriers, 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 about 2 October 1944.

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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 specifications thereunder. Evidence was introduced of one previous conviction by summary court for absence without leave for one day 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 finding of guilty of Specification 1 of the Charge as involved a finding of guilty of absence without leave from 17 August 1944 to 18 August 1944, in violation of Article of War 61, approved the findings of guilty of Specification 2 of the Charge and the Charge, approved the sentence but reduced the period of confinement to 20 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 50½.

3. Specification 1: Accused's absence without leave from his company from 17 August 1944 to 18 August 1944 was proved (R9; Govt.Ex.A).

Specification 2: The evidence shows that Company D, 137th Infantry, on 14 September 1944 was in combat with the enemy in the vicinity of Ferriers, France. Its mission was to capture that town. The leading elements of the company were under small-arms fire and the entire unit received artillery fire (R8). Accused, a member of the company, left it without authority during the course of the advance (R9; Govt.Ex.A). Accused, in a pre-trial statement, made during the course of the investigation of the case, asserted he obtained permission from his platoon leader (who was missing in action (R9)) to go to the company medical officers in the rear to receive medical treatment. He was sent by them to the aid station where he received attention. He then attempted to rejoin his company but he could not find it. He went to Luneville and thence to Nancy and beyond. An officer directed him to remain in Nancy until his organization was found. Through the efforts of the officer he was able to reach his division. He denied he intended to be absent without leave but asserted he was lost. He further denied he tried to avoid combat and expressed the desire to return to his company (R10,11; Govt.Ex.B).

Independent evidence established the fact that while Company D was in Ferriers the aid station was not more than 300 yards from the company command post (R17). Accused voluntarily returned to his company on 2 October 1944 (R9; Govt.Ex.A).

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

BOARD OF REVIEW NO. 2 6 JAN 1945

CM ETO 5346

U N I T E D S T A T E S	104TH INFANTRY DIVISION
v.	Trial by GCM, convened at Brand, Germany, 6 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private FRANCIS L. HANNIGAN (35614877), Company I, 413th Infantry	

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

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

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

CHARGE: Violation of the 75th Artide of War.

Specification: In that Private Francis L. Hannigan, Company "I", Four Hundred and Thirteenth Infantry, did, near Heilbloom, Holland, on or about 26 October 1944, misbehave himself before the enemy by failing to advance with his organization, which had been ordered forward, and did exhibit white paper in a manner indicating surrender, and did, without authority, leave his organization toward a rear area.

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 one previous conviction by summary court for absence without leave for two 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 showed that accused was a member of the second platoon, Company I, 413th Infantry. The organization came overseas in September 1944 and went into combat in Holland on 25 October 1944 (R6a, 6d, 6l). On the morning of 26 October 1944 the platoon was attacking across a level, open field towards a German position located in a group of trees some 200 yards beyond (R6a,6m). Snipers were firing on the platoon (R6h). "Everybody layed down for a while and then the Platoon Leader gave us the order to advance" (R6a). The squad went forward with the exception of accused and a Private First Class Contreras who, as Browning Automatic Rifleman, stayed back to cover the squad. Sergeant Rostrom, Assistant Squad Leader, ordered accused to advance but he "just layed there" (R6b,6c). Shortly thereafter the sergeant saw accused put a piece of white paper on his bayonet and wave it back and forth in the air for about 30 seconds (R6a,6f,6g, 6m). Sergeant Rostrom ordered accused to remove the paper and he did so (R6m). The sergeant then "gave him another order to advance and then left him and went with my squad". He next saw accused about three days later "at Zundert" (R6b).

Private First Class Contreras, who had remained to the rear to cover the squad as it advanced, testified that he saw accused "raise that white flag" and stated that he "told him to put it down and he put it down" (R6b,6g). Contreras then told accused to go forward and, upon his refusal to do so, pushed past him in the ditch where he was lying and advanced (R6g). Of the squad, only accused remained behind after Contreras went forward (R6h).

On the following day the company "got a little rest period" during which First Lieutenant Arthur R. Decert, Company Executive Officer, "went back" about two miles to secure water (R6i,6k). He there saw accused sitting with a group of men near a "medical wagon" (R6k,6u). He ordered him to remain in the area until his return at which time "I would take him back with me to the front". When Lieutenant Decert returned, accused could not be found. He next saw accused some two or three days later at "the Company C.P. in Zundert" (R6r).

On cross-examination, Sergeant Rostrom testified that he had

observed accused on field problems and maneuvers in the United States and that as a soldier he was "a little nervous" (R6c). Contreras testified that he had known accused for approximately four years and that "he is nervous, all right" (R6h). Lieutenant Decert stated on cross-examination that he would not classify accused as "the excitable type". Rather, it was Lieutenant Decert's opinion that he was a "very good thinker under certain circumstances". When asked under what circumstances accused was not a "good thinker" he stated, "I've never seen that circumstance" (R6l).

The prosecution introduced a sworn statement voluntarily made by the accused to the investigating officer in which he recited that he was "scared" and fell behind his platoon. At this time he discovered his gun would not fire but, at the urging of one of his noncommissioned officers, he went on. As he did so he thought he detected enemy fire close by so he "jumped into a ditch where some of my platoon was at. We were pinned down by snipers". The platoon then

> "started to move but I was shaking and nervous but did move and saw a sniper in a tree and tried to fire with my gun but it would not work so I hollered to Contreras and told him to shoot at the sniper in tree. He shot and said there was not any sniper there. He moved to another ditch and I crawled as far as the end of ditch * * *. I stayed there for cover altho rest of my platoon went forward".

He then tried to locate the command post of Company L and on "going back" could not find it. He met a man from Company L and sat in a road with him while he tried to take his gun apart to clean it. At dusk, he encountered two Company I men "going forward" who asked him if he was also "going forward". He replied he would stay with the soldier from Company L "whose gun was shot out of his hand earlier in the day so I could act as security for him if I could get my gun to work". The following day, after various journeyings, he reached Third Battalion Headquarters. He there saw Lieutenant Decert who told him to wait as "he was going to do some fighting". He then went to "the medics" and explained "how nervous he was". He later went to an aid station where he saw his Company Commander who ordered him to report to company headquarters. Accused's statement closed with the following recital:

> "In connection with my putting toilet paper on the bayonet, after putting it up, I did take it down. I did this because I was excited. I did this before the tank destroyers and other companies come up to help us" (R6o).

5. For the defense, Private Paul E. Kramer, a member of accused's company, testified that when accused became nervous he "tightened up". However, when asked whether he considered accused to be "a nervous type of individual" and whether accused had in the past exhibited any traits of nervousness, he replied "Not too much, sir". During training in the United States, accused was capable of "doing everything that the majority of his platoon members did" (R6o,6p).

Major George M. Cowan, Division Psychiatrist, testified that, he examined accused "in the latter part of October" and based upon a history elicited from accused, he found him to be suffering from "psychoneurosis, moderately severe". He testified that this type of person is easily fatigued and more apt than the average person to break when subjected to strain (R6q,6s). It was the opinion of Major Cowan that, on the day of examination, accused was capable of "conscientious and voluntary actions" and "of discerning between right and wrong" (R6t).

Accused, after having been advised of his rights as a witness, elected to remain silent.

6. Upon being recalled, Lieutenant Decert testified that, on 27 October 1944, when he saw accused at the "medical wagon", he noticed nothing unusual in the behavior of the accused. Rather, he was "acting the same that he has always acted" (R6u,6v).

7. The evidence adduced shows clearly that accused refused to advance with his squad while it was engaged with the enemy. It is also uncontradicted that, in the midst of an attack, he affixed white paper to his bayonet and waved it in the air in a manner indicating surrender. It was further shown that he retired to the rear at a time when his unit was going forward and the court was clearly warranted in inferring that in so doing accused acted without authority. There can be no doubt that these actions constituted misbehavior before the enemy in violation of Article of War 75 (Winthrop's Military Law and Precedents, Reprint, 1920,pp.622-625). The defense introduced evidence showing that accused was suffering from "psychoneurosis, moderately severe". However, this diagnosis was made wholly upon the basis of a history given to the Division Psychiatrist by the accused. The testimony of certain members of accused's organization indicated that in the past, accused had manifested certain nervous traits. However, another member of his organization testified that this nervousness was not especially pronounced and that accused had been capable of performing the same duties as those performed by the majority of the members of his platoon. Lieutenant Decert testified that accused appeared normal upon the day following his derelictions. He further testified that accused was not highly excitable and that he had "never seen that circumstance" when accused was not a "good thinker". The unsworn statement of the accused, read as a whole, does not indicate that he was suffering from more than the normal

amount of fear in the face of enemy action. Whether or not accused "was suffering under a genuine or extreme illness or other disability at the time of the alleged misbehavior", which would constitute a defense (Winthrop's Military Law & Precedents, Reprint, 1920, p.624) was essentially a question of fact for the court. On the entire evidence, it does not appear that the court abused its discretion in resolving this question adversely to the accused (CM ETO 4095, Delre).

8. The charge sheet shows that accused is 26 years of age and was inducted on 18 November 1942. No prior service is shown.

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

10. 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

(324)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 6 JAN 1945 TO: Commanding General, 104th Infantry Division, APO 104, U.S. Army.

1. In the case of Private FRANCIS L. HANNIGAN (35614877), Company I, 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, 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 5346. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5346).

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

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

BOARD OF REVIEW NO. 1

20 DEC 1944

CM ETO 5347

U N I T E D S T A T E S v. Private WILLIAM T. CLAY (32350459), Company C, 354th Engineer General Service Regiment	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Cherbourg, Department of Manche, France, 25 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio

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

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the sentence.

2. Confinement in a penitentiary is authorized for the offense of assault with intent to do bodily harm with a dangerous weapon by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The same article of war authorizes penitentiary confinement upon conviction of two or more acts or omissions, any one of which is punishable by confinement in a penitentiary. However, prisoners under 31 years of age and under sentence of not more than ten years, will be confined in a Federal correctional institution or reformatory. The place of confinement herein designated is therefore proper (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1) and 3a).

Judge Advocate

Judge Advocate

Judge Advocate

5347

(326)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 20 DEC 1944 TO: Commanding Officer, Normandy Base Section, Communications Zone, European Theater of Operations, APO 562, U. S. Army.

1. In the case of Private WILLIAM T. CLAY (32350459), Company C, 354th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the 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 5347. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5347).

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

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

BOARD OF REVIEW NO. 2

28 DEC 1944

CM ETO 5353

U N I T E D S T A T E S	THIRD UNITED STATES ARMY
v.	Trial by GCM, convened at Nancy, France, 15 October 1944. Sentence: To be dismissed the service.
Second Lieutenant WALTER S. CHAPLINSKI (O-1049763), Coast Artillery Corps, Army Photo Interpretation Detachment.	

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

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

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

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

Specification: In that Second Lieutenant Walter S. Chaplinski, Army Photo Interpretation Detachment, Third United States Army, having received a lawful command from Captain William R. Campbell, Infantry, his superior officer, to go to Chateaudun, France and immediate vicinity, and not to go to Paris, France, did at or near Paris, France, on or about 6 September 1944, willfully disobey the same.

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

Specification: In that * * * did, at or near Paris, France, on or about 6 September 1944, knowingly and willfully apply to his own use and benefit one command and reconnaissance vehicle of the value of over $50.00, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty and was found guilty of all the charges and specifications, except the words "to go to Chateaudun, France, and immediate vicinity, and", in the Specification of Charge I, of which excepted words he was found not guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, the Third United States Army, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution showed that accused is a second lieutenant, Coast Artillery Corps, Photo Interpretation Detachment, Third United States Army. On 6 September 1944, this detachment was under the Third Army Photo Center of which Captain William Robert Campbell, Infantry, was the commanding officer, and was located about three-quarters of a mile from the city limits of Chateaudun (R6-8). Right after lunch that day, accused asked Captain Campbell if he could have a vehicle in which to go to a place "just close by", which on questioning accused specified as Chateaudun (R7,9). The captain testified:

> "I gave him permission to use the vehicle and I said 'I don't want you to go to Paris'. He said 'but Captain, I can get my own gasoline' and I said that I didn't give a damn whose gas it was, there was a gas shortage and that he would not go to Paris and I asked him if he understood and he replied 'yes'" (R7).

Accused took a command and reconnaissance car, "vehicle number 20175680", property of the United States, and left the dispatch office, St. Dizier, France, at a little after 3:00 p.m. on 6 September 1944. He returned the car the next day "just after dinner", probably about 1:00 p.m. (R16-23). Captain Campbell saw accused on the morning of 7 September, after he returned from the trip, and asked him "if he went to Paris". Accused "was rather vague about it * * * and said he thought he was in a suburb of Paris" (R9,13,29). Master Sergeant Frank C. Kirk, G-2, Air Section, Headquarters, Third Army, drove the car in question for accused on that trip. He testified that on 6 September 1944,

he and accused went to Paris (R29,30). They went to Chateaudun where they looked at German tanks and other equipment, then on to Chartres, and from there to Versailles. It was getting rather late, was dark, and they were running low on gas. Inquiry elicited the information that the nearest place for gas "would be Paris" and so they drove on to Paris where they stayed at a hotel overnight (R29-31). The car used by accused was worth more than $50. (R14).

4. The defense called as character witness two officers who knew accused and who knew of his army service and his personal character. These witnesses spoke in the highest terms of accused's sobriety and conscientiousness in all his work (R35-39). Accused's WD AGO Form 66-1 card showed his services for the period commencing and subsequent to February 1943 had been rated "Excellent" and "Very Satisfactory" (R52).

