E. T. O.

BOARD

OF

REVIEW

OPINIONS

CM ETO 3880

CM ETO 4490

VOLS. 11-12

HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

EUROPEAN THEATER OF OPERATIONS

VOLUME 12 B.R. (ETO)

CM ETO 4138 - CM ETO 4490

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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 12 B.R. (ETO)

including

CM ETO 4138 - CM ETO 4490

(1944-1945)

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

BOARD OF REVIEW NO. 1

2 DEC 1944

CM ETO 4138

UNITED STATES	1ST BOMBARDMENT DIVISION
v.	Trial by GCM, convened at AAF Station 128, APO 557, U. S. Army, 26, 28 September 1944.
Private (formerly Technical Sergeant) MICHAEL P. URBAN (32797470), 615th Bombardment Squadron, 401st Bombardment Group	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for two years. Place of confinement not designated.

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 Michael P. Urban, 615th Bombardment Squadron, 401st Bombardment Group, then Technical Sergeant, 615th Bombardment Squadron, 401st Bombardment Group, did, at AAF Station 128, APO 557, 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 and to shirk important service, to wit: flying as member of a combat crew on combat missions, and did remain absent in desertion until he surrendered himself at AAF Station 128, APO 557, on or about 22 August 1944.

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(2)

CHARGE II: Violation of the 96th Article of War.
Specification: In that * * * did, at AAF Station 128, APO 557, on or about 16 August 1944, wrongfully take and use without proper authority a certain bicycle, to wit: Bicycle Serial No. 283591, Permit No. 445, property of the United States, of a value of less than $50.00 and more than $20.00

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 Charge I and its Specification, guilty of the Specification, Charge II, except the words and figures "$50.00 and more than $20.00", substituting therefor the words and figures, "$20.00 and more than $10.00", of the excepted words and figures not guilty, of the substituted words and figures guilty, and guilty of Charge II. 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 two years. The reviewing authority approved the sentence, did not designate any 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 was top-turret gunner and flight engineer of a lead crew in the squadron named in the Specification (R6,9,14). On 16 August he flew with his crew on an operational mission to Leipzig, Germany (R5,9). Intensive flak was encountered and the ship received direct hits. During the mission accused announced over the interphone that fighters were approaching, but there was in fact no fighter attack. The mission was considered "rough" and "very severe" by members of the crew. It was exceeded in severity by only one previous mission in which the ship was attacked by enemy fighters (R12,13,35,37). On the way back from the raid accused told the pilot that he was going to quit flying, and when asked for his reason, replied, "I just don't want to fly anymore, and I never did like to fly, anyway". After the interrogation he spoke to the pilot again, repeated the statement that he was going to quit and asked him, "What are you going to do about it"? The pilot answered that he had no authority to do anything and suggested that he see the flight or squadron surgeon (R5,6). While returning from the same mission accused stated to two other members of the crew that he was going to quit flying, adding in one instance that this mission would be his last (R9,35). Subsequently on the same day accused met the co-pilot of his crew who asked him if he were not going to clean his guns. He replied, "No, not till later". In the course of their conversation, accused said that he was going

to quit flying, and that he "never wanted to fly in the first place and didn't like it". He paid no attention to this officer's attempt to persuade him that he was wrong. As they parted, accused remarked "I will see you in a couple of weeks in the guardhouse, maybe. I am taking a vacation"(R11). The pilot did not take the statements of accused seriously and attached no importance to them (R8). None of the other three to whom he spoke thought that accused was serious, and one of them, a non-commissioned officer, testified that among themselves members of a crew "usually, say something like that after a rough raid, but nobody ever means it". (R9,11,37). Accused had never before made statements of that nature to the pilot, co-pilot, or bombardier (R6,8,10). Still later in the day, 16 August, the latter saw accused walking out of the camp dressed in olive drabs and field jacket and carrying a package under his arm. He told this officer that he was going to town for a while and would see him later. There was a standing arrangement in the squadron permitting members of a crew to leave the base on a six-hour pass even if they were scheduled to fly on the following day (R9,15).

Accused did not return to his barracks that night nor thereafter until 22 August. His absence without leave from his organization was established by the testimony of witnesses having personal knowledge of his absence and by pertinent entries in the morning reports (R6,9,14,16,17,32,35; Pros.Exs.1,2). The evening of 16 August and the following day were "stand-down" for the crew, that is, the crew was not in a status of alert. On the evening of 17 August the crew was alerted and every member, including accused, was scheduled to fly (R13). The pilot first learned of that mission about 8 pm 17 August and not having seen accused since the preceding day, went to his barracks about 8:30 pm "to see if he had been joking or really meant it" (i.e., the statement that he was going to quit flying). He did not find him (R6,7). When the crew was called in on 18 August accused was not present and another man was substituted for him (R13). That day the crew flew on a combat operational mission to Belgium, then occupied by the enemy. Because of his absence accused did not participate in the mission (R7,9,14,32).

On 22 August two members of the crew met him in Kettering, England. They asked him where he had been and he said he had been to Sheffield where he had had "a good time" and that he was going back to camp. He volunteered the statement that he either was not going to fly any more, or that he did not want to fly any more. This statement was not taken seriously by the crew member to whom it was made (R32,33). Accused returned to his station on 22 August. Inquiry discloses that Sheffield was about 70 miles, and Kettering about 14 miles, from AAF Station 128.

Accused's crew left the United States for service overseas on 31 May 1944. He had been a member of it since February 1944 (R9,10, 31). From about the time of their arrival in this theater, to the

time of the trial on 26 September, a period of approximately three months, the crew was in a combat operational status (R7,14). The evening of 16 August was a "stand-down" but accused, being a member of a lead crew, was scheduled to fly a practice mission which members of lead crews were regularly required to fly when not flying operational missions. If an operational mission were ordered, the practice mission would be cancelled. Orders for an operational mission reach the operations officer the evening before the day on which the mission is to take place (R14). Although ordinarily a lead crew will not fly two missions in a rew, its members remain on duty, unless they are on pass, and can expect to be called upon to fly on any mission (R14,15). A mission is generally but not always preceded by an alert but members of a crew do not know "until the last minute" whether there will be an alert or a stand-down (R8). The pilot testified that accused had participated in about 14 missions with him (R6). The operations officer testified that accused's crew, apparently up to the time of the trial on 26 September, had flown 11 missions (R13). Accused flew his last mission on 16 August (R5,13). Effective June 1944, 35 missions were required to complete an operational tour. Upon recommendation of the group commander, personnel could be released prior to completion of 35 missions (R25; Pros.Ex.6). In a memorandum issued by the Commanding General of the Eighth Air Force, it was provided that no heavy bombardment combat crew member be required to participate in more than 35 sorties without a determination being made of his fatigue condition (R23). Accused was a technical sergeant at the time of the commission of the alleged offense (R37).