After having been fully advised of his rights as a witness, accused was sworn and testified in his own behalf. He said that he wanted to go out and look over some enemy equipment since it was part of his work at "photo interpretation" to be familiar with enemy tanks and motorized equipment. Accordingly he asked the captain for a verbal pass and the use of a vehicle. According to accused, this interview took only about one and a half minutes. He told his superior that he had arranged with another officer to take his shift until he got back. He testified that he got this permission, and added "there was no talk about going to Paris and there was no order" (R40,41). He received permission about three o'clock. They took the car about 5:30. Asked where he was going by the dispatcher, he replied that he "didn't know definitely * * * just put down Chateaudun". They then left and drove down the road to the entrance of Chateaudun where there was a large tank (German). They stopped there a few minutes and looked at it. They then went on to Chateaudun and then on to Chartres where they examined four or five trucks and some tanks. They went on through Chartres. Accused continued:

> "We were much closer to Versailles and Paris than anywhere, and we were running out of gas and we were trying to get gas all along the road but everybody was short on gas. We stopped several trucks and talked with the drivers but they had no gas but they said we could get some in Paris at some motor pool. They didn't stipulate which motor pool. It had started drizzling and was getting dark and we did go to Paris. Our first concern was to find ourselves a room. We found two rooms in a hotel. We had difficulty in finding billets there. The billets were taken up by the Army and we couldn't get billets and finally got in a hotel, Hotel Castile, I believe it was, and we got two rooms. I didn't go out except when we went out to eat. I stayed there and it had started raining, a fine drizzle had started

before we got to Versailles and it kept on that night. We slept until about 11:30 and it kept on raining all day. We succeeded in getting the gasoline at the MP Motor Pool and at about 1:30 or 2:00, somewhere around that time, we went on towards Versailles. We had difficulty getting out of town and further on we had a detour that took us, I don't remember the name of the town, but it took us off the regular route. We came back to camp between 11:00 and 11:30. It was raining quite steadily all that time" (R41,42).

Accused reported that "Nothing whatsoever, sir" was said about Paris by Captain Campbell prior to his going on this trip (R43).

5. The evidence thus introduced is conflicting. But in the testimony of Captain Campbell there is evidence that accused was expressly ordered not to take the vehicle to Paris. That accused did take a United States vehicle to Paris is admitted. It is not the function of the Board of Review on appellate review under Article of War 50½ to weigh the evidence. Its duty is to ascertain if there is substantial credible evidence in the record to support the findings and the sentence(CM ETO 1953, Lewis). If the testimony of Captain Campbell is to be believed, and it cannot be held incredible, then the conduct of accused obviously involved a violation of Article of War 64 (Charge I, and its Specification) and also a violation of Article of War 94 (Charge II and its Specification) (MCM, 1928, par. 134b, p.148; par.150i, pp.184,185).

6. Accused is 29 years of age. He was inducted 8 June 1942 for the duration of the war; and was commissioned second lieutenant on 14 January 1943, Coast Artillery Corps (and assigned to Military Intelligence Section, European Theater of Operations).

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 is legally sufficient to support the findings of guilty and the sentence.

8. Dismissal is authorized on conviction of a violation of either Article of War 64 or Article of War 94.

Judge Advocate

Judge Advocate

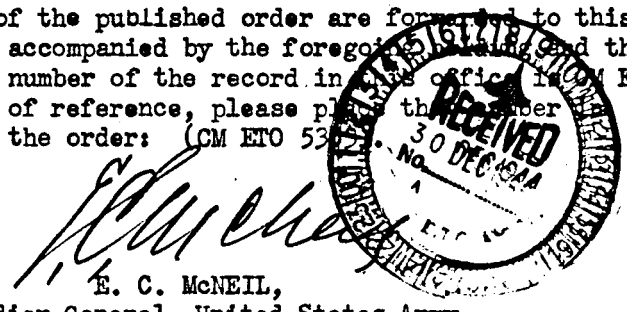
Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 28 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant WALTER S. CHAPLINSKI (O-1049763), Coast Artillery Corps, Army Photo Interpretation Detachment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5353. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5353).



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

(Sentence ordered executed. GCMO 3, ETO, 3 Jan 1945)

Confidential

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

BOARD OF REVIEW NO. 1

30 DEC 1944

CM ETO 5359

U N I T E D S T A T E S	102D INFANTRY DIVISION
v.	Trial by GCM convened at Brunssum, Holland, 27 November 1944. Sentence: Dishonorable discharge, total forfeitutes and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private DONALD H. YOUNG (12226305), Medical Detachment, 407th Infantry	

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

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

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

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

Specification: In that Private Donald H. Young, Medical Detachment, 407th Infantry, did, at Brunnsum, Holland, absent himself without leave from about 1400, 12 November 1944 to about 1705 12 November 1944.

CHARGE II: Violation of the 75th Article of War.

Specification: In that * * * did, at Bergden, Germany, on or about 10 November 1944, misbehave before the enemy by refusing to advance with his squad, which had been ordered forward by Tec 4 William H Ingram, Medical Detachment, 407th Infantry, to evacuate personnel who had sufferred injuries from the opposing forces.

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CHARGE III: Violation of the 65th Article of War.
(Nolle Prosequi)

Specification: (Nolle Prosequi)

He pleaded guilty to Charge I and its Specification, not 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 all charges and specifications. Evidence was introduced of three previous convictions by summary court for four absences without leave for one, four, nine and 13 days respectively in violation of Article of War 61, (the last two absences were made the subject of one prosecution). 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 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. Accused was brought to trial two days subsequent to the service of charges upon him (R2). In answer to inquiries made by the trial judge advocate and the president of the court, he stated that he had had sufficient time to prepare his defense. He was further asked by the president if he desired additional time and he replied in the negative (R4). It can be fairly concluded that he was not deprived of his right to a reasonable opportunity to prepare for trial. There is no indication in the record that he was in fact prejudiced in any of his rights by not having the trial deferred to a later date. This was non-prejudicial (CM ETO 5255, Duncan).

4. Charge I and Specification.

(a) Accused pleaded guilty to absence without leave as alleged, and it was explained to him that on the basis of his plea of guilty the court could impose upon him a maximum sentence of dishonorable discharge, total forfeitures and confinement for life. He stated that he still pleaded guilty to the Charge and Specification (R6,7). The battalion surgeon of the 1st Battalion, 407th Infantry, called as a witness by the prosecution, testified that the organization of which accused was a member, namely the 1st Battalion Aid Station, Medical Detachment, 407th Infantry, had withdrawn from the line and was situated in a rest area in the vicinity of Brunssum, Holland. Although the men of the organization were close together, he did not see accused in the area after 1400 hours 12 November 1944. He observed that accused was not present at the evening meal and searched the area for him but did not find him (R9,10). Accused personally agreed to a

stipulation that

> "if the military police were to testify * * * his testimony would be to the effect that the accused surrendered himself to him at Hoensbroek, Holland, about 1705 12 November 1944" (R11).

Inquiry discloses that Brunssum and Hoensbroek are approximately two and one-half miles apart.

(b) The Specification is defective in that it does not allege that the absence was from command, guard, quarters, station, or camp (AW 61; MCM, 1928, par.132, p.146; Ibid., App.4, Form 21, p.241). It cannot reasonably be said, however, that the Specification does not allege an offense denounced and made punishable by Article of War 61. The words "absent without leave", by long-continued and generally accepted usage, describe the status of a soldier who has absented himself without proper leave from command, guard, quarters, station, or camp, or the place where he should be. The Specification in this case fairly apprised accused that he was charged with absence without leave in the generally accepted meaning of those words. If the failure to specify that the absence was from command, guard, quarters, station, camp, or other place made the Specification vague or indefinite to accused, he could have raised that objection by a plea in abatement (MCM, 1928, par.66, pp.51-52). By pleading to the general issue he waived such objection (Ibid., par.64a, p.51). Thus it has been held that an allegation that accused

> "did, at Fort Bliss, Texas, on or about the 15th day of May, 1932, absent himself without leave and did remain absent without leave until he surrendered himself at Jefferson Barracks, Missouri, on or about the 22d day of May, 1932",

though defective, [illegible] alleged by implication that part, if not all, of the absence was from the station of accused's organization (CM 199641, Davis, 4 B.R. 145). In the instant case it is clear that the summary nature of the allegation of absence without leave is at most a defect as to a matter of pleading which did not injuriously affect the substantial rights of accused within the purview of Article of War 37. The Specification stated facts constituting an offense under the 61st Article of War notwithstanding the omission indicated above. His plea of guilty and his assent to the stipulation that a member of the military police, if present, would testify that accused surrendered himself at a place about two and one-half miles from where his organization was situate, show that he was not misled by the defect in the Specification.

5. Charge II and Specification.

(a) The evidence for the prosecution may be summarized as follows:

Accused was a member of a litter squad consisting of four men. At about0400 hours 10 November 1944 the squad was ordered to go into the town of Bergden to evacuate casualties reported from Company C which was dispersed in foxholes beyond the far side of the town in the front line (R12,27,28). The squad proceeded to the town in a jeep driven by a fifth man. As they entered the town they encountered enemy artillery fire and took cover under an archway. A shell landed nearby and they "hit the ground" (R12,22). They then decided it would be safer inside the building and moved into it. Accused, who was behind them, called for help. The squad leader ran back to see what had happened to him and found that he had merely caught his coat on some object. After waiting a few minutes the squad leader thought that the shelling had abated sufficiently to enable the men to move forward. He called out to the squad "Come on and let's get up to C Company and get the casualties back", or "Come on, you guys, let's go". Accused said "I don't want to go, I am scared, I am not going, I am scared" (R13,16,17,21). He urged another member of the squad to remain behind with him because he was afraid (R26). The other three men moved forward on foot and proceeded to evacuate casualties as a three-man squad (R23,25). Accused did not go with them. The normal procedure in the evacuation of casualties was for all four members of the squad to go forward together and for the driver to remain behind with the vehicle to await their return. No member of the squad was told to stay with the vehicle (R16,20). When the three men returned with a casualty, the jeep was gone and no one was there. They took another jeep which was parked nearby and brought the casualty to the aid station (R13,17). Accused was not with them when they returned to the station. He had returned earlier in another jeep with a walking casualty (R34-35).

(b) After his rights were explained to him, accused, at his own request, was sworn and testified substantially as follows:

At about 0400 or 0430 hours he was directed to go into the town of Bergden and evacuate casualties. As they entered the town they were compelled to stop because of an artillery barrage which lasted about 20 minutes. Some members of the squad took cover in a building and others in a cellar. He himself got caught on a wire and called for help. The squad leader went over and spoke to him believing accused had been hit. When the squad leader decided that the barrage was over, he said "O.K.

boys, let's go". Accused told him that he was afraid. He had been near enemy shellfire before but was nevertheless afraid. He did not recall saying that he would not go. He distinctly heard one of the men say "one of you can stay with the vehicle", and accused stated "All right I will". The squad leader then repeated "O.K. boys, let's go", and accused remained with the driver of the jeep while the others went into the town. Later the squad leader returned with a casualty on a litter. Accused assisted in placing the casualty on the jeep and went back with him to the aid station (R29-34).

No other evidence was offered by the defense.

(c) The evidence clearly established that accused refused to move forward with his squad when it was ordered forward by its leader. His refusal to accompany the squad on its mission constituted misbehavior within the meaning of Article of War 75 (CM ETO 4820, Skovan). The evidence leaves no doubt that at the time of his refusal accused and the other members of his squad were before the enemy (CM ETO 1663, Ison). The Specification did not allege that he failed to move forward. This was not necessary since the gist of the offense set out in the Specification was his refusal to advance. Evidence that he in fact failed to advance was nevertheless properly received as tending to show the persistency of his refusal and as an element of aggravation.

6. The charge sheet shows that accused is 19 years of age and enlisted 12 July 1943 to serve for the duration of the war and six months thereafter. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. 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 misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 75), and for absence without leave, such punishment other than death, as the court martial may direct (AW 61). 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 Sep 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

5359

(338)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 30 DEC 1944 TO: Commanding General, 102d Infantry Division, APO 102, U.S. Army.

1. In the case of Private DONALD H. YOUNG (12226305), Medical Detachment, 407th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5359. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5359).

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

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

BOARD OF REVIEW NO. 1

28 DEC 1944

CM ETO 5362

U N I T E D S T A T E S	)	THIRD UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Nancy, France, 25-26 October 1944.
	)	
Private First Class JOHN DAVID COOPER (34562464) and Private J. P. WILSON (32484756), both of 3966th Quartermaster Truck Company	)	Sentence as to each accused: To be hanged by the neck until dead.

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

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

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

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

Specification 1: In that Private J. P. Wilson and Private First Class John David Cooper, both of the 3966th Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at Lerouville, Meuse, France, on or about 19 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Mlle. Christiane Pivel.

Specification 2: In that * * * acting jointly and in pursuance of a common intent, did, at Lerouville, Meuse, France, on or about 19 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Mlle. Germaine Pivel.

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Specification 3: In that * * * acting jointly and in pursuance of a common intent, did, at Ferme de Marville, par Chonville, Meuse, France, on or about 21 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Mme. Lucienne Barry.

Specification 4: In that * * * acting jointly and in pursuance of a common intent, did, at Ferme de Marville, par Chonville, Meuse, France, on or about 21 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Mlle. Mireille Weber.

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

Specification 1: In that * * * acting jointly and in pursuance of a common intent, did, at Lerouville, Meuse, France, on or about 19 September 1944, unlawfully enter the dwelling house of Gustave Pivel with intent to commit a criminal offense, to-wit, a wrongful search and trespass, therein.

Specification 2: In that * * * acting jointly and in pursuance of a common intent, did, at Ferme de Marville, par Chonville, Meuse, France, on or about 21 September 1944, unlawfully enter the dwelling house occupied by Mme. Lucienne Barry and others, the ownership of which is unknown, with intent to commit a criminal offense, to-wit, a wrongful search and trespass therein.