4. The defense offered no evidence. After his rights were explained to him, accused elected to remain silent (R38).

5. 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 either hazardous duty or important service; (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 or to shirk important service (CM ETO 2432, Durie; CM ETO 2473, Cantwell; CM ETO 2481, Newton).

(1) Absence without leave was adequately proved.

(2) A crew which was in a combat operational status at a base from which sorties were being continually made against the enemy while the invasion of the continent was in full progress may properly be considered as being under anticipated orders to fly on combat missions at any time while it remained in that status.

(3) Since accused was a member of such a crew at the time he absented himself without leave, and had been a member for a period of many weeks, the inference could be drawn by the court that he knew that he, with the rest of his crew, was in a combat operational status, and was under anticipated orders to fly in combat missions at any time.

The vital question for consideration is whether there is substantial evidence supporting the finding by the court that at the time he absented himself accused entertained the specific intent to avoid flying with his crew on combat missions. Repeated statements were made by accused while returning from an unusually severe mission and subsequently on the same day, to the pilot, co-pilot, bombardier, and a non-commissioned officer, separately, to the effect that he intended to quit flying, that he had never liked flying, had never wanted to fly, and that the mission from which he was returning would be his last one. These statements and the circumstances in which they were made, followed contemporaneously by his absence without leave, constituted competent and substantial evidence from which the court was justified in inferring that the requisite intent existed at the time he absented himself.

> "The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be" (Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285,295; 36 L.ed.706,710).

Each witness who testified to these statements said that he thought accused was not serious when he made them. It does not appear that any of them knew of the similar statements made by accused to the others. It is significant that the pilot was sufficiently impressed by accused's statements to suggest that he consult a medical officer, and to make a search for him on the evening of 17 August "to see if he had been joking or really meant it". The co-pilot attached such importance to the statements accused made to him that he tried to show accused, without success, that he was wrong. One witness testified that statements similar to those made by accused were usually but never seriously made by members of a crew among themselves after a "rough" raid. Accused, however, had never before made statements of that nature to the pilot, co-pilot, or bombardier. It does not appear that he had ever made them to any one else. Furthermore, after a lapse of six days accused gave expression to his determination not to fly again when met at Kettering by members of his crew. Whether accused was serious when he made the statements was a question of fact for the court.

Another consideration weighs against accused. Shortly before he absented himself and in the same conversation in which he told the co-pilot that he intended to quit flying, accused stated "I will see you in a couple of weeks in the guardhouse, maybe, I am taking a vacation".

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The court could reasonably have found that the period of absence he contemplated was so long that as an experienced member of a combat crew, aware of the frequency of his previous missions, he knew that he would miss flying on a combat mission during such absence (Cf: MCM, 1921, par.409, p.345, Note).

During accused's absence his crew engaged in a combat mission to Belgium which was then under enemy occupation. Such fact may be considered by the court in determining the intent which motivated his absence (CM ETO 2481, Newton and cases cited therein). The fact that accused voluntarily returned after an absence of six days instead of two weeks, while material in extenuation, is no defense (Cf: MCM 1928, par.130a, p.142).

Flying as a member of a combat crew on combat missions to targets in territory on the continent occupied by the enemy, constitutes both hazardous duty and important service. The dangers attendant upon the performance of such duty are shown by the evidence and are so commonly known that judicial notice may be taken of them (CM ETO 2368, Lybrand). Participation in combat missions has such a direct and immediate bearing upon the prosecution of the war that it is difficult to conceive of service that is more important within the meaning of Article of War 28 (CM 151672, Lytle; id. Dig. Op. JAG, 1912-1940, sec.385, pp.193-194; MCM, 1928, par.130a, pp.142-143).

The Board of Review is of the opinion that the findings of guilty of Charge I and its specification are supported by competent, substantial evidence.

6. Charge II and Specification: The evidence for the prosecution may be summarized as follows:

It was stipulated that the bicycle alleged in the Specification was the property of the United States on 16 August 1944 and prior thereto. It was also stipulated that its value was in excess of $10.00 and less than $20.00 (R22,23; Pros. Ex.5). The bicycle was issued to an officer on a memorandum receipt on 6 August 1944 (R19). About 12 August the bicycle was reported missing from the officer's barracks at the place alleged in the Specification, and two days later it was seen in the squadron area. Accused had possession of the bicycle and was asked where he had obtained it. He replied that he had borrowed it from an officer. He was seen riding the bicycle on 14 August (R19,20,21,22). He also stated that he had changed the rear fender of the bicycle and that the original fender bore the number 445 (R23). Accused loaned the bicycle to another soldier and while in the latter's possession it was recovered by the military police on 15 August (R28,36). The officer to whom the bicycle had been issued never authorized accused to take it (R18). The defense offered no evidence and accused elected to remain silent after his rights had been explained to him (R28). All the elements of the offense alleged are established by competent evidence (CM ETO 2926, Norman and Greenawalt).

41:

7. The charge sheet shows that accused is 22 years one month of age and was inducted 9 February 1943 in New York City, New York, to serve for the duration of the war plus six months. He had no prior service.

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

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens Jr. Judge Advocate

(8)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 DEC 1944 TO: Commanding General, 1st Bombardment Division, APO 557, U. S. Army.

1. In the case of Private (formerly Technical Sergeant) MICHAEL P. URBAN (32797470), 615th Bombardment Squadron, 401st Bombardment 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. It is noted that your action in this case did not designate the place of confinement. It is requested that supplemental action designating the place of confinement (MCM, 1928, p.275, Form 10) be executed and forwarded to this headquarters for insertion in the record of trial.

3. There was no evidence of previous convictions of accused by court-martial and his civil record fails to reveal bad character. The sentence of confinement at hard labor for a period of two years for desertion in time of war with intent to avoid hazardous duty is inadequate (WD letter, 5 Mar 1943 (AG 250.4); Cir. 72, ETOUSA, 1943, sec.II, par.6a). In view of this fact, 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 service in a combat area. In view of the prevailing policy in this theater of conserving manpower, I recommend that consideration be given to 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.

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 4138. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4138).

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

(9)

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

BOARD OF REVIEW NO. 2

23 NOV 1944

CM ETO 4139

U N I T E D S T A T E S	)	1ST BOMBARDMENT DIVISION
	)	
v.	)	Trial by GCM, convened at Northampton, Northamptonshire, England, 29 September 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. The United States Penitentiary, Lewisburg, Pennsylvania.
Private HARLEY A. REDD (35411856), 360th Bombardment Squadron (H) 303rd Bombardment Group (H)	)	

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 charges and specifications:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Harley A. Redd, 360th Bombardment Squadron (H), 303rd Bombardment Group (H), did, at Northampton, Northamptonshire, England, on or about 10 July 1944, commit the crime of sodomy by feloniously and against the order of nature have carnal connection per os with Brian Wright.

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

Specification: In that * * * did, at Northampton, Northamptonshire, England, on or about 10 July 1944, wrongfully and unlawfully commit an indecent assault

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(10)

and battery upon Brian Wright, a male of the age of eleven (11) years, by rubbing his penis against the posterior of the said Brian Wright.

He pleaded not guilty to and was found guilty of the charges and specifications. No evidence of previous convictionswas introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. Competent evidence introduced by the prosectuion fully established the commission by accused of the act of sodomy per os on Brian Wright at the time and place and as alleged in the Specification of the Charge in violation of Article of War 93; also, that at the same time and place accused placed his penis "up the boy's posterior and there rubbed his penis up and down, thereby committing an indecent assault on the boy, as alleged in the Specification of the Additional Charge, in violation of Article of War 96 (CM ETO 3436 Paquette; CM ETO 3717 Farrington). Brian Wright, eleven years of age, testified to the act (R25-33). The court properly found this child a competent witness. Circumstantial evidence adduced from others was strongly corroborative of the boy's testimony.

4. Accused, advised of his right, testified on his own behalf. Although he denied that he even "touched him" (the pathic) "either by using his privates parts in my mouth or using my private parts in his rectum" (R43), he admitted certain facts including the fact that he was inside the actual water closet compartment with the boy which, taken with the prosecution's case, compel the conclusion of guilty. (47,48) Medical authority called on behalf of accused testified that accused's mental age, as indicated by tests, was "consistent" with accused's Army General Classification Test score of 61; also that assuming accused was possessed of homosexual tendencies, he might be a constitutional psycopathic. However, the examination indicated that accused was sane (R35-37).

5. Accused is 33 years old. He was inducted at Fort Benjamin Harrison, Indiana, 29 July 1942, to serve for the duration of the war plus six months. He had no prior service.

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

7. Since accused is over 31 years of age, his confinement in a penitentiary for five years is authorized for the offense of sodomy (AW 42; District of Columbia Code, Title 22, Section 107; MCM, 1928, par. 90a, p. 81; Cir. 229, WD, 8 June 1944, Sec. II, par. 1a (1), 3a). The designation of the United States Penitentiary, Lewisburg, Pennsylvania is proper (AW 42; Cir 229, WD, 8 June 1944, sec. II, par. 1b(4),3b).

Judge Advocate

Judge Advocate

Judge Advocate

(12)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 23 NOV 1944 TO: Commanding General, 1st Bombardment Division, APO 557, U. S. Army.

1. In the case of Private HARLEY A. REDD (35411856), 360th Bombardment Squadron (H), 303rd Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 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 4139. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4139).

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

CM ETO 4143

5 DEC 1944

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

v.

Private PETER BLAKE (34549926), Private JAMES E. CLEMONS (33740879), Private First Class EUGENE HANEY (34626123), Private BOB WEST (34423569), Private WILLIAM R. ROSE (35763840), all of 4150th Quartermaster Service Company.	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Rennes, Brittany, France, 22 September 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. The 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. Each accused was tried upon the following charges and specifications, identical except that the name of each was set out in their respective specifications:

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

Specification 1: In that Private Peter Blake, 4150th Quartermaster Service Company, did, at or near La Bacommiere, France, on or about 15 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Mademoiselle Helene Fouillet, a French woman.

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(14)

Specification 2: In that * * * did, at or near La Baconniere, France, on or about 15 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Mademoiselle Yvonne Fouillet, a French woman.

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

Specification: In that * * * did, at or near La Baconniere, France, on or about 15 August 1944, with intent to commit a felony, viz, rape, commit an assault upon Mademoiselle Marie Fouillet, a French woman, by willfully and feloniously striking her and trying to lift her nightgown.

(Identical charges and specifications against Private James E. Clemons, Private First Class Eugene Haney, Private Bob West, Private William R. Rose).

Each of the accused pleaded not guilty and, three-fourths of the members of the court present when the vote was taken concurring, each 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, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence of each accused, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. For the prosecution, Mademoiselle Helene Fouillet, through an interpreter, testified that she is 27 years of age, unmarried and lives at home with her parents on a farm at La Baconniere, Mayenne, France. She has two sisters, Marie, 30 years of age, and Yvonne, 21 years of age, and two brothers, Francis, 20 years of age, and Henry, 16 years of age, also living at home. Early in her testimony, this witness identified accused Blake, Rose, Clemons and Haney from a number of colored soldiers lined up with accused in the courtroom, as soldiers who came to the farm on 15 August. She failed at that time to identify accused West but picked out another soldier, not one of accused. The nearest house to their home was some 400 meters away and the home was about 250 meters back from the highway (R20-23). At a quarter past eleven of 15 August in the morning five colored soldiers came to the house and asked for brandy and cognac (R24-25). At first three soldiers arrived, identified by her as accused Rose, Clemons and Haney and five or ten minutes later the first three whistled and the other two, whom she identified as accused West

and Blake, came and followed the first three into the house (R24-25). All of the soldiers were drunk and a glass of cognac was given to each of them (R26). The soldiers shut them in the house. Her sister Yvonne was pushed by them (indicating accused Clemons) into the milk room. One of them (accused Haney indicated (R31)) seized witness and threw her on a trunk. She tried to escape but could not. Her mother and brothers tried to help her but were threatened by one of the soldiers with a rifle (indicating accused West (R27)). He (Haney) put his private part in her private part (R27,32). She defended herself "as well as she could" (R27). When she called her brother, he tried to help her but one of the soldiers who was guarding the room fired his rifle at him several times as he escaped (R28). Only the one soldier raped her (R32). Witness was all this time crying and shouting. Her sister Marie was ill in the next room and "then one of the five soldiers who was in the room threw himself upon my sister who was ill". Her mother and brother tried to open the door which the soldier had closed but could not, so witness did not see what happened to her sister Marie who cried for help. During this time Yvonne was in the milk shed but the black soldier (indicating accused Clemons) had closed the door so witness could not see. She heard noise in the milk shed and her sister callin g "Helene, come to help me, help" (R28). The soldiers remained in the house about three-quarters of an hour (R30). On the same day about three o'clock witness visited the camp of colored soldiers (R29,32) and identified from all the soldiers lined up accused West, Rose, Haney and Blake. During that evening, an American car brought accused Clemons to her home when he was also identified as one of the five earlier visitors to their home (R29).