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

Specification 1: In that * * * acting jointly and in pursuance of a common intent, did, at Lerouville, Meuse, France, on or about 19 September 1944, commit an assault upon Gustave Pivel by threatening him with a bayonet and by tying his hands and feet.

Specification 2: In that * * * acting jointly and in pursuance of a common intent, did, at Lerouville, Meuse, France, on or about 19 September 1944, commit an assault upon Mme. Gustave Pivel, by threatening her with a bayonet.

Specification 3: In that * * * acting jointly and in pursuance of a common intent, did, at Ferme de Marville, par Chonville, Meuse, France, on or about 21 September 1944, wrongfully imprison by locking them in a cellar M. Paul Weber, M. Edouard

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Weber and other male occupants of a dwelling house occupied by Mme. Lucienne Barry and others, the ownership of which is unknown.

Specification 4: In that * * * acting jointly and in pursuance of a common intent, did, at Lerouville, Meuse,France, on or about 19 September 1944, forcibly enter and wrongfully search the dwelling house occupied by Mme. Henriette Boidin, M. Sylvain Boidin and others, the ownership of which is unknown.

Specification 5: In that * * * acting jointly and in pursuance of a common intent, did, at Lerouville, Meuse, France, on or about 19 September 1944, wrongfully enter and trespass in the dwelling of M. Jean Frey.

Each accused pleaded not guilty and, all members of the court present at the time the votes were taken concurring, was found guilty of Charges I, II and their specifications, guilty of Specification 1, Charge III except the words "and by tying his hands and feet", of the excepted words not guilty, guilty of Specifications 2,3,4 and 5, Charge III and of Charge III. Evidence was introduced of three previous convictions of accused Wilson: one by special court-martial for two absences without leave for one hour each in violation of Article of War 61, and two by summary court, one for breaking restriction in violation of Article of War 96, and one for absence without leave for two hours in violation of Article of War 61. All members of the court 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, Third United States, approved the sentence as to each accused and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as to each accused and withheld the order directing execution thereof pursuant to Article of War 50½.

3. (a) The following undisputed evidence was introduced by the prosecution with reference to Specifications 3 and 4, Charge I (rapes of Madame Lucienne Barry and Madamoiselle Mireille Weber), Specification 2, Charge II (unlawful entry of house occupied by Madame Barry and others with intent to commit criminal offense of wrongful search and trespass therein) and Specification 3, Charge III (wrongful imprisonment of Messieurs Paul Weber, Edouard Weber and other male occupants of dwelling occupied by Madame Barry and others):

On 21 September 1944, Messieurs Paul Weber (R34) and Maurice Paquin (R39), Madame Lucienne Barry (R36,43), and Weber's daughter, Mademoiselle Mireille Weber (R36,48-49), were living at a farm in Ferme de Marville, France. Mireille Weber was 14 years of age and unmarried (R49,52-53). About 2 am 21 September, two colored soldiers, each armed with a gun, fired two shots outside the farmhouse and then knocked on the door (R34-35,42,43,50). They appeared at Weber's window with a flashlight and said they were searching for Germans. Weber, believing that they were actually looking for Germans and that he had to admit them, left his bed, lit a candle and opened the door. He did not think it strange for Germans had previously searched the house (R34,36-37). One of the soldiers immediately extinguished the candle and shone his flashlight in Weber's eyes. They made him follow them and looked in all the rooms of the house, including that occupied by Madame Barry and the Weber girl, despite Weber's assertion that there were no Germans in the house. They also searched the stable (R34,36-38,43). During the search the soldiers continually pointed their guns at Weber (R35,37). The soldiers told Weber, Paquin and four other male occupants of the house, including one Edouard Weber, that they were going to take them to see "our Captain at the camp". The six men went out into the courtyard and one of the soldiers "with his gun made us enter the basement". He told the men that he was going to fetch the captain himself and that they were to wait in the basement. After the soldiers shut the door, one returned and said that "the first one of you that goes out will be shot". The door was then bolted on the outside, a shot was fired, and the two soldiers departed (R35,36,38,40-41). When the six men were released about 40 minutes later by a boy (R35,37) his daughter Mireille said to Weber "we have been raped by the negroes" (R37).

In the meantime Madame Lucienne Barry, not certain that the search was genuine, put on her dress and gave Mireille her dress. The two soldiers returned, pinched Lucienne's arm, made Mireille dress, and directed the women to accompany them. Lucienne refused, "had them believing" she was the mother of Paul Weber's 11 children, and said that she had to remain there to take care of them. Mireille asked Lucienne not to leave her. The soldiers then "took us by the arm * * * to the dinner room". Lucienne resisted. In the dinner room the two women who "were holding together by the arm", shouted. The soldiers threatened them with their guns and one soldier came between them. The tall soldier (accused Wilson) took out a knife and placed it at the throats of the women. Lucienne "was making so much noise" that he (Wilson) "put his hand on her throat meaning to strangle me". Her throat was painful for some days thereafter. Wilson, then took Mireille to one of two adjoining bedrooms and the other soldier (Cooper) took Lucienne to the other (R43-44,50).

Lucienne testified that after she entered the bedroom she heard Mireille crying for her mother and then heard no more (R44). Cooper held his knife at Lucienne's throat and "pressed " her on the bed. As she was shouting he took her scarf and put it in her mouth.

He "had always this knife on my throat". She "fought with him and the first time he didn't succeed". She struggled for "at least half an hour, if not more". He then removed her "panties" and finally, when she "was not able to speak any more", he penetrated her person, engaged in sexual intercourse without her consent, and had an emission. When he finished, Lucienne arose, went to a two-year old boy who was in the next bed, "was a little sick" and coughed for about five minutes. Cooper"was ready to jump on me again and his friend" came out of the other bedroom with Mireille. Lucienne further testified that her skirt and "panties" were torn, that Cooper did not give her any candy or cigarettes, and that she did not hold his flashlight (R45,47-48).

Mireille testified that she was crying when accused Wilson took her to the other bedroom. He threatened her with his gun, and also with a knife which he kept pushing at her upper right chest (R50-51). She heard Lucienne shouting in the next room (R52). He seized Mireille's throat pushed her on the bed and "took away a button on my panties". The girl

> "fought for about ten minutes but he was strangling me and I had to surrender. He was holding my hands and I couldn't do anything to fight" (R51).

He inserted his penis in the girl's person without her consent. When asked by the court if he completed the act of intercourse, Mireille testified that she did not know (R51-53).

After the acts were completed both accused "spoke together", doubled their fists at the two women and ran away (R45,51). The women, who were crying, arrived at the house of a Madame Lavina about eight minutes after the incident (R45-46,51-52).

At the trial Lucienne identified accused Cooper as her assailant and accused Wilson as the soldier who went into the adjoining bedroom with Mireille (R46,48). Mireille identified Wilson as the soldier who attacked her but was unable to identify the soldier who went into the bedroom with Lucienne (R52-53). Paquin identified Cooper, "the dark one", as one of the soldiers who were at the farm that night (R39-40) and testified that it was "the taller one" who appeared to be in charge of the two soldiers and who entered witness' bedroom and indicated that he had to get up (R40,42). He could not, however, identify the taller soldier (R40-42). Paul Weber was "sure" of his identification of Cooper and testified that as both soldiers wore their helmets he might identify the other soldier if he had on his helmet. After both accused put on their helmets at the request of the Law member, Weber testified that he "can not tell of the other /Wilson/ * * * I think so", and "there is a doubt because I do not recognize him well, but I can say that he can be the one" (R38-39).

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Each accused consenting thereto, it was stipulated by the prosecution and defense that if Madame Bartole Lavina was present in court she would testify that about 2:45 am 21 September, Lucienne and Mireille informed her that each had been forced against her will to have sexual intercourse, each by a different colored American soldier (R53-54; Pros. Ex.D). Also, each accused consenting thereto, it was stipulated by the prosecution and defense that if First Lieutenant Joseph S. Mansker, Medical Corps, were present in court he would testify that on 22 September he examined Lucienne, "age forty years * * * married woman, twenty years", that her neck showed superficial redness, that there was a small abrasion on her left thumb and that there was no further evidence of violence. A vaginal smear disclosed no spermatozoa. Her hymen was perforated. On the same day he examined Mireille whose neck also showed some superficial redness and whose hymen was perforated. There was no evidence of recent laceration and a vaginal smear disclosed no spermatozoa (R55-56; Pros. Ex.F).

(b) The undisputed evidence for the prosecution further showed that on 19 September 1944, Messieurs Jean Frey (R56), Sylvain Boidin (R61), Monsieur and Madame Gustave Pivel (R67-70) and their two daughters, Germaine, 18 years of age and Christiane, then 14 years of age (R70,73,83), both single (R77,86), lived in Lerouville, France. The Frey, Boidin and Pivel homes were in a row on the same side of the road. The Boidin home was between the Frey and Pivel houses and the distance between the Frey and Pivel homes was about 100 yards (R19-20).

Spec.5, Chg.III-wrongful entry and trespass in Frey dwelling.

About 12:30 am 19 September 1944, Monsieur Jean Frey, who lived on the second floor of his house, was awakened by a knocking on the door which lasted about ten minutes. As he did not open the door someone broke a panel in a window, entered the house and fired a shot into the ceiling. When summoned by the people who lived on the first floor, Frey came downstairs with his flashlight. Two colored soldiers were there, one of whom also had a flashlight. This soldier opened a notebook, "showed me his name was 'Captain Ganier'" and indicated that he was looking for German paratroops who were supposed to have descended from a German plane which "passed a quarter of an hour before". The soldier searched the house, including every room in the basement and first floor and noted in his book how many people were in the house. Frey thought the search was genuine and made no objection. The soldiers departed 15 minutes later. Frey saw the colored soldiers under an electric light for about a minute and also "shot" his flashlight at "the first one" when he (Frey) went downstairs (R56-59). At the trial Frey identified "the taller one", accused Wilson, as one of the two soldiers and testified that he believed he wore a canvas jacket. He had "three stripes up and one down on the arm". Shown a staff sergeant's stripes with a "'T'" in the center, Frey testified "I cannot say that the 'T' was in it but the stripes are the same". Wilson was

the soldier who identified himself as Captain Gainer. Asked by the law member if there was any doubt in his mind as to the identity of Wilson, Frey replied "There is some doubt, sir". The other soldier was about one meter, 65 centimeters in height, "and very fat, and a very strong man" (R59-60). When the soldiers left, one of them "took his bayonet in his hand" and pointed it at Frey's chest (R61).

Spec.4, Chg.III-forcible entry and wrongful search of dwelling occupied by Henriette and Sylvain Boidin and others.

Between 12-1 am 19 September, someone repeatedly knocked on the door of the house occupied by Monsieur and Madame Sylvain Boidin and said "American promenade" several times. Boidin did not answer and a window in the basement and a door upstairs were broken. Boidin found two colored American soldiers, each with a gun, in the house (R61-63, 66-67). When the "taller" soldier could not open the door of the "dinner room" he put the muzzle of his gun in Boidin's face and asked for the key. He then asked Boidin how many people were in the house and Boidin replied "'ten'". The tall soldier then made Boidin go upstairs to the rooms "with his gun on my back" (R62). The other soldier said nothing during the entire incident and did not threaten Boidin with his gun. He remained downstairs with the butt of his rifle on the ground and the muzzle in his hand (R62,65). The taller soldier counted everyone in the house and could find only nine persons. Boidin "counted with him the third time and we found ten" (R62). The soldier then descended the stairs, wrote in a small black notebook and both soldiers left about 1:30 am (R62-63,66). At the trial Boidin identified accused Cooper as the man who remained downstairs during the search (R63,65). He could not identify the taller soldier but testified that he wore three stripes "with one down and two medals with four bars, and a whistle with a chain". He wore a field jacket and a shirt thereunder. The medals were on the field jacket and his whistle was in the pocket of the jacket. Shown an OD shirt with staff sergeant chevrons, medals, and brass whistle and chain thereon (Pros. Ex.A), Boidin testified that the stripes and medals worn by the taller soldier were similar, but that the chain on the whistle had smaller links (R63-66). The taller soldier had a "little beard" just beneath his lower lip and Boidin testified that he could identify him if "I saw him" but did not see him in the courtroom (R67).

Specs.1,2, Chg.I-rapes of Christiane and Germaine Pivel; Spec.1, Chg. II-unlawful entry of dwelling of Gustave Pivel with intent to commit wrongful search and trespass therein; Specs.1,2, Chg.III-assaults on Gustave Pivel and Madame Pivel by threatening them with bayonet.

The soldiers left Boidin's house about 1:30 am 19 September. About ten minutes later Boidin heard shots in the direction of the Pivel house which was about 80 meters away (R63). About 2 am someone knocked repeatedly on the Pivel door and asked if there were any Germans therein.

The Pivels did not answer and a shot was fired through the window and into the ceiling of the kitchen. Gustave Pivel opened the door and two colored soldiers entered the house who demanded that they search all the rooms. When the Pivels lit a candle the soldiers blew it out. The soldiers had guns under their arms and "the taller one" had a bayonet on his weapon. They looked around the room with a flashlight and said "Boche, Boche". The tall soldier "showed us a paper saying that he was a 'Captain Ganier'", and searched the house with Gustave (R68-69,73,81-82,84). When they returned the tall soldier told Gustave to put on his shoes, that he (Gustave) was to go "to the Captain for information". Gustave "was playing the part of somebody who does not understand" and the taller soldier put his bayonet on the back of Gustave's neck. The shorter soldier, who did not search the house, remained in the corner of the room with the butt of his gun on the ground and said nothing. After Gustave put on his shoes he and the soldiers left the house. Madame Pivel did not want her husband to leave her alone and tried to put on her coat, but they "forbade me to go with him" (R69,73-75,80-81, 84-85). About ten minutes later the soldiers returned and said that the captain wanted Germaine and Christiane for "information". When Madame Pivel said she did not want her daughters to go, the tall soldier put his bayonet on the side of her neck. The two soldiers, with their guns on their shoulders, then seized the two girls by the arms and pulled them out of the house. Madame Pivel later went out on the road and called but received no answer (R69-70,75-76,85). The soldiers took the girls into a quarry. The "tall" soldier pulled Germaine by the arm in one direction and "the small one" pulled Christiane by her arm in the other direction (R76,85).