Yvonne Fouillet gave substantially the same story as her sister Helene. She identified accused Clemons, Haney and Rose out of a group consisting of the five accused and five other colored soldiers (R37). She testified that one of the soldiers (she was not able to say which one) entered the milk shed where she was cleaning her teeth and indicated to her that he wanted to "abuse" her. She "did not wish to" and he took her by the hair and threw her on the ground and wanted to have sexual intercourse (R38). He tore her pants.

> "He had closed the door and there was one with his rifle to guard the door. * * * Then when he had raped me, the one who was standing at the door with his rifle, the one who was with his rifle to the door came to me and wanted to rape me also, but he did not have time to do it".

The first soldier put his private part in her private part though she defended herself. She resisted and did not consent. The second soldier touched her "just a little, but hardly anything" (R39) with his penis (R41); "he inserted it a little" (R43). The soldier with the rifle stood at the door in sight of witness at all times. Helene

tried to help her but was prevented and a "black soldier threw himself on her also". Witness was so frightened she did not observe the soldiers carefully (R40). While in the milk shed with the soldiers she heard about five shots (R41).

Marie, her sister, testified to the same events. She picked accused West as the one who came to her room - "the one who resembles him most". Marie had been ill for 13 months with "lung trouble", and she was brought into court on a stretcher. She testified that she saw the five soldiers through the window of her room (R44). She left her bed when she heard Helene in the kitchen shouting and at that moment one of the soldiers came in. She had on only her nightdress and tried to escape through the window. He beat her about the head, put her on her bed and tried to have relations with her. She struggled with him 10 or 15 minutes. He removed her clothes and exposed his private parts but another soldier came and talked to him and returned a second time when they left (R45-48). Yvonne was examined by a physician on 16 August and Helene on 20 August. In his opinion Yvonne was raped and Helene probably raped. He testified and his certificates of examination were received (Pros.Exs. 3 and 4; R34-36).

Joseph Fouillet testified that his son Francis came to the field after him on the morning of 15 August 1944 and that on the way back to the house he saw five black soldiers at a distance of 25 or 30 meters (R48-49).

Madame Helen Fouillet, his wife, testified to substantially the same facts as did her daughters. She identified accused Haney and West, but was not sure of Clemons and Blake out of a line-up of accused and a number of other colored soldiers (R49-50). She testified accused Haney took her daughter Helene on the trunk and when she attempted to defend her daughter a soldier by the door "directed" his rifle at witness and when she went to help the daughter in the milk shed there was another soldier standing at that door and she could not enter. The soldier "undressed" Helene when he put her on the trunk and laid on top of her as she defended herself "as much as she could". She got a glimpse of the feet of her daughter on the ground in the milk shed and thought she had been killed (R52). She heard Yvonne shouting and Helene was crying. One soldier waited near the chimney for the other. One was on the chest with Helene, one at each door with rifles; one was with Marie. They remained at the house about three-quarters of an hour, and left very suddenly. Her son had gone to call his father (R53).

Francis Fouillet, son of Joseph Fouillet, testified also to the same events. He identified in court accused Rose, West and Haney as the first to enter the house. He testified he saw accused West lying on his sister Yvonne in the milk house, then he left to call his father (R55-57).

Paul Pelle identified in court accused Rose and Haney as two

of five colored soldiers who came to his home on a farm near the Fouillet farm on 15 August. He gave them two dozen eggs. He visited a soldiers' camp with Helene Fouillet on the afternoon of 15 August to identify the soldiers and he identified Haney who had put "dust on his face" and Rose who put his helmet over his spectacles (R58-60).

Corporal Oliver C. Crawford, of accuseds' unit, testified that he saw all of accused at different times on 15 August. He walked from the "PX" back to the area with accused West and on the way West said "me and Blake sure fucked up this morning". He did not see any of accused in camp between nine and twelve o'clock. He was present at the line-up at which a "French lady" picked out Haney, Rose, Clemons and West and a Corporal May also. Accused Blake was found in the back area later asleep and was not in the line-up. After he was awakened, he was asked whom he had been with and he said Haney, Clemons, West and Rose. Haney was not at dinner, said he didn't "want any of that slop". He had some eggs (R70-74). All accused were seen together prior to ten-thirty on 15 August but not afterwards (R76).

4. The defense offered no witnesses and each of accused on being advised of his rights as a witness remained silent (R78-81).

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" (MCM, 1928, par.148b, p.165).

The evidence is uncontradicted that two soldiers raped Yvonne, one definitely and she says the other "inserted it a little"; and one definitely raped Helene. Still a fourth attacked Marie, struck her and removed her clothes intending to rape her. They were frightened away before the fifth man, who acted as an armed guard for the others while awaiting his turn, apparently had time to get very far in his efforts. Accused were charged separately for the rapes of Helene and Yvonne Fouillet and for the assault with intent to rape Marie Fouillet. Their actions indicate what were the intentions of all of accused. The acts of each engaged in a common undertaking are imputed to all.

"So, among offenders, the Articles recognise no principals, and no accessories either before or after the fact, as such. The grades of crimes and of participators in crime, familiar to the common law, are unknown to the law military, and the embarrassing technicalities which have grown out of the division of crimes into principal and accessorial are wholly foreign to the procedure of courts-martial. In the military practice all

accused persons are treated as independent offenders. Even though they may be jointly charged and tried, as for participation in a mutiny for example, and each may be guilty of a distinct measure of criminality calling for a distinct punishment, yet all are principals in law" (Winthrop's Military Law and Precedents, 1920 Reprint, p.108; 22 C.J.S., sec. 87a, p.155).

"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" (35 Stat. 1152; U.S. Criminal Code, sec.332; 18 U.S.C.A., sec.550; CM ETO 3475, Blackwell et al; CM NATO 2221, Harris et al).

"Where, as in the instant case two or more persons by common design jointly engage in the same unlawful act, each is chargeable with liability, and is guilty of the offense committed to the same extent as if he were the sole offender. CM 240646 (1944)" (Bull. JAG, Vol.III, No.5, May 1944, p.188).

The surrounding facts and circumstances afford substantial legal basis for imputing to each of accused the specific acts of the others (CM ETO 1052, Geddies et al (1944); Ibid. p.189). Two persons cannot be jointly guilty of a single rape but all persons present aiding and abetting in the commission of the crime are guilty as principals equally with the actual perpetrator of the crime (CM NATO 643 (1943); Bull.JAG, Vol.III, No.2, February 1944, p.62). All five of accused were properly charged and found guilty as principals.

6. The charge sheets show: Blake to be 23 years ten months of age, inducted at Camp Blanding, Florida, 30 March 1943 without prior service; Clemons to be 21 years of age, inducted at Fort Myers, Virginia, 4 May 1943 without prior service; Haney to be 21 years two months of age, inducted at Camp Shelby, Mississippi, 18 March 1943 without prior service; West to be 24 years of age, inducted at Camp Shelby, Mississippi, 8 September 1942 without prior service; Rose to be 25 years two months of age, inducted in Ohio, 29 October 1942 without prior service.

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

8. A sentence of death or life imprisonment is mandatory upon conviction of an offense under Article of War 92. Confinement in a penitentiary is authorized for the crime of rape (AW 42; Federal Criminal Code, secs.278 and 330 (18 U.S.CA. 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

(20) CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 5 DEC 1944 TO: Commanding Officer, Headquarters Brittany Base Section, Communications Zone, European Theater of Operations, APO 517, U. S. Army.

1. In the case of Privates PETER BLAKE (34549926), JAMES E. CLEMONS (33740879), BOB WEST (34423569), WILLIAM R. ROSE (35763840), and Private First Class EUGENE HANEY (34626123), 4150th Quartermaster Service 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 of each accused, 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 4143. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4143).

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

14 DEC 1944

CM ETO 4149

U N I T E D S T A T E S	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private THOMAS H. LEWIS (33638991), 388th Quartermaster Truck Company	Trial by GCM, convened at Rennes, Brittany, France, 29 September 1944. Sentence: 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 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 Thomas H. Lewis, 388th Quartermaster Truck Company, did at Les Bois en Lanhelin, France on or about 1 September 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Joseph Le Yaouang, a human being by shooting him with a rifle.

CHARGE II: Violation of the 96th Article of War.
Specification: In that * * * did, at Les Bois en Lanhelin, France, on or about 1 September 1944, wrongfully strike Marie Le Yaouang on the face and arms with his hands and grabbing her arms, tear her clothes from her body.

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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 both charges and their specifications. Evidence was introduced of one previous conviction by summary court for being disorderly in uniform in a public place in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, 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 shows that on 31 August 1944 Monsieur Joseph Le Yaouang (deceased) and his wife Marie lived in Les Bois en Lanhelin, Department of Ille et Vilaine, France (R8). Their five children, the oldest of whom was 13 years of age, lived with them (R11) in a house comprised of one room and a kitchen (R16). About 20 meters away from the house and at a slightly lower level was a cellar or cider shed. There were no steps leading into the cellar as it was "even with the ground around it". The cellar, which had one door and no windows, was a separate structure and one could not enter it from within the house (R15-16). It was "approximately ten feet by about fourteen feet" and contained cider barrels (R24,43: Pros.Ex.1).

About 11 pm "sun time", 31 August, accused, a colored soldier, knocked at the door of the Yaouang home. Madame Yaouang was in bed and when her husband opened the door accused asked for cider. The two men left for the cider cellar and "almost immediately afterwards" Madame Yaouang heard two or three shots and recognized the voice of her husband who shouted twice. She did not hear any argument or shouting before the shots were fired (R8-10,14,15,16,17). She did not see accused return to the house from the cellar because she was in bed at the time (R16). She arose from her bed, clad only in a "shirt" and "large apron". In the kitchen accused seized her by both arms, struck her on both sides of her face, and tore "all around my apron * * * on the back and more or less everywhere". She tried to defend herself but he "drew me with him outside" and forced her to enter a United States Army truck. When he started the motor, she jumped out of the vehicle and ran to the home of her uncle who lived about 200-300 meters away. She was preceded by her 13-year-old son who ran from the house during the disturbance. As her son and uncle "had gone" when she arrived, she immediately returned to her home about 11:30 pm "sun time", and found her husband lying in the cellar. He was dead (R10-12). Madame Yaouang identified the accused at the trial (R9) and testified that he "was drunk" on the evening in question (R17). He had a rifle in his possession but no cider when he took her out of the house, and she believed he dropped the rifle later because he did not have it when he entered the truck (R14,16).

About 11:30 pm Monsieur Alphonse Duffie, Madame Yaouang's uncle, heard dogs barking and saw the 13-year-old Yaouang boy standing outside his window. Duffie followed the boy and "heard the truck on the road". He then went to the cider shed where he saw Yaouang lying on his stomach. He lifted him and saw blood on the floor (R22-24).

About 12:30 am "sun time", 1 September, accused appeared at the home of Monsieur Jacques Trys, who lived at Fourebride en Meillas, about two or three kilometers from the Yaouang home. Accused, whom Trys identified at the trial, was "quite sober" and was unarmed. He indicated that his vehicle "had broken down" and Trys went with him and saw a large American military truck in a ditch. Accused spent the rest of the night in Trys' storeroom on a blanket. The French police arrested him about 8:00 am the following morning at Trys' home where he was identified by Madame Yaouang as the same soldier who was at her house the previous night (R13-15,25-27,32-33,39-41). Accused was unarmed but when searched "two magazines, one empty and the other half filled", were found in his possession (R41).

On the morning of 1 September the cellar was examined by French gendarmes and United States military police. The distance from the door of the cider shed to the head of a certain cider barrel therein was about three meters (R33; Pros.Ex.1). Blood was discovered on the floor in front of the barrel about six feet from the door (R43; Pros.Ex.1). The barrel was on its side and the head of the barrel faced the door to the cellar. Cider was oozing from three bullet holes in the head of the barrel. Two of the holes were about an inch and a half apart and the third hole was about three inches away from the other two. A piece of the barrel head containing the bullet holes was identified and admitted in evidence. The holes had been "plugged up * * * so that the cider would not run out" (R29-30,43-46; Pros.Ex.9). Outside the cellar about a foot from the entrance, three empty shells were found lying so close together that it was possible to cover them by a board about two feet square (R28,43-44, 51-52; Pros.Exs.14,15,16). A .30 caliber carbine, No. 1488175, which was found against a fence surrounding the house, was identified at the trial and admitted in evidence. When discovered the weapon had a magazine pouch attached (R13,30-32; Pros.Ex.2). On 4 September three bullets were discovered within the cider barrel itself (R44,51-52; Pros. Exs.11,12,13). The shells and bullets were of a type used with a .30 caliber carbine (R44,51-52). Photographs of the cider shed as seen from the doorway, and of deceased (in his dwelling), taken on 2 September, were also identified and admitted in evidence (R34-37; Pros.Exs.1,4,5,6,7)

On 2 September Lieutenant Colonel O. Currier McEwen, Medical Corps, Medical Consultant, Brittany Base Section, examined the body of deceased (R17).