Germaine testified that "they used so much strength that we had to part". She went with the tall soldier to a spot about 50 yards away. He held her by the neck and "put out his bayonet". He "put me down on my side and after that he had me to lie down on his side". She was "very afraid". He then lay on her and she struggled with him for about ten minutes.

> "He opened up his pants and I didn't want to go with him and he broke my panties".

He penetrated her person and indulged in sexual intercourse without her consent. After the act he helped her up. She was still "very afraid" and they returned to find Christiane and the other soldier seated on a bridge (R76-77,81-82). She did not hear Christiane make any noises during this time (R78).

Christiane testified that after the two girls were separated she (Christiane) ran away but the "fatter and the smaller" soldier caught her, seized her by the throat and forced her to lie down. She struggled for about ten minutes but he choked and "strangled" her so much that she "could not nearly speak any more or make any noise". He pulled up

her skirts with both hands, then held her by the throat and tore her "panties" with the other, laid on top of her, and inserted his penis in her person without her consent (R85-89). After the act she arose and ran away but he caught her, forced her to sit down on a bridge and held her by her skirt. Her sister then returned (R86,88). The sisters were then taken to the entry of the quarry by the soldiers who departed. The girls ran home where each told her mother she had been raped (R70,77-78,86).

Madame Pivel testified that she was not able to identify the soldiers. Only the tall one had a bayonet and he threatened her with it. The "smaller one" did not threaten her (R71-72). Christiane testified that she could not identify either soldier (R87,89), that she believed the taller one had a medal, four bars and a whistle on his shirt, and three stripes on his arm, "but I do not remember if he had any on the bottom or not" (R88-89). She did not notice if he had a goatee on his chin (R89). Germaine was positive (R82) of her identification of "the fat one", accused Cooper, as the soldier who went with Christiane at the quarry. She later identified Cooper at an identification parade of about 75 men at Lerouville and at a parade of six men at Commercy. At the trial she was unable to identify her own assailant, the tall soldier, but testified that he wore three stripes and, she believed, a "T", together with a whistle and medals. She saw "four bars". She did not remember whether he had a goatee (R79-80, and testified that she might be mistaken about the "T" (R81).

Both accused consenting thereto, it was stipulated between the prosecution and defense that if Dr. D. Boudin of Lerouville were present in court he would testify that he examined Germaine and Christiane 19 September "at 1630 in the morning". In the case of Germaine he found

> "obvious traces of sexual intercourse having occurred in the last few hours, in view of the presence of fresh spermatozoa".

He found the same condition with respect to Christiane and, in addition, her hymen was torn "and still bled". She had a bloody bruise on the right side of her neck. He examined Gustave at 4:30 am on 19 September, and discovered traces of "pinched spots around both wrists" (R90-91; Pros. Ex.E).

Captain Walter G. Cederberg, commanding officer of both accused who were truck drivers, had never ordered either accused or any member of his command to search any houses in France or to arrest, place in custody or restrain any civilian while in France (R9-10,14). Between 19-21 September accuseds' organization was situate about a mile south of Lerouville (R13). The Pivel home was about a half mile

from the area and the Weber house was about the same distance from the area but in the opposite direction (R13,32). After 21 September, Cederberg and Agent William P. Graham, Criminal Investigation Department, asked accused Wilson if he objected to their searching his personal effects and he replied in the negative. Wilson was present when they found in his tent a duffle bag which was marked with the name of someone not a member of Cederberg's command. Wilson's two tentmates said that the bag did not belong to them. Inside the bag were found several articles of clothing with the name "J.P. Wilson" marked on the collar. There were other articles of clothing which were unmarked. About three-fourths of the articles and equipment in the bag were marked "J.P. Wilson" and the remaining articles were unmarked. Also in the bag was a field jacket, and an unmarked shirt which had on it the stripes of a staff sergeant, a driver's medal with one bar, an expert medal with four bars, a brass whistle and chain, and a small pocket diary. Cederberg testified that Wilson admitted that the field jacket and certain other articles belonged to him but that he neither admitted nor denied ownership of the shirt. Graham testified that Wilson admitted ownership of the shirt and bag (R11-14,16,23-24). The shirt was identified and admitted in evidence as against accused Wilson (R13,24; Pros. Ex.A). Wilson was not a staff sergeant (R15). The diary was a "little black" name and address book and the name of the owner was in the front thereof. Wilson's name was also on one page and Cederberg testified that it contained some of Wilson's writing (R15-16).

Graham testified that four identification parades were held, three in the 201st Quartermaster Battalion area and one at Commercy. Sixteen French civilians were present (R20) and the same witnesses attended each parade (R33). In the first parade the whole battalion participated. There were four companies of about 150 men each. The second identification parade was by roster "and all that we didn't get in the first line up were called back for the second". About 50 men participated in the third parade (R32-33). Cooper was identified at one of these parades by one witness. Five colored American soldiers of about the same height and build as the two accused, plus both accused, participated in the parade at Commercy. Cooper was identified by six witnesses at this parade, and one female witness

> "pointed to Wilson but wouldn't point him out because she wasn't sure about Wilson because he had shaved off a little growth of hair"

which was below his lower lip. When Wilson was taken into custody 26 September, he had a growth of hair below his lower lip but on 27 September he had removed this growth (R21-22).

On 27 September Graham interviewed Cooper, who was advised of his rights under Article of War 24 by both Graham and a summary court officer, a Colonel Harold Engerud. Cooper then made a statement which was written by Graham who read it back to him after it was completed. The statement was voluntarily given and without promise of re-

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ward or intimidation. Cooper signed it in the presence of Graham who identified the statement at the trial. The deletions made in the statement (the name of accused Wilson) were made on the day of trial on the authority of the trial judge advocate. The defense stating that it had no objection thereto, the statement was admitted in evidence as to Cooper only (R25-28; Pros.Ex.B). It was in pertinent part as follows:

> "On 18th September 1944, just before midnight, __ came up to my trailer and said come on with me and we'll go up to my friends house and get some cognac. With that we set off in the direction of Lerouville.
>
> When we got nearly to town __ stopped at a house and said he was going in to look for Germans. He fired into the house before he entered. I stayed out at the gate. He didn't stay in there very long. He came out and said 'Let's go up to the next house'. When we got there __ fired into that house too. With that the people came down and opened the door. He told them he was looking, for Germans, then he went up stairs. A few minutes later he came out with a couple of girls. He said come on with me. I told him 'No lets not do that.' Then he gave me the biggest girl. We went up in the woods and we sat down and I gave her some gum. While she was opening the gum I started playing with her tits. Then I pulled up her dress and she pulled down her drawers. I got down on my knees and took my penis out and put it in her private parts. She was still sitting down when I stuck my penis in her. I worked my penis in and out. She had her hands behind her. When I stuck my penis in her she said something about 'papa'.
>
> When I had finished I got up and waited for __ to come back with the other girl. While I was there waiting for __ to come back this girl was showing me a souvinier on her dress. When __ came up the girl I was with grabbed hold of her sister's hand and __ went back to the house with them. He was gone just a few minutes and then he returned. We went back to Camp and then went to sleep.
>
> On the 20th of September 1944, __ came up to me and said that someone had a chicken fixed for him and wanted me to go with him. We went down the road to a small village, through some woods and up to a farm house. __ shouted for the red-headed boy who could speak English. This boy came to the door and ask us to come in. Later __ took this boy and locked him in the wine cellar and told me to stay there and watch him. His wife was left in bed.

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__ fired his carbine into the house before he locked the red-headed man in the cellar. __ put all the men in the wine cellar and locked them up. As far as I know all the women were left in the house. __ went up inside the house and stayed for a hell of a long time. If there were any women raped at that house that night, __ did it all, because I didn't have any woman that night. We got back to camp about 12:30 am" (Pros. Ex.B).

After the last identification parade Graham asked Cooper (on 28 September) if he would like to make another statement and the latter replied in the affirmative. The 24th Article of War was again read and explained to him before he made and signed the second statement in Graham's presence. Graham identified this statement at the trial as the same statement except for the deletions which appeared therein (name of accused Wilson). The defense stating that there was no objection thereto, it was admitted in evidence as against Cooper only (R29-31; Pros. Ex.C). It was in pertinent part as follows:

"I want to make a correction in my statement that I gave you yesterday.

On the 20th of September 1944, I went up to this farm house up from camp with __. We got up there a little after 2100 hours. We went around to the side of the house where the boy lived that could speak English. I went inside. __ said he didn't want to go in because this boy and his wife knew him. I was talking to the boy who could speak English when I heard some shots on the other side of the house. I don't remember how many shots there were. __ called me around there and the red-headed boy who could speak English went around there where he was. When we got around there, __ had all the men locked up in the wine cellar. He put the red-headed boy in there too.

I waited there for sometime for __ and he didn't come back. I started up to look for him. I met a middle aged woman on the poarch. I told her I would give her some chocolate and cigarettes for some 'zig-zig'. She took my flashlight and led me into her room. When we got in her room, she laid down on the bed and took her step-ins off. I got up on top of her and took my prick out. I had intercourse with her between 5 - 10 minutes. After I finished I started to call __ but he didn't answer. Later he came out to where I was and we left and came back to camp.

I saw this woman that I had intercourse with today at the identification parade. I know now

that her name is Mrs. Barry" (Pros. Ex.C).

4. The defense offered no evidence and each accused, upon being advised of his rights, elected to remain silent (R91-92).

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

* * *

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient when there is in fact no consent.

* * *

Proof - (a) That the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent" (MCM, 1928, par.148b, p.165). (Underscoring supplied).

The identification of both accused as the soldiers involved in the four offenses of rape was definitely established by the evidence. It was clearly apparent that Wilson was the tall soldier and Cooper the short one. Madame Barry identified Cooper as the one who attacked her on 21 September, and Wilson as the soldier who went into the adjoining bedroom with 14 year old Mireille Weber. Mireille identified Wilson as the soldier who attacked her. Paquin and Paul Weber both identified Cooper as being one of the two soldiers at the farm in the early morning hours and testified that the other soldier was taller. Germaine Pivel definitely identified Cooper as the soldier who was the captor of her sister Christiane at the quarry on 19 September and testified that her own assailant was the tall soldier who wore three stripes, whistle, medals and four bars. Although Christiane could not identify either soldier she also testified that the taller of the two had a medal, four bars, three stripes and a whistle on his shirt. The testimony of the Pivel sisters as to identification was substantiated by Frey and Boidin whose houses were entered shortly before the entry of the Pivel house. Frey identified Wilson as the soldier with "three stripes up and one down on his arm", although witness had "some doubt" as to his identification of this accused. Boidin identified Cooper as one of the two soldiers who entered his house. He could not identify the taller soldier who wore three stripes "with one down and two medals with four bars, and a whistle with a chain". The medals were on a field jacket and the whistle in the pocket thereof. The taller soldier also had a "little beard" below his lower lip and wrote in a small black notebook. There was evidence that on 26 September Wilson had a growth of hair below his lower lip and that he had removed it by the next day. After 21 September there was found in a duffle bag containing several articles of clothing marked with Wilson's name, an unmarked shirt with staff

sergeant's chevrons, driver's medal with one bar, expert medal with four bars, a brass whistle and chain, and a "little black" notebook which, although not Wilson's contained his name and handwriting. Cooper, in his pre-trial statements, admitted that he had intercourse with one of two sisters in the early morning hours of 19 September and that he had intercourse with Madame Barry sometime after 9 pm 20 September.

Germaine and Christiane both testified that their persons were penetrated by force and violence and without their consent. After a shot was fired into the Pivel house and accused were admitted, Gustave, the father, was threatened with a bayonet and taken from the house. After both accused returned, the mother was similarly threatened and both accused dragged the two girls away and took them to the quarry. After the girls were forcibly separated Wilson held Germaine by the neck, threatened her with his bayonet, terrorized her and forced her to the ground. She struggled with him for about ten minutes but he "broke my panties" and succeeded in penetrating her person. Cooper also seized Christiane by the throat and forced her to lie down. She also struggled for about ten minutes. He choked her, pulled up her skirts, tore her"panties" and forcibly inserted his penis in her person. The testimony of the victims was not only corroborated by their prompt complaint to their mother that they had been raped, but also most convincingly by medical evidence that "fresh spermatozoa" was found in each instance, that Christiane's hymen was torn and still bleeding and that she had a bloody bruise on her neck.

Both Lucienne and Mireille similarly testified that accused penetrated their persons by force and violence and without their consent. After locking the six men in the cellar by the force of arms, both accused returned to the house, forced both victims to go downstairs and threatened them with guns. Wilson also placed a knife at their throats and seized Lucienne by the throat because she "was making so much noise". After the women were taken to adjoining bedrooms, Lucienne heard Mireille calling for her mother and the latter heard the former shouting. Cooper continually held his knife at Lucienne's throat and put her scarf in her mouth to stifle her shouts. She fought so strenuously that "the first time he didn't succeed". After she struggled for about a half hour and was unable to "speak any more" he removed her "panties", penetrated her person, and had an emission. She became ill after the experience and Cooper was about ready to attack her a second time when Wilson appeared with Mireille. Mireille testified that Wilson threatened her with his gun and also a knife which he kept pushing at her chest. He seized her throat, pushed her on the bed and "took away a button on my panties". He held her hands and also choked her so that she "had to surrender". He forcibly penetrated her person but she did not know if he completed the act. The testimony of the victims was also corroborated by their prompt complaint to Madame Lavina that they had been raped. The medical evidence disclosed a superficial redness on Lucienne's throat and a small abrasion on her left thumb. Although she testified that Cooper had an emission and there

was no evidence of spermatozoa, the fact may readily be explained by the fact that she had been married for 20 years. Mireille's neck also was superficially red and her hymen was perforated. Although there was no evidence of spermatozoa, this fact may also be explained by personal hygiene, or by her testimony that she did not know if Wilson completed the act, that is, had an emission. In any event, the slightest penetration of her genitals was sufficient, whether or not emission occurred (MCM, 1928, par.149b, p.165).

Accused were charged with and found guilty of raping each of the four women while "acting jointly and in pursuance of a common intent". When Lucienne and Mireille were actually attacked, the two accused were in separate but adjoining bedrooms. They also separated Germaine and Christiane after their arrival in the quarry but there was no evidence as to the distance between the couples. The fact that accused separated to commit the final indignity upon their respective victims is immaterial. The evidence clearly showed that on each night in question, accused went on a joint venture to secure sexual intercourse by any means whatsoever. It is abundantly evident that they aided and abetted each other in the final accomplishment of this purpose by the manner of their entry of the Weber and Pivel homes, their terrorization of the occupants of both houses, their imprisonment in the basement of the male occupants of the Weber home, and their removal from his house of Gustave Pivel. One who aids and abets the commission of rape by another person is chargeable as a principal whether or not the aider and abetter actually engages in sexual intercourse with the victim (CM ETO 3740, Sanders,et al, and authorities cited therein; CM ETO 3859, Watson and Wimberly; Cf: CM ETO 1453, Fowler). The Board of Review is of the opinion that the findings of guilty of rape were sustained by an abundance of competent and substantial evidence (CM ETO 3740, Sanders, et al, and authorities cited therein; CM ETO 2686, Brinson and Smith; CM ETO 3197, Colson and Brown; CM ETO 3859, Watson and Wimberly; CM ETO 4775, Teton and Farrell).

6. The evidence clearly sustains the findings of guilty of housebreaking (CM ETO 4589, Powell, et al, and authorities cited therein) Chg.II and Specs.). The evidence is also legally sufficient to sustain the findings of guilty of the assaults upon Gustave and Madame Pivel by threatening them with a bayonet (Specs.1,2, Chg.III). Although it was Wilson who actually put his bayonet on the necks of the victims, the evidence showed that Cooper was an active aider and abetter in the commission of the assaults alleged (see authorities supra). Similarly, the evidence fully warranted the findings of guilty of the wrongful imprisonment of the male occupants of the house occupied by Lucienne Barry and others, forcible entry and wrongful search of the Boidin home, and wrongful entry and trespass in the Frey dwelling (Specs.3,4,5, Chg.III). No authority had been given either accused to imprison French civilians or to enter and search their dwellings. Although Wilson appeared to be more actively engaged within the houses, the evidence showed that he was fully aided and abetted by Cooper. Such conduct was obviously service discrediting and violative of Article of War 96.

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7. The charge sheets show that accused Cooper is 22 years of age and was ordered to active duty at Fort Benning, Georgia, 26 December 1942. Accused Wilson is 26 years of age and was inducted at Fort Dix, New Jersey, 26 December 1942. No prior service of either accused is shown.

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

9. The penalty forrape is death or life imprisonment, as the court-martial may direct (AW 92).

E. Franklin Pitts Judge Advocate

Edward H. Legge Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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CONFIDENTIAL

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 28 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private First Class JOHN DAVID COOPER (34562464) and Private J. P. WILSON (32484756), both of 3966th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that as to each accused, the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. 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 5362. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5362).

3. Should the sentences 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 its files may be complete.

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

(Sentence ordered executed as to accused Cooper. GCMO 2, ETO, 3 Jan 1945
Sentence ordered executed as to accused Wilson. GCMO 30, ETO, 26 Jan 1945)

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

BOARD OF REVIEW NO. 1 29 DEC 1944

CM ETO 5363

U N I T E D S T A T E S)	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.)	
Private ROBERT L. SKINNER (35802328), 1511th Engineer Water Supply Company)	Trial by GCM, convened at Cherbourg, Department of Manche, France, 8 November 1944. Sentence: To be hanged by the neck until dead.

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

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

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

CHARGE: Violation of the 92 Article of War.

Specification: In that Private Robert L. Skinner, 1511th Engineer Water Supply Company, did at Hameau-Pigeon, France, on or about 1 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Miss Marie R. Osouf.

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. All 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 Officer, Normandy Base Section, Communications Zone, European Theater of Operations, approved the findings and sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

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

On 1 August 1944 Mademoiselle Marie Osouf (hereinafter referred to as "Marie") was living at the home of Madame Xavier Hebert in the village of Hameau-Pigeon, Quettetot ~~(Quettehou)~~, France, where she was employed as housemaid. About 8:45 pm French time, 2245 hours American time, on that day two colored American soldiers came to the Hebert house and demanded cider. The two women were alone at the time. Marie was in the courtyard. Madame Hebert sent Marie to bring some cider and the soldiers were each given about five glasses thereof, which they consumed. Thereupon the soldiers went down the road, but in a few minutes returned and asked for more cider. Again Madame Hebert sent Marie to bring it for them (R12,14,15,16). The taller of the two, identified at the trial by Madame Hebert as accused (R13) (but indicated by Marie to be his companion (R15), pursued Marie when she left, and caught her in the doorway of the cider shed or cellar situated behind the Hebert house (R13,15,17; Pros.Exs.B,E). According to Marie's testimony, he threw her on the floor (of the shed) struck her several blows on the head and dragged her out into the courtyard of the Hebert home. She screamed, the soldier released her and she fled along the road toward the farm of a neighbor named Mace (R15,16,17; Pros.Exs.B,D).

Meanwhile, according to Madame Hebert's testimony, the smaller of the two (whom she indicated to be accused's companion) (R13) aimed his carbine at her whereupon she disarmed him and fled toward the Mace farm. He pursued her, struck her on the head with his fists and helmet causing her to fall, and recovered his weapon. She then took refuge in the Mace home. During this episode she heard Marie shouting (R13-14).

Marie testified that while she was running down the road toward the Mace farm (Pros.Ex.B) she met the "smaller black soldier", whom she identified at the trial as accused. It was "rather dark" at this time. He struck her on the head with the stock of his "rifle", causing her to fall to the ground. Then both soldiers, one of whom displayed an open knife to her with a threatening gesture, dragged her through the gate into the orchard or field behind the cider shed (R16,17; Pros.Exs.B,C). There they removed her drawers and each in turn lay upon her, introduced his private parts into her private parts, and engaged in sexual intercourse with her. The "taller" soldier had intercourse with her first, during

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which time the "smaller" one took the "rifle" of the other and "looked through the gate" (R16,17). Marie denied that she inserted the penis of either soldier in her person or did anything to assist them in having intercourse with her(R17). She further testified that she did not put up any resistance while she was in the orchard but that during intercourse the "taller" soldier twice slapped her on the face (R18). After the soldiers completed the acts of intercourse they "went down the orchard by the apple tree" and Marie took refuge "at Mr. Laisne's" (apparently a neighbor) (R17).

Four U. S. Army Signal Corps photographs were authenticated and identified as having been taken at the scene of the alleged offense during an investigation thereof conducted about 2 August by Captain Henry Rollman, Assistant Provost Marshall, Headquarters XII Corps. They were admitted in evidence without objection by the defense (R10-11; Pros.Exs.B,C,D,E). They represented the cider shed (B), the orchard or field behind it (C), the road from the cider shed to the Mace farm (D), and the barn, cider shed and rear area of the Hebert home (E). Marie testified that the gate shown in Pros.Ex.B led "into the orchard where I was raped" and that Pros. Ex.C represented "the field where I was raped" (R17).

About 1:30 am 2 August, Captain Ralph R. Jardine, Medical Corps, 101st Evacuation Hospital, Nancy, France, examined Marie Osouf as a patient at that hospital (R6-7). He testified that his examination

> "disclosed a nineteen year old white girl who was found to be suffering from a laceration of the forehead and a depressed fracture of the skill. She also had a bruise on her cheek and she had a wound of her right shoulder" (R7).

A U.S. Army Signal Corps photograph of Marie, identified as having been taken on 2 or 3 August at the hospital, was admitted in evidence without objection by the defense (R10-11; Pros.Ex.A). On 4 or 5 August Captain Robert A. Dionne, 101st Evacuation Hospital, performed a vaginal examination upon Marie Osouf. He testified as to his findings as follows:

> "On Vaginal examination the introitus was injected ~~infected~~ or inflamed just below the hymen, the edge of the hymen. The hymen had two small lacerations along the margin on each side laterally. These small lacerations appeared to be of recent origin. On digital examination I could not introduce two fingers into the vagina without causing discomfort to the patient. So I

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> was able to duly examine with only one finger. The examination was otherwise negative" (R8).

Witness did not conclude that the girl was a virgin prior to the hymeneal tear (R9). She remained in the mentioned hospital until 7 August, when she was transferred to a French hospital (R7-8). Marie testified that it was about five weeks before she was able to return to work (R17).

Early in August Captain Rollman, in the course of his investigation of the alleged offense in which he was assisted by Staff Sergeant John B. Nesfield, Military Police Platoon, XII Corps, took accused into custody and duly warned him of his rights in the premises. Without inducements or threats, accused made an oral statement which was transcribed by a reporter and corrected, initialed and signed by accused (R18-19,20). The prosecution offered the statement in evidence, but the law member excluded it, stating that confessions (made to a military superior) should be received with caution and that "a prima facie case has been made from the evidence previously introduced" (R19,21). In the course of the "talks" between the investigators and accused, he admitted that he had been Hameau-Pigeon on the night in question and identified the soldier who was with him as Private Waiters Yancy (R19,21). Captain Rollman testified that he knew Yancy, as well as accused, and that he believed Yancy was the smaller of the two (R20).

Captain Jardine examined accused about 2 August at the 101st Evacuation Hospital and found a small lacerated wound about an inch in length at the base of his right thumb and a still smaller laceration one half inch below the nail of that thumb. The wounds were consistent with teeth bites. Accused admitted to Captain Jardine that they were in fact teeth bites but did not say who bit him (R7). Sergeant Nesfield testified that during the investigation he noticed a wound on accused's right thumb (R21). Accused first explained

> "that he had cut his hand on KP, or words to that effect and later when he made the statement in the presence of the stenographer he said that he had been bitten. * * * By a girl within the field".

Witness stated that the girl's name was Marie Osouf (R22).

4. After a full explanation of his rights, accused elected to remain silent (R22).

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5. The following well-settled legal principles govern the situation disclosed by the evidence:

"Rape is the unlawful carnal knowledge of a woman by force and without her consent.

Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

The offense may be committed on a female of any age.

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to and are called for by the circumstances, the inference may be drawn that she did in fact consent" (MCM, 1928, par.148b, p.165).

"Where the act of intercourse is accomplished after the female yields through fear caused by threats of great bodily injury, there is constructive force, and the act is rape, actual physical force or actual physical resistance not being required in such cases, even where the female is capable of consenting. It has been held that, where the female yields through fear, the offense is rape, whether or not the apprehension of bodily harm is reasonable, although there is also authority that the threats must create a reasonable apprehension of great bodily harm, and that the threat must be accompanied by a demonstration of brutal force or a dangerous weapon, or by an apparent power of execution" (52 CJ, sec.32, p.1024) (Underscoring supplied).

"Consent, however reluctant, negatives rape; but where the woman is insensible through fright, or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape. * * * Nor is it necessary that there should be force enough to create 'reasonable apprehension of death.' But it is necessary to prove in such case that the defendant intended to complete his purpose in defiance

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of all resistance" (1 Wharton's Criminal Law, 12th Ed., sec. 701, pp.942-943) (Underscoring supplied).

(a) Accused was positively identified at the trial by both Madame Hebert and Marie as one of the two colored American soldiers who came to the Hebert home on the evening in question and demanded cider. Marie was positive in her identification of accused as the colored soldier whom she met while she was attempting to escape from his companion and who felled her with the stock of his rifle. She was equally positive in her testimony that thereafter both colored soldiers dragged her to the orchard behind the cider shed where they both removed her drawers, successively effected penetration of her person and engaged in sexual intercourse with her. In view of this unambiguous evidence of accused's identity as one of the assailants, corroborated by his own admission during investigation of the case that he was at the scene of the alleged crime with another colored soldier on the evening in question and that the wounds on his thumb were the result of a bite by "a girl within the field", the confusion in the evidence concerning the relative size of the two soldiers is not important. Madame Hebert testified that accused was the taller of the two soldiers and Captain Rollman testified he believed that Yancy, the other soldier, was smaller than accused. Marie, on the other hand, testified that accused was the smaller of the two. She also testified, however, that it was "rather dark" just preceding the assault. Her confusion, evidently engendered by the excitement and surprise of the assault, is readily understandable and in no way impeaches her positive identification of accused as one of the two soldiers who had intercourse with her. There was convincing evidence of accused's identity as the culprit to support the court's findings of guilty and the same will therefore not be disturbed upon appellate review (CM ETO 4589, Powell et al; CM ETO 4608, Murray, pp. 9-10; and authorities there cited).