> "The body was stiff, showing that death had occurred some time previously and the most important finding was two holes, one at the

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> left arm pit, between the fourth space, between the ribs, the fourth intercostal space. That hole was perfectly round with a smooth border, and was the size such as you might expect it would have been caused by a bullet. The other hole was in front of the chest, on the right side, about six centimeters to the left of the midline and again between the fourth, in the fourth intercostal space. This hole was larger, of a ragged, jagged outline and when a finger was inserted into this hole, the finger went into another hole in the breast bone which was of jagged shape and the margins of the bone were broken in this direction, that is, towards the outside of the body, indicating that whatever projectile had passed through had been going from the direction of the hole here towards the larger hole in front of the chest" (R17-18).

In Colonel McEwen's opinion, death was caused by a projectile which entered the left axilla, passed through the heart, and left the body anteriorally through the right side of the chest (R18). It was his further opinion that the wound could have been made only by a "perfectly round, smooth, very hard projectile", as reflected by the "perfectly round, smooth outline of the wound of entrance" (R21). In his opinion the bullet was not within the body at the time of his examination because there were but two holes in the body, one of which in his judgment was the point of entrance and the other the point of exit. A wound of the type sustained by deceased "would lead to death" within one or two minutes (R18). No powder burns were found around the wound (R20). The superficial abrasions on deceased's face were of a type which might have been caused either by a glancing blow or by the body striking a hard object "such as the cider barrel" (R19).

On 3 September Agent Anthony F. Winters, Criminal Investigation Division, stationed at Rennes, interviewed accused who made a statement after he was warned of his rights. On 5 September accused made a second statement after he received another warning as to his rights. Both statements, which were reduced to writing by Winters and signed by accused, were voluntarily made without threats or promises of reward. They were identified by Winters and admitted in evidence (R42,46-50; Pros.Exs.9,10). Accused made an unsworn statement at the trial in substantial accord with Pros.Ex.9 relative to the events of the evening prior to his arrival at the Yaouang house, and following his departure therefrom (see par.4 below). Accordingly, those portions of Pros.Ex.9 are omitted at this point. The pertinent portions of Pros.Exs. 9 and 10 with reference to the actual shooting and his encounter with Madame Yaouang are as follows:

"I knocked on the door and a man /Yaouang/* * * answered the door. We shook hands then I ask him for some cidre. He got a pitcher and started for the cidre barrell which was in the back yard. I had my carbine at port arms. I for got that you didn't have the saftey on. (I had a bullet in the chamber.) I pulled the trigger of my carbine about three times. At this time the man was in the building getting cidre. It was dark in this building. My gun was pointed into the door. After I fired the third shot I heard the man scream. I ran towards my truck, I had my carbine then the lady ran out of the house screaming. I caught her by the arm and I was trying to explain to her how it happened and that I didn't mean to kill him. She pulled away from me and her dress tore. While I had a hold of her I put my carbine on the ground. When she got away from me, she ran thru the field. I got into the truck and drove away" (Pros.Ex.9).

"The night that I shot the man I was not drunk. I had only three drinks. I loaded my gun while I was walking back to the camp with Cpl. Russo /before accused went to the deceased's home/. (Pvt Thomas H. Lewis was shown a carbine and asked, 'How do you know that this is your carbine.') I know this gun by the markings on the side. Where upon he read the following serial number off the carbine 1488175. After I fired the first shot I was surprised and I moved the gun then I shot the second shot, then I put the heel of the stock and it was pointing into the air when I fired the third shot. I have been instructed by the Company Commander never to load the rifles unless you are standing on Post" (Pros.Ex.10).

4. For the defense, accused elected to make an unsworn statement after receiving an explanation of his rights (R53). The statement in substance was as follows:

On the evening of 31 August he and another soldier went to a cafe in the village where they remained for two hours. Accused had a pitcher of cider and two glasses of cognac. On the way back to camp they stopped at a house where he had cider and a half glass of cognac. They then returned to camp where accused took a truck and drove toward Comburg. He met a civilian and gave him a ride to his home where he drank a half glass of wine. He then drove away, became lost, stopped at another

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house and asked a girl for directions. There, he had part of a glass of cider. He then started for camp, found that he was going in the wrong direction, turned the truck around and stopped at another house (Yaouang's). Deceased came to the door and said "'bon jour'". When accused replied "'oui'", deceased obtained a tall cider pitcher and went to a cider barrel in the rear of the house, followed by accused who had his rifle at "'port arms'".

> "In the dark there I had the rifle and was fumbling around with the trigger. When I pulled on the trigger, not knowing that the safety was off, the gun rung out. I said 'God damn', something wrong with the gun. I shot it again to see if there was something wrong with the gun. At that time, the man hollered out. I ran to see what was the matter with him. He fell on the floor. I hid my rifle to see what I had in my truck to help him out. The lady came out running" (R54).

After his encounter with Madame Yaouang (supra) accused, who was excited, drove a short distance down the road, and then thought Yaouang might be dying. He turned the truck around, intending to go back "to see what is wrong", lost control of the vehicle and "went over in the ditch". He walked to a house (Trys') and knocked on the door. When accused, Trys and his son found that they were unable to remove the truck from the ditch, Trys invited him to spend the night at the house. He was awakened and arrested by the French police the following morning, and identified by Madame Yaouang as the one who had been at her house the previous evening. Accused further stated:

> "I haven't any idea of killing him. I did not have that idea at all" (R55).

5. Madame Yaouang testified accused was drunk. Accused stated that he drank cider, cognac, and a small amount of wine prior to his arrival at the deceased's house but that he was not drunk on evening in question. Trys testified that accused was "quite sober". The issue of whether accused was sufficiently intoxicated to prevent his entertaining the intent requisite to constitute murder was one of fact for the determination of the court. As there was substantial evidence that he was not so intoxicated, its findings on this issue will not be disturbed (CM ETO 2007, Harris, Jr.).