(b) That accused penetrated the private parts of Marie Osouf with his penis is established by her clear testimony to this effect, corroborated by the testimony of Captain Dionne that upon vaginal examination of Marie less than four days following the incident, he found the introitus injected or inflamed just below the hymen, which bore lateral lacerations of recent origin on each side thereof, and that the introduction of more than one finger into the vagina caused discomfort to the patient. The first element of the offense, carnal knowledge of Marie by accused, was established beyond contradiction (CM ETO 5052, Malley; CM ETO 3933, Ferguson and Rorie, p.8; and authorities there cited).

(c) That accused's penetration of Marie's person was accomplished by force and without her consent is also clearly established. Marie's testimony that she did not resist while she was in the orchard at the time of the attacks upon her is perfectly consistent with lack of consent on her part when considered in the light of other facts in the case. She had already been pursued,

thrown to the floor of the cider shed, beaten on the head and dragged out into the courtyard by the "taller" soldier, during which time she screamed and was heard by Madame Hebert. Thereafter she had escaped from him only to be struck on the head with a carbine stock and felled by the "smaller" soldier, whom she identified as accused, and then dragged by both into the orchard. One of the two displayed an open knife in a threatening manner on the way to the orchard, where both soldiers removed her drawers. While the "smaller" soldier was engaged in intercourse with Marie, the "taller" one took his weapon from him in order to stand watch at the orchard gate. By the time accused and his companion effectuated their purpose, Marie's terrorization was complete. She testified that she did nothing to assist them in effecting intercourse with her. Resistance by the victim at some point, moreover, is evidenced by the teeth marks discovered upon accused's thumb following the incident, which he admitted were caused by a bite by "a girl within the field". The following language in CM ETO 3933, Ferguson and Rorie pp.10-11, governs the instant case:

> "The evidence in this case presents a pattern which has made its unwelcomed appearance with increasing frequency since the invasion of the continent of Europe by American military forces in cases wherein colored American soldiers are charged with the heinous crime of rape of French female citizens. Cases of this type show the victim in an apparently passive, non-resistant attitude at the time of the actual intercourse or at least exhibiting only a minimum of resistance. However, such non-inculpatory evidence is but one small facet of the complete evidentiary matrix, which cogently reveals that the woman has been reduced to a state of submission by accused's threatening and menacing use of firearms and other lethal weapons, has often suffered personal violence and physical injury and has been placed in fear of her life or great bodily harm. Under such influenceshe has submitted to intercourse (CM ETO 3141, Whitfield, CM ETO 3709, Martin; CM ETO 3740, Sanders et al; CM ETO 3859, Watson and Wimberly; CM ETO 4017, Pennyfeather; CM ETO 4194, Scott). Of such situation the Board of Review has commented thus:
>
> > 'It is apparent from the foregoing that an accused may be guilty of accomplishing rape by mere threats of bodily harm as distinguished from rape by means of actual force and violence. In each instance the offense must be consummated without the voluntary consent of the victim. Rape accomplished through force and violence

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> ordinarily requires proof that the victim exercised all of her powers of resistance, consistent with the surrounding circumstances. Such offense assumes that the victim does resist and her opposition is overcome by physical force of her assailant. Rape accomplished by threats of bodily harm assumes that she does not resist but upon the contrary that she is prevented from doing so through fear caused by the assailant's threats to inflict upon her great bodily harm (People v. Battilana, ---Cal.App. (2nd) ---, 128 Pac.(2nd) 923)' (CM ETO 3740, Sanders et al)".

It may be observed that the most potent threat to Marie consisted in the fact that at the time of the rape she had already suffered brutal violence at the hands of both soldiers. Her testimony to this effect was amply corroborated by that of Captain Jardine that her forehead was lacerated, her skull fractured, her cheek bruised and her shoulder wounded. She could well expect further and even more bestial violence if she did not submit to the desire of accused, who was armed with a carbine. The findings of guilty were fully justified by convincing evidence and will not be disturbed by the Board of Review upon appellate review (CM ETO 5052, Malley).

6. The ruling by the law member excluding the pre-trial statement by accused was manifestly improper in view of the affirmative evidence of its voluntary character. The error, however, benefited rather than harmed accused and was thus immaterial.

7. The charge sheet shows that accused is 20 years three months of age and was inducted 21 May 1944 (the review by the staff judge advocate, Normandy Base Section, shows that the correct year is 1943) at Fort Thomas, Kentucky, 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 tiral. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

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

W. Franklin Riter Judge Advocate

Edward Kitzgerald Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private ROBERT L. SKINNER (35802328), 1511th Engineer Water Supply Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, 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 5363. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5363).

3. 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 ordered executed. GCMO 32, ETO, 3 Feb 1945)

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

BOARD OF REVIEW NO. 1 4 JAN 1945

CM ETO 5389

U N I T E D S T A T E S	V CORPS
v.	Trial by GCM, convened at Headquarters V Corps, Rear Echelon Command Post, near St. Vith, Belgium, 24 October 1944.
First Lieutenant SAM F. POMERANTZ (O-1106409), Headquarters 254th Engineer Combat Battalion	Sentence: Dismissal.

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

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

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

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

Specification 1: In that First Lieutenant Sam F. Pomerantz, 254th Engineer Combat Battalion, being in command of a detail of men on patrol in search of germans, did, in the vicinity of Mersch, Luxembourg, on or about 23 September 1944, wrongfully and unlawfully allow, permit and suffer one Private Ovadia I. Mayberg, Company B, 254th Engineer Combat Battalion, to dispose of one rifle, of the value of about $80.50, issued for use in the military service of the United States, by trading the same away.

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Specification 2: In that * * * being detailed to make an informal investigation in the matter of one Private Ovadia I. Mayberg, Company B, 254th Engineer Combat Battalion, trading away a rifle, of the value of about $80.50, issued for use in the military service of the United States, did, in the vicinity of Mersch, Luxembourg, on or about 24 September 1944, wrongfully and deliberately induce and ascertain that the said Private Ovadia I. Mayberg would conceal the fact that he, the said First Lieutenant Sam F. Pomerantz had given his permission and approval to the trading away of the rifle.

Specification 3: In that * * * did, in the vicinity of Rocherath, Belgium, on or about 9 October 1944, in an affidavit made by him in a formal investigation of court-martial charges pursuant to AW 70 and paragraph 35a, Manual for Courts-Martial, with intent to deceive, make under oath in answer to the question: "Did you give Private Mayberg any advice pro or con in regard to him trading his M-1 rifle, while in the woods", a statement in substance as follows: "No, other than I wouldn't trade my carbine for such junk as a P-38", which statement he did not then believe to be true.

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

Specification: In that * * * did, in the vicinity of Rocherath, Belgium, on or about 9 October 1944, in an affidavit made by him in a formal investigation of court-martial charges pursuant to AW 70 and paragraph 35a, Manual for Courts-Martial, with intent to deceive, make under oath in answer to the question: "Did you give Private Mayberg any advice pro or con in regard to him trading his M-1 rifle, while in the woods", a statement in substance as follows: "No, other than I wouldn't trade my carbine for such junk as a P-38," which statement he did not then believe to be true.

He pleaded not guilty to and was found guilty of both charges and their specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, V Corps, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, though deemed inadequate punishment

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for such conduct on the part of an officer, and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

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

On 23 September 1944 accused, then executive officer of the 254th Engineer Detachment (R31), was on detached service with V Corps Provisional Military Government Police Force Battalion under the command of Captain William W. Bainbridge, Headquarters 254th Engineer Combat Battalion, stationed in the chateau of Mersch, Luxembourg (R30, 31). On the morning of that day, Bainbridge organized a searching party which, with the help of some Maquis militiamen, searched nearby woods for two German soldiers reported to have been seen there (R6,23, 25,31-32). This searching party was divided into two patrols, of one of which accused was in charge (R6,25,32). Private Ovadia I. Mayberg, Company B, 254th Engineer Combat Battalion, was in the other patrol and during his patrol activities endeavored to acquire a P-38 pistol with which a Maquis militiaman, on patrol with him, was armed. The Maquis was unwilling to trade his P-38 for cigarettes or francs, but indicated he would trade for Mayberg's rifle (R6,7, 15,42-43). At a point where the two patrols met in the woods, Mayberg, within the hearing of Private Charles O. E. Kaufman, 461st Antiaircraft Artillery Battalion, another member of his patrol (R18,22,24, 26), said to accused, "I would like to ask your advice on a certain matter" and inquired "if he would trade his carbine or M-1 rifle for a German pistol". Accused replied, "If it is a Luger, yes". Mayberg said, "No, it's a P-38". Accused advised him, "If it's a P-38, make sure it's in good condition". Mayberg remarked, "I have a chance to make a trade" as he left and walked over to the Maquis (R9,16-17, 24). Later in the morning, Mayberg effected this exchange, delivering his rifle to the Maquis and receiving in return the P-38 pistol (R9, 10,18,17,20,45). In the "chow line" at noon (23 September) accused saw Mayberg with the weapon on his hip and commented "See you got the pistol". Mayberg said "Yes" (R10).

The following morning Bainbridge learned of this exchange of arms and ordered accused to obtain the pistol from Mayberg and find out where the rifle was (R32). Accused protested about the propriety of this, arguing that it was Mayberg's property (R32,33,34, 35), but did go to the building where Mayberg was staying, called him aside and said he wanted to speak to him in private. They went into a back room where accused remarked: "Well, the Captain knows about the pistol". He added that

> "he didn't think it was a very serious matter. He just thought the Captain wanted the pistol so he could get the Maquis and trade it back for the rifle, and didn't think it would help any to say anything about what went on in the woods, and if I didn't say anything about it, he wouldn't say.

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anything about it, and I agreed to that" (R11).

Accused was making reference "to our conversation we had in the woods". Mayberg surrendered the pistol to him (R12).

On 9 October at a formal investigation of court-martial charges preferred against Mayberg for violation of the 84th Article of War, accused was present and, after being duly sworn, in answer to the question "Did you give Pvt. Mayberg any advice pro or con in regard to him trading his M-1 rifle, while in the woods", stated: "No, other than I wouldn't trade my carbine for such junk as a P-38" (R36,37; Pros.Ex.A). It was stipulated by the prosecution and defense, with accused's consent, that the value of a United States Army M-1 rifle was $80.50 (R22). Private Mayberg was armed with an M-1 rifle on the morning of 23 September (R7,8,9, 24,27).

4. (a) On behalf of the defense, it was shown that Technician Fourth Grade Milton Schultz, 461st Antiaircraft Artillery Automatic Weapons Battalion, was on a patrol in search of Germans on 23 September 1944 with accused (R43). He saw Mayberg in another patrol coming over the hill. Mayberg came up and

> "asked us if we would have traded a rifle for a German weapon. We didn't say anything. He pulled a P-38 out of his shirt or pocket".

He said, "How do you like my new gun. I just traded with a millet" (R44). A little later Schultz saw that Mayberg gave "the millet his M-1 and told him to keep it under cover" (R45).

Cross-examined by the prosecution, Schultz testified that he could not say whether Mayberg talked with accused after their parties joined forces on the hill (R45,46).

Private Robert E. Butt, of the same organization, rode back in a truck with Mayberg and Private Charles O. E. Kaufman after the patrol and heard Mayberg say that he had traded his rifle for a pistol (R47,48) and that

> "he had permission from the Supply Sergeant to trade his rifle for a pistol of better value or just as good a one" (R49).

(b) Accused, upon being advised of his rights, elected to be sworn and to testify in his own behalf (R55). With reference to the alleged conversation between Mayberg and himself, he testified,

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"Be it the pleasure of the court, I would rather say it wasn't a conversation. It was a conversation in the sense words were exchanged. I didn't at any time believe I was addressing any particular man".

He was

"watching my patrol, and I noticed to my left an unknown man appeared. I hadn't seen him previously that day. He was talking and I gained he was speaking to me. I understood him to ask me, 'Would I trade my carbine for a pistol' that much I gained. A lot of things entered my mind. One was the proposed change of T/E in the organization since we were no longer in the Combat Engineers. Also the Captain had a pistol he found that was the joke of the organization, because it hadn't ejected and fired properly. I answered him, "I wouldn't trade my carbine for a piece of junk like a P-38". Then the man took off very rapidly".

He definitely did not hear Mayberg make any statement to the effect that he had chance to trade his rifle. There had been in his organization some discussion as to a change of weapons (R56), and

"There were two approaches. On the second day the Military Provisional Government Detachment was formed, Colonel Mathews made a statement to all the officers of the Military Police Government Detachment that a new change of T/E be forwarded to him. The other thought was we would probably come across an arsenal store of arms captured. The Colonel was willing to use that equipment".

The next thing he heard about the matter of exchanging weapons was the next morning when

"Captain Bainbridge and I had just finished washing, and I am not sure whether he was looking for his launcher or M-1. There was some reason why he wanted the M-1. He asked me if I knew what happened to his M-1. I told him I didn't know. He turned to the first sergeant, Sergeant Toerpe and asked him. Sergeant Toerpe said, 'Yes, Private Mayberg had the weapon'. He said, 'How come?' He said, 'Private Mayberg had traded his rifle for a pistol'. The Captain immediately became very angry

> and took out the Courts-Martial Manual, and, I shouldn't say inferred, but he was rather rough on me in the sense that he believed I had knowledge of the trade. The more he insisted, I insisted I had no knowledge the trade had been conceivably made".

Bainbridge "blustered around a little bit like he did in court here" and said, "Go to Private Mayberg and get the pistol" (R57). Accused then went where Mayberg was and

> "All the men were in a house and there was a lot of noise. I asked Private Mayberg to step in the back room where I could speak to him in private. The first thing I said was, 'I'm here to investigate whether you traded your rifle for the pistol you are wearing'. The man was wearing a pistol underneath his arm. The man said, 'Yes. I traded my rifle for this pistol'. He was moving to take out the pistol to show it to me. I was disgusted and I said, 'I don't care to see it'" (R57).