6. The evidence was legally sufficient to support the findings of guilty of Charge II and Specification (assault and battery upon Madame Yaouang in violation of Article of War 96).

With reference to Charge I and Specification (murder in violation of Article of War 92) the evidence, including accused's own testimony,

conclusively established the fact that he shot and killed deceased. The issues of self-defense or of whether the homicide was committed under the influence of an uncontrollable passion or emotion aroused by adequate provocation were not involved nor were they raised by the defense.

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse.
>
> * * *
>
> Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. * * *
>
> Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not * * * knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused" (MCM, 1928, par.148a, pp.162,163-164) (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

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"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. 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).

The fact that the three empty shells were found close together immediately outside of the entrance to the cellar, together with the location of the body and bloodstains, corroborated accused's statement (Pros. Ex.9) that he fired three shots while he was outside the cellar and deceased was within, obtaining cider. The close position of the shells further indicated that accused stood in the same position as he fired the three shots. The location of the two wounds in the body indicated that when he was shot, deceased's left side was toward accused but at a degree slightly more than that of a right angle. The point of entrance of the bullet warrants the inference that deceased's arms were not by his side but that they were probably thrust forward, or in an upraised position, or, more unlikely however, behind him. The distance between the bullet holes in the barrel head and the fact that all three bullets, including the lethal bullet,were found within the barrel itself, show that accused's gun was pointed in substantially the same direction when he fired the three shots.

In his first pre-trial statement accused stated that he held his carbine at port arms and forgot that the safety was not on. His gun was pointed "into the door" of the cellar and he pulled the trigger three times. Deceased, who was in the cellar obtaining cider, screamed after the third shot (Pros.Ex.9). In his second pre-trial statement accused stated that after he fired the first shot he was "surprised". He "moved" the gun, fired the second shot, and then "put the heel of the stock" and fired the third shot when the gun was pointing "into the air". In his unsworn statement at the trial he stated that he was fumbling around with the trigger in the dark, pulled it not knowing that the safety was off and the gun "rung out". He exclaimed that there was something wrong with the gun and fired it again to discover "if there was something wrong with the gun". Deceased then "hollered out" and fell on the floor. Accused was silent with regard to the third shot.

The court was entitled to believe or disbelieve the whole or any part of each of the three statements of accused which constituted the only direct evidence of the shooting. It is clear that accused knew deceased was within the cellar when the former fired each of the shots. The first statement (Pros.Ex.9) is the most damaging to accused as he admitted firing his weapon three times as it was pointed "into the door". His claim in the second statement that he moved the position of his gun before firing the second shot and also before firing the third, and that he fired the third shot into the air, is clearly negatived by the evidence as to the position of the three bullet holes in the barrel head. Moreover, he further admitted that he purposefully fired the weapon

twice after the gun supposedly accidentally discharged on the first occasion. The court was fully 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 his guilt of the offense alleged, the Board of Review will not disturb the findings of the court of appellate review (CM ETO 3042, Guy, Jr.; CM ETO 1901, Miranda).

7. The charge sheet shows that accused is 20 years and one month of age and was inducted 27 May 1943. He had no prior service.

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

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

/s/ [illegible] Judge Advocate

/s/ [illegible] Judge Advocate

/s/ [illegible] Judge Advocate

(31)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 DEC 1944. TO: Commanding General, Brittany Base Section, Communications Zone, European Theater of Operations, APO 517, U. S. Army.

1. In the case of Private THOMAS H. LEWIS (33638991), 388th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4149. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4149).

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

20 JAN 1945

CM ETO 4155

U N I T E D S T A T E S	IX ENGINEER COMMAND
v.	Trial by GCM, convened at APO 126, 23 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 12 years. United States Penitentiary, Lewisburg, Pennsylvania.
Technician Fifth Grade ORA B. BROADUS (35480777), Company B, 832nd Engineer Aviation Battalion	

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 above named has been examined by the Board of Review.

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

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

Specification: In that Technician Fifth Grade Ora B. Broadus, Company "B", 832nd Engineer Aviation Battalion, did, at Neuilly-La-Foret, France, on or about 24 July 1944, with intent to commit a felony, viz., rape, commit an assault upon Madamoiselle Raymonde Gassion, Neuilly-La-Foret, France, by willfully and feloniously grabbing her around the waist and forcing her to the ground.

CHARGE II and Specification: (Finding of Not Guilty)

He pleaded not guilty and was found guilty of Charge I and its Specification, and not guilty of Charge II and its Specification. No evidence of previous convictions was introduced. Three-fourths of the members 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 12 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The prosecutrix, Raymonde Gassion, was 15 years 10 months of age at the time of the alleged offense (R3). She was the daughter of Augustine Letournier, divorcee Gassion, who was then living in Neuilly-la-Foret with a man named Marion (R3,6,10,12). During the latter part of July 1944, American soldiers were constantly passing their house there and stopping in for cider, morning, noon and night (R11). The prosecutrix testified that on Friday, Saturday and Sunday nights, 21, 22 and 23 July 1944, accused stopped at their house for cider (R4,5-6,11). On Monday night, 24 July, prosecutrix was returning from milking at about 8 pm. She was pulling, and 7-year-old Daniel Castile was pushing, a milk cart along the road in the direction of a wash house situated about 250 meters from the Letournier-Marion home (R4,7-8). Accused joined them and "asked if we had cider, in French, in a single word: 'Cidre'" (R9). He then helped her pull the milk cart toward the wash house while Daniel continued to push it, all the way (R4,8). As they proceeded "he wanted to grab me around the waist, so I turned the wagon round" (R4,6). When they arrived at the wash house accused "wanted" to take her inside. She, for her part, "wanted" and undertook to return to her home (R4). Accused stopped her with his rifle, not by pointing it at her but by interposing it in such a manner as to bar her passage (R4,6). Then, she testified,

> "I turned around and went in the opposite direction, running. Then he grabbed me with his arms. He threw me to the ground. He put his rifle and hat on the ground there. He lifted my dress and put his hand on my stomach. Then he started to unbutton his trousers. I hollered. He held me. About this time there were two colored American soldiers came on the scene and Germaine Letillier. We also hollered. He grabbed his rifle and helmet and ran away".