Accused wrote down a statement dictated by Mayberg regarding the exchange and description of the Maquis with whom he had dealt and offered him some advice, saying

> "I advised him to tell the truth. I saw he had made a mistake, but the best thing for him to do was to tell the truth. Just previous to that I asked how he was going to plead guilty or not guilty. I explained it to him by telling the truth or lying your way out. I gave him advice. I told him to tell the truth, the whole truth about the matter".

He made no statement to Mayberg relative to anything that had developed in the woods the day before and "The question of the woods never came up". He did not recall seeing Mayberg in the mess line but "it is possible I might have seen him" (R58).

On the 9th of October "Lieutenant Shaffer" contacted him relative to an investigation of a court-martial charge. Accused was then sworn as a witness and answered a series of questions. The following excerpt from the record of trial is pertinent:

> "Q. Shortly after that was a transcription of questions and answers shown to you?
> A. Yes sir. They were.

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Q. Did you glance over or read that statement at that time?
A. I hate to admit my own guilt. I guess I didn't.

Q. Did you glance over the paper?
A. No sir.

Q. Did you sign the statement that was prepared by Lieutenant Shaffer?
A. Yes, sir.

Q. Lieutenant Pomerantz, I show you Prosecution Exhibit A, is that your signature at the bottom thereof?
A. Yes sir. This was added the next day.

Q. The first page was initialed the next day?
A. Yes sir. Just prior to seeing the Major.

Q. Did you in that statement make any statement that you know was false?
A. No. There is no statement in there that is false" (R59).

Cross-examined by the prosecution, accused was asked,

"Are you positive that you never said to Private Mayberg in answer to the question about the advisability of trading a carbine or rifle for a pistol, 'If it's a Luger, O.K.'".

Accused replied, "I don't recall any such instance, sir. There wasn't time" (R61). There were also questions and answers as follows:

"Q. You were present in court when Private Mayberg testified and when Private Kaufman testified, were you not?
A. Yes sir.

Q. You heard them both testify to the effect you made some statements to Private Mayberg concerning a Luger pistol. Do you recall those statements those witnesses made?
A. I don't get your point, sir.

Q. I am just asking you a question.
A. I didn't hear the question, sir.

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Q. It is my recollection that both Private Mayberg and Private Kaufman when they testified here in court said that after Private Mayberg had asked you some advice concerning trading an M-1 or carbine for a pistol, you said substantially as follows: 'If it's a Luger, yes' or 'If it's a Luger, do it.' Do you recall having made any such reference to a Luger?
A. No, I don't see how it enters in at all.

Q. I am asking you if you wish the court to understand you testify under oath that you didn't make such a statement?
A. Yes sir.

Q. You are positive you didn't make such a statement?
A. A Luger pistol? Yes sir" (R62).

Accused was further asked,

"You heard Private Mayberg testify you came up to him in the chow line that afternoon and said, 'See you got the P-38.' Are you prepared to say definitely or not whether you said that?"

and answered, "No sir. I am not definitely prepared to say one way or the other" (R64).

5. With reference to Specification 1 of Charge 1, there was substantial and compelling evidence that accused gave his approval to a "trading away" of an M-1 rifle by Private Ovadia I. Mayberg at the time and place alleged. Such act by Mayberg constituted a violation of the 84th Article of War (CM 207652, Fay and Morris 8 B.R. 365).

"Although there may be no direct evidence that the property was issued for use in the military service, still circumstantial evidence such as evidence that the property shown to have been sold or otherwise disposed of by the accused soldier was of a type and kind issued for use in the military service might warrant the court in inferring that it was so issued" (MCM, 1928, Sec.144a, p.158).

There is substantial evidence from which the court could infer that Mayberg's M-1 rifle was of government issue. (R11,19,22).

It was within the province of the court to disbelieve the accused's denials that he said to Mayberg, "If it's a Luger, O.K." 5389

or words to that effect. It was admitted by accused that Mayberg did inquire of him if he could trade his carbine for a pistol. The promptness with which Mayberg thereafter completed the trade of his rifle indicates, along with other pertinent evidence, that accused gave Mayberg to understand he could properly do so. Such conduct constitutes a disorder or neglect prejudicial to good order and military discipline within the meaning of Article of War 96 (Winthrop's Military Law and Precedents - Reprint, p.726).

With reference to Specification 2 of Charge I, it was similarly within the province of the court to believe the prosecution's evidence that accused, under the circumstances alleged, deliberately induced Mayberg to conceal the fact that accused had voiced approval of the trade above described, and to disbelieve the testimony of accused in this regard. The evidence indicates that accused attempted to suppress evidence that incriminated him in a law violation. He was properly found guilty of this Specification, likewise a disorder prejudicial to good order and military discipline (Ibid., pp.726,728), and also conduct of a nature to bring discredit upon the military service (Ibid., p.722), within the meaning of Article of War 96.

As to Specification 3 of Charge I, it was shown beyond any reasonable doubt that accused made a statement, known by him to be false, in an affidavit used in a formal investigation as alleged, - an offense specifically designated as a violation of Article of War 96 (MCM, 1928,pars.152a,152c; pp.187,191; CM ETO 3456, Neff).

The Specification of Charge II is in language identical with that in Specification 3, Charge I and describes conduct that is a violation of Article of War 95 as well as Article of War 96. The evidence fully supports the court's findings that accused intentionally made a false statement. For an officer to make knowingly a false statement in the course of an official investigation is an offense under the 95th Article of War (MCM, 1928, par.151, p.186; CM ETO 1786, Hambright: CM ETO 1447, Scholbe; CM ETO 1538, Rhodes; CM ETO 1953, Lewis). The conviction of an officer under both Articles on the same facts is not illegal (CM ETO 1197, Carr; McRae v. Henkes 273 Fed.108, Certiorari denied 258 U.S. 624, 66 L.Ed. 797).

6. The charge sheet shows that accused is 25 years and one month of age. He entered on extended active duty 11 November 1942 per paragraph 4, Special Orders 197, Headquarters Engineer School, Fort Belvoir, Virginia. 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

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

8. A sentence of dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 96.

/s/ Franklin Potter Judge Advocate

Elwood K. Sergent Judge Advocate

Edward L. Stevens Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 JAN 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of First Lieutenant SAM F. POMERANTZ (O-1106409), Headquarters 254th Engineer Combat Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

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 5389. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5389).

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

(Sentence ordered executed. GCMO 9, ETO, 9 Jan 1945)

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

BOARD OF REVIEW NO. 1

18 JAN 1945

CM ETO 5393

U N I T E D S T A T E S	35TH INFANTRY DIVISION
v.	Trial by GCM, convened at Oriocourt, France, 6 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private LEON L. LEACH (16015341), Company L, 137th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Leon L. Leach, Company L, 137th Infantry, did, at Aboncourt, France, on or about 12 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 returned to his organization on or about 6 November 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. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at

the time 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 established that accused, a rifleman in Company L, 137th Infantry, while proceeding with his squad and company at about 2100 hours 12 October 1944 from a defensive position in the vicinity of Aboncourt to a forward assembly area preparatory to an attack against the enemy, absented himself without authority and remained absent until his return to the company on 6 November 1944 (R8,9,10; Pros.Ex.A). As they moved up to the forward assembly area, all the members of accused's squad knew "they were going to attack the next morning", and the squad in fact attacked the enemy the next day (R9). After he was advised of his rights under Article of War 24, accused voluntarily made the following signed statement to the investigating officer:

> "On or about 12 October 1944 while the Company was leaving reserve area in vicinity Abaucourt, France and going up to forward assembly area, I dropped out and went AWOL. I just couldn't stand those big shells any more. I stayed around the small towns in the rear area until I was picked up about the 7th of November, 1944. I don't believe I could take it up at the front now, but would be a nuisance" (R12; Pros. Ex.B).

4. After his rights were explained to him, accused elected to make the following unsworn statement through his counsel:

> "The accused volunteered for service in the army on the 6th of August,1940. He spent his civilian life as a farm laborer and as a laborer for the railroad and was on the railroad line doing work. He also worked on the public roads. After he volunteered for service, he was assigned to the 32nd Infantry and received his basic training at Fort Ord, California. He was with this organization for about nine months, after which time he was transferred to Camp Roberts. He

spent about two years there. After having spent some time at the replacement training center, he volunteered for the paratroops and was sent to Fort Benning for training in that branch of the service, and spent about six months there, four of which were in the hospital. During one of the practice jumps from the towers, his leg was broken and as a result, he was hospitalized. Due to this injury, he was not allowed to complete his training, and he was transferred to the 76th Division at Camp McCoy, Wisconsin. While there, he volunteered for overseas service, and was sent to the European Theatre of Operations as a replacement. He joined the 137th Infantry on the 17th of July, 1944, while it was north of St. Lo in the initial stages of its campaign in the hedgerow country. He has been present with Company 'L' or with regiment until the 12th of October, 1944. During this time, he has not left his organization, but has stayed with it through its many engagements. The accused has had difficulty keeping up on road marches, due to the condition of his ankle, brought about by his injury while with the paratroopers. However, he has kept up as well as he could. He has been subjected to shelling, as everyone of his organization has. After the crossing of the Moselle River, a particularly bitter engagement for the 137th Infantry, the accused states that his nerves began to shatter. He did, in fact, on the 12th of October, go to the medical aid station for treatment. His ankle had been bothering him. In attempting to rejoin his organization, he obtained a ride, and as they moved up, shellfire came in, so that the driver of the jeep could not go forward. The accused turned back then, and spent the night alone. The next day, he did not return to his organization. He went absent without leave until about the 6th of November. The accused states that while he feels he would probably be a nuisance in the front lines, he is willing to go back to his organization and try to stay up there again" (R13-14).

The defense offered no evidence.

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5. All the elements of the offense charged were proved by competent, substantial evidence (CM ETO 1664, Wilson; CM ETO 4165, Fecica; CM ETO 4743, Gotschall; CM ETO 5293, Killen; CM ETO 5555 Slovik; CM ETO 5565, Fendorak).

6. The charge sheet shows that accused is 25 years of age and enlisted 6 August 1940. (His service period is governed by the Service Extension Act of 1941.) No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors 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 pentitentiary 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) and 3 b).

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 JAN 1945 TO: Commanding General, 35th Infantry Division, APO 35, U. S. Army.

1. In the case of Private LEON L. LEACH (16015341), Company L, 137th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. This accused has been a soldier for four and a half years. The record indicated that he volunteered for paratroop duty and broke his leg in a practice jump; later he volunteered for overseas service and served with the division from July 17 to October 12, 1944. There were no previous convictions. Since his offense is purely military and caused by military service, I think his confinement should be served in a military institution rather than in a penitentiary. Such change of place may be made in the published court-martial order. You designated a disciplinary barracks as the place of confinement of Edward L. Fuller and John Brucker, Jr., which are similar cases with like sentences.

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 5393. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5393).

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

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

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17 FEB 1945

BOARD OF REVIEW NO. 1

CM ETO 5394

U N I T E D S T A T E S	35TH INFANTRY DIVISION.
v.	Trial by GCM, convened at Oriocourt, France, 7 December 1944. Sentence:
Private WOODROE W. QUINN (34871357), Company F, 137th Infantry.	Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Woodroe W Quinn, Company "F", 137th Infantry, did, at Chartreuse, France on or about 21 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 returned to his organization on or about 7 November 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. 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 50½.

3. Prosecution's evidence proved the following facts:

On 21 September 1944 accused was a rifleman in the 3rd Platoon, Company F, 137th Infantry. The platoon was located at Chartreuse, France. The company was under orders to cross the Meurthe River and capture a convent on the west bank thereof (R8). Accused had knowledge of the mission (R9,11). While the company was advancing from Chartreuse to the river, accused was with his platoon but he fell out of the line of march (R9,12). The company made the attack and was under enemy fire (R9). It crossed the river successfully and captured the convent. Accused's absence was then discovered (R8). He did not cross the river with his platoon or engage in the fighting (R9,11). In a voluntary pre-trial statement given during the course of the investigation (R13), accused stated:

> "I fell out of the column of Company "F" to relieve my bowels on the 15th of September, 1944. I fell back in with Company "H" and crossed the Meuthe River with them about the 17th of September. We crossed to Laneveville, France. I left Company "H" there and went on to Nancy and hung around Nancy until about the 7th of November when MP's picked us up in Nancy.
>
> I soldiered ok all the way across France but when we crossed the Moselle I spent 15 hours in the water and it made me feel so bad I could not stand it up with the Company any more. Every time I started to go back I would think about how bad that was and couldn't do it. I would not be willing to go back to the Company" (Govt.Ex.B).

Accused's platoon commander encountered accused on a street in Nancy during the latter part of October, and made arrangements with him to meet him shortly thereafter with the intention of taking him back to the company. Accused did not keep the appointment (R9).

4. In an unsworn statement made through his counsel, accused asserted that at the crossing of the Moselle River he was "pinned-down under fire" for 15 hours. Thereafter he was unable to stand exposure to shell fire. On 21 September, as his company marched to the Meurthe River to make an attack, he dropped out of line to defecate. Thereafter he could not find his company and was taken to Company H, with which he did make the river crossing. He remained with Company H for three days and then went to Nancy where sometime later he encountered his company commander (Captain Giacobello) and arranged to meet him at the Red Cross Club. He went in search of a friend to accompany him and missed the appointment with the company commander. Thereupon he immediately prepared to return to his company. He reached an ordnance outfit where he was arrested, about 7 November, by military police and returned to his regiment. Defense counsel further stated:

> "He fought clear across France in all the battles, but exposure to shelling got the best of him. He would be more than willing to serve in any capacity that doesn't require him to be in the front lines. He didn't think he was deserting his regiment in combat, because his regiment was not fighting when he left" (R15).

5. The evidence is clear and undisputed that accused possessed knowledge that his company was about to make a river crossing in the face of enemy opposition. By his own assertion, he had previously participated in the operations involved in the crossing of the Moselle River. He therefore understood the nature of the operations and the threat to his own life and safety. The inference is reasonable and just that accused absented himself with the specific intent of avoiding the perils and hazards of combat which confronted him. His guilt of the offense charged was proved beyond doubt (CM ETO 4570, Hawkins; CM ETO 4701, Minnetto).

6. The charge sheet shows that accused is 29 years of age. He was inducted 21 August 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 accused were committed during the trial. The Board of Review is of the opinion that the record is legally sufficient to support the findings of guilty and the sentence.

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) and 3b).

/s/ Franklin Riter Judge Advocate

/s/ Malcolm C. Stevens Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 FEB 1945 TO: Commanding General, 35th Infantry Division, APO 35, U. S. Army.

1. In the case of Private WOODROE W. QUINN (34871357), Company F, 137th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5394. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5394).

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

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

BOARD OF REVIEW NO. I

16 FEB 1945

CM ETO 5396

U N I T E D S T A T E S	35TH INFANTRY DIVISION
v.	Trial by GCM, convened at Oriocourt, France, 6 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private GEORGE R. NURSEMENT (20934940), Company M, 137th Infantry	

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

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

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

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

Specification: In that Private George R. Nursement, Company "M", 137th Infantry did, in the vicinity of Ormes, France on or about 11 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 returned to his organization on or about 18 November 1944.

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

Specification: In that * * * having received a lawful command from Captain William E Sinex, his

> superior officer, to report to the Company Commander, Company "M", 137th Infantry, did, at Gros-Tenquin, France on or about 23 November 1944, willfully disobey the same.

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. 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 50½.

3. Accused, an ammunition bearer in the mortar platoon of Company M, 137th Infantry, was wounded on 13 July 1944 during the operations of the company at or near St. Lo, France (R7,15; Def.Ex.1). He was hospitalized in England, but was returned to his company in September 1944. He arrived at the company kitchen on 11 September 1944 (R10). At that time the company was located near Ormes, France. It was engaged in making the crossing of the Moselle River in support of the 3rd Battalion of the regiment (R7). The morning report of the company (R7; Govt.Ex.A) of 24 November 1944, correcting the morning report of 14 October 1944, showed that accused was absent without leave from 11 September 1944 to 18 November 1944. In an extra-judicial statement voluntarily made during the pre-trial investigation accused admitted he

> "returned to the * * * kitchen area from the hospital sometime in the first part of September; 1944. The kitchen was a few miles from the Moselle River, France at the time, on the west side. * * * I understood the Company was up forward planning on crossing the Moselle. I did not feel well enough for duty up there and went AWOL from the kitchen area. * * * I left on foot. About two months later I was apprehended at Revigny near Bar le Duc, France. * * * Captain Sinex gave me an order to go back to my Company on 23 November and I refused to do it" (R13,14; Govt.Ex.C).

After his rights were explained, accused elected to make an unsworn statement through his counsel which included the declaration that accused

> "was sent to the kitchen area where he was slated for transportation to his company,

Company "M". The accused felt that he was in no condition to return to combat, and rather than go up front, left his organization from the kitchen area" (R15).

After his apprehension and while he was being held by the Service Company of his regiment, he received from Captain William E. Sinex, company commander, a direct order "to report to the Commanding Officer of Company 'M', 137th Infantry, for duty". The oral order was confirmed in writing and was served on accused. He acknowledged receipt of the same (R11,12; Govt.Ex.B). Accused refused obedience (R12).

a. Charge I and Specification: The evidence clearly shows that accused deliberately left the kitchen area after he had gained knowledge that his company "was up forward planning on crossing the Moselle". It was in fact supporting the 3rd Battalion of the regiment in the crossing operations. The court, under the circumstances shown, was justified in inferring that the "crossing" was a combat activity, opposed by the enemy, and that it was of a hazardous nature. Although the combat elements of the company were "up forward" an unstated distance from the kitchen, the kitchen was certainly a part of accused's "organization". It was the point where accused gained information as to the nature of his expected duties when he reached his platoon. Accused, with knowledge of this situation, deliberately left his command and thereby avoided the perils arising during the crossing operations. All of the elements of the offense were proved (CM ETO 4570, Hawkins; CM ETO 4701, Minnetto).

b. Charge II and Specification: The evidence is uncontradicted that accused, after he had been apprehended, willfully and deliberately refused to obey Captain Sinex's order to report to his company commander. The offense charged was fully proved (CM ETO 3988, O'Berry and authorities therein cited).

4. The charge sheet shows that accused is 22 years of age. He was inducted 21 March 1942. Prior service is shown from 25 September 1940 to 14 November 1941.

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

6. The penalty for desertion in time of war is death or such other punishment as may direct (AW 58). The designation tes Disciplinary Barracks, Greenhaven, ment is proper (Cir.210, WD, 12 Sep

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 FEB 1945 TO: Commanding General, 35th Infantry Division, APO 35, U. S. Army.

1. In the case of Private GEORGE R. NURSEMENT (20934940), Company M, 137th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5396. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5396).

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

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

BOARD OF REVIEW NO. 1

17 FEB 1945

CM ETO 5406

U N I T E D S T A T E S	36TH INFANTRY DIVISION
v.	Trial by GCM, convened at Headquarters 36th Infantry Division, APO 36, U.S. Army, 27 November 1944, Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private FRED ALDINGER (39857015), Medical Detachment, 143rd Infantry.	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Pvt Fred Aldinger, Medical Detachment, 143rd Infantry, did on or about 28 April 1944 near Qualiano, Italy, desert the service of the United States and did remain absent in desertion until returned to military control on or about 2 November 1944.

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 Specification, except the words "2 November 1944", substituting therefor the words, "1 October 1944", of the excepted words, not guilty, of the substituted words guilty and guilty of the Charge.

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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 50½.

3. The evidence for the prosecution showed by signed extract copies of morning reports of accused's organization, which were received in evidence without objection, the initial absence of accused without leave on 28 April 1944, his continued absence on 21 October 1944, and his confinement on 2 November 1944 in the "PBS stockade" (R6; Pros.Ex.1). No witness was called by the prosecution.

4. For the defense, it was stipulated between the prosecution, accused and the defense that he returned to military control on or about 1 October 1944 (R6).

After his rights were explained to him, accused elected to make an unsworn statement through counsel as follows:

> "The accused was inducted into the Federal Service on the 24th of February 1943 and received his basic training at Fort McClellan, Alabama. In the basic training the accused was given the regular infantry training and did not receive any medical training. The accused landed in Oran, North Africa during the month of November 1943 and then went to Naples, Italy, landing there during the month of December 1943. The accused was assigned to the Medical Detachment of the 143rd Infantry around the first of January 1944. Shortly after his assignment to the Medical Detachment of the 143rd Infantry the unit to which he was assigned was engaged in the Rapido River action. The accused was evacuated to a hospital shortly following that engagement for exhaustion. Following his stay of a few weeks in the hospital he was returned to duty with his unit. The accused desires to make no further statement" (R6).

5. Each of the three extract copies of morning reports which were received without objection were signed by "J. B. Cunningham Maj. M.C.", who failed to indicate in what capacity he acted in placing his signature on each instrument. Since no question was

raised by the defense, it could properly be assumed by the court that he acted in the capacity of commanding officer of the Medical Detachment, 143rd Infantry (CM 233121, Patton).

> "A failure to object to a proffered document on the ground that its genuineness has not been shown may be regarded as a waiver of that objection" (MCM, 1928, par.116b, p.120).

6. 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 (MCM, 1928, par.130a, p.143; CM ETO 1629, O'Donnell; CM ETO 2343, Welbes, and cases therein cited).

7. The charge sheet shows that accused is 21 years of age and was inducted at Phoenix, Arizona, 24 February 1943, to serve for the duration of the war plus six months. He had no prior service.

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

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

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 FEB 1945 TO: Commanding General, 36th Infantry Division, APO 36, U.S. Army.

1. In the case of Private FRED ALDINGER (39857015), Medical Detachment, 143rd Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Particular attention is invited to the comments in paragraph 7 of the holding of the Board of Review in CM ETO 5196, Ford which are equally applicable to the record of trial and accompanying papers herein.

3. No witnesses were called by the prosecution. The government's case consists of 12 lines of the record, introducing three morning reports and the stipulation. All that is shown as to the facts of the offense appears in the short unsworn statement of the accused. It is not a satisfactory record to support a life sentence.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5406. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5406).

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

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

BOARD OF REVIEW NO. 1

17 FEB 1945

CM ETO 5414

U N I T E D S T A T E S	36TH INFANTRY DIVISION
v.	Trial by GCM, convened at Headquarters 36th Infantry Division, APO 36, U. S. Army, 27 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ALVA M. WHITE (34368824), Company B, 141st Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Pvt. Alva M. White, Co B, 141st Infantry, did, at or near Battipaglia, Italy, on or about 27 June 1944, desert the service of the United States and did remain absent in desertion until on or about 2 November 1944.

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 Specification, except the words "2 November 1944", substituting therefor the words "1 October 1944", of the excepted words, not guilty and of the substituted words guilty,

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and guilty of the Charge. 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 50½.

3. The evidence for the prosecution showed by a certified extract copy of the morning report of accused's organization, which was received in evidence, defense counsel stating there was no objection, the initial absence of accused without leave on 27 June 1944 (R5; Pros.Ex.1). His return to military control on or about 2 November 1944 was indicated by a certified copy of travel orders, dated 2 November 1944, of Headquarters Peninsular Base Section, APO 782, pertaining to certain prisoners, including accused, which was also received in evidence without objection (R6; Pros.Ex.2). No witnesses were called by the prosecution.

4. For the defense, it was stipulated between the prosecution, accused and the defense that accused returned to military control on or about 1 October 1944.

After his rights were explained to him (R6), accused elected to be sworn and testified that he finished the eighth grade in school and was 20 years of age when inducted 6 September 1942. Prior to his induction, he was a mechanic and was trained in the army as a mechanic from 30 September 1942 until the latter part of February 1943. He joined the 36th Division about 1 April 1943 and was assigned as a rifleman, but after the division came overseas he was assigned as a mechanic and truck driver about 1 May 1943 in the "Special Company", with which he remained until December 1943 (R7). He then rejoined his unit at Cassino and took part in the attack across the Rapido River. About 30 January 1944 he suffered a bad case of trench foot and went to the hospital for 60 days. He returned to his company at Avellino where the men were taking "mountain training". Later he joined the "Muleback Outfit". He was at Anzio and stayed with a special service troop in the Avellino hills through the Anzio campaign. He went absent without leave from the "Muleback Outfit" about 17 June 1944, because he knew if he got back to his company he would never get a transfer. He went to Rome and was apprehended about 30 September 1944. Regarding his absence he said

"All the time I was AWOL I wanted to get back. I went back to turn in and the Division had moved to Southern Italy to take training again. I tried to get to them from one day to another and kept trying. I didn't want to desert the Army. I wished a thousand time I could get into another outfit. I had a good record. I didn't get transferred because orders came through the Division that nobody in the Infantry could get transferred to another outfit. They sent me back to my company" (R8).

Cross-examined, accused stated he was absent without leave at the time the invasion of France was made, and was "sorry about that". One of the main reasons he didn't join his company was that he did not like to carry a rifle. He

"didn't want to shoot anybody but I wanted to do my part in the War. I drove a truck and hauled PX rations in the Special company; I liked the outfit. I knew the boys up farther were doing more than I was".

He was not afraid of getting killed but stated "I don't believe in killing anyone". He fired a rifle once or twice while at the Rapido River but "was nervous and scared at the time and I don't know if I hit anything" (R9). Asked, "You don't want to go back to an infantry company--a fighting company?", he replied, "Well, I....I want to get into another outfit if I can" (R10).

5. The certified extract copy of the morning report of accused's organization, which was received in evidence without objection, purports to be authenticated by the assistant personnel officer, 141st Infantry. Such officer was not the official custodian of the original and was thus unauthorized to authenticate a copy thereof. The improper authentication, however, was waived by the failure to object thereto (CM ETO 5234, Stubinski). The extract copy also indicates that the original 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. Since no question was raised by the defense, it could properly be assumed by the court that he acted in his capacity of commanding officer of the company (CM ETO 5406, Aldinger).

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6. From the evidence presented the court could properly find that accused was absent without leave from his organization for the period alleged exceeding three months, which, under all the circumstances, warranted the court's finding that he did not intend to return to the service (MCM, 1928, par.130a, p.143; CM ETO 1629, O'Donnell; CM ETO 2343, Welbes and cases therein cited; CM ETO 5406, Aldinger).

7. The charge sheet shows that accused is 22 years of age and while it does not indicate whether he enlisted or was inducted, at Jefferson City, Tennessee, 7 September 1942, his testimony showed that he was inducted. 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 committed 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, is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 FEB 1945 TO: Commanding General, 36th Infantry Division, APO 36, U. S. Army.

1. In the case of Private ALVA M. WHITE (34368824), Company B, 141st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Particular attention is invited to the comments in paragraph 7 in the opinion of the Board of Review in CM ETO 5196, Ford, which is equally applicable to the record of trial and accompanying papers herein.

3. No witnesses were called by the prosecution; the Government's case consists of 14 lines in the record introducing a morning report and a stipulation. The facts were all told by the accused. It is not a satisfactory record to support a life sentence.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5414. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 5414).

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

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BY REGINALD C. MILLER, COL.
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