Roger Letillier, aged 16, was present with his mother, Madame Letillier, at the close of this incident (R4). The boy Daniel left the wash house when the American ran after the prosecutrix. "He ran to my home. * * * I seen him leave, running", she testified (R8). He went for help, "to get Mr. Marion" (R9). She estimated that she struggled with accused for probably 7 or 8 minutes (R6). Her only report to Madame Letellier after the attack was that "I knew the soldier that came to our home Friday and it wasn't worth giving him cider" (R6). When she first saw the colored men they were probably 100 yards away. She did not appeal to them to try to stop her assailant and they "passed by near and said nothing".

She was standing when she first saw them (R7).

Augustine Letournier testified that on Friday, Saturday and Sunday, 21, 22 and 23 July, accused came while she and prosecutrix were "milking cows" and he came back to the house and asked for cider, which he received on each occasion (R10-11). "The third night * * *", she elaborated, "he even helped my little girl milk cows" (R11). She was not permitted to testify, on cross examination, how many children she had at home, the law member sustaining the trial judge advocate's objection, after defense counsel explained that he was

> "trying to show that if there are any other children, some of them were present at the time the accused was there. That is the basis for my asking that question" (R12).

Roger Letellier, aged 16, testified that he lived 1500 meters from prosecutrix' house (R12-13); that at 7 or 7:30 o'clock on the evening of 24 July

> "I heard her cry for help. I went running. I saw the American * * * soldier who was picking up his helmet and his rifle and leaving. I saw two colored soldiers and that's all".

When he heard prosecutrix scream, he was probably 15 meters from the point where he saw the soldier leave (R13). He also testified that when he first saw the soldier, witness and prosecutrix were in a field together. He observed that her blouse was torn (R14). She told him she was attacked by an American soldier, whom the witness saw picking up his hat and rifle and walking slowly when the witness arrived (R13-14). "I said, 'Leave the young lady alone'", Roger testified. At the time he heard prosecutrix cry for help he was in the same field but could not see her or accused because there was a hedge in between (R14). He heard her cry for help continuously for at least ten minutes. After listening for awhile, he ran about 200 meters to where he saw the soldier. As to the length and width of the field, he described it as "about 20 metres large. I don't know the width" (R15).

Captain Albert M. Shultz, defense counsel, testified for the prosecution that he was accused's company commander and that accused was in the military service of the United States (R22-23). On cross examination he testified that on the evening of 28 July, a military police officer escorted prosecutrix and Jeanne Toquet, named as prosecutrix in the Specification, Charge II, of which accused was acquitted - to the camp.

> "I called Broadus off the field where he had been working because it had been told to me that a man of Broadus' description was the man

> Jeanne Toquet and Raymonde Gassion was looking for. The M.P. lieutenant, Jeanne Toquet, Raymonde Gassion and myself were standing there when Broadus walked into the company area. As soon as Broadus appeared, Jeanne Toquet immediately pointed to him and said, 'That's the man'" (R23) (Underscoring supplied).

Thereafter,

> "I had a formation in which T/5 Broadus and five or six other soldiers in the company similar in appearance to Broadus lined up before them. Raymonde Gassion and Jeanne Toquet both identified the accused. Later, after Daniel Castile and Madame Letillier arrived I held another formation".

Neither of the two latter could identify anybody (R24). On redirect examination, he testified that when accused walked up to Jeanne Toquet and prosecutrix at the time they were brought to the camp, "They nodded their heads" (R25).

Captain Shultz also testified that he had known accused for over two years and had been his company commander during all of that time. He characterized his efficiency rating as "Satisfactory, inasmuch as he is old and cannot work like the rest of the men in the company" (R23). Accused had several times been placed on duty of a different type because of physical disability to work out on the line. "Sometimes we would go out on the line to work, and he would go along with us. We would have to pull him back; he never complained and was always willing to work, but he was physically unable to do this heavy type of work". His particular duty, during the period involved, was officers' orderly. It was "on account of physical disability to work out on the line that he was given other types of work" (R25).

4. For the defense, Technician Fifth Grade Thomas Gartland, Company B, 832nd Engineer Aviation Battalion, testified that he slept in a pup tent with accused during the month of July 1944. In the evening accused "wrote letters and listened to the radio and played cards. That was about all he cared to do" (R27). Witness worked on the runway at the airdrome on Monday, the 24th, the date on which the alleged offense was committed (R28).

Second Lieutenant Samuel D. Worton, 925th Engineer Aviation Regiment, was appointed investigating officer to make a further investigation of accused's case after it was sent to regimental headquarters (R28-29). In this capacity he made certain physical tests and measurements to determine the reliability of the witnesses' statements (R29). One of these tests was to have Roger Letellier re-enact the run he said

he made on the night of the alleged attack (R30-31,33). The results showed that if immediately after Roger started running accused had started getting up slowly, picked up his rifle and helmet, and walked slowly away in the direction indicated, he would have been out of sight by the time Roger arrived at the place where he testified he saw the accused. According to Lieutenant Worton's recollection, it took a little over a minute for Roger to make the run (R32).

5. Accused, after his rights were explained to him (R33), testified in substance as follows:

On 18 July he passed the house where prosecutrix lived with her mother and "Mr. Marion" and saw, out in front, two American soldiers and also a man and a boy. He accepted their invitation to drink cider, of which the boy brought him two glasses. While there he observed "four or five kids". He did not see the prosecutrix nor any "women folks". He did not enter the house but, after drinking the cider, returned to camp (R34). On the evening of the 24th (the date of the alleged offense), he went visiting the airdrome after supper, about 6:30 or a quarter of 7, "walking around where they were working". The distance he walked, around the company area and the airport, was about three and a half miles. He returned from the airport to the company area at about 9:30 or 10 o'clock. Thomas Gartland, his tentmate, was there at the time. "I talked to him about the airfield. I told him it looked like it was going to be a nice airfield" (R35). He had been to prosecutrix' home to get cider "Not more than once or twice. * * * I don't remember seeing any women there at all" (R36).

On cross examination, he testified that he had been to the house where prosecutrix lived once before and that he stopped at the home of Madame Letellier on his way back on the same afternoon. At first he had told the investigating officer that he had never been to either of these houses before because "I knew I was not the man they were looking for, and I didn't want to be mixed up in it". He never talked to Madame Gassion (Augustine Letournier) but he did talk to Madame Letellier when he was at her house. He wanted to see if she could talk English, so he asked her whether she was married or not (R37).

A member of the court, having elicited testimony that accused spoke no French at all, asked him "How would you go about asking her if she was married?". Accused replied, "All I know how to go about asking her is 'Zig-Zig'. I guess the Germans said that to them". Asked what he said when he asked Mme. Letellier that question, accused answered that it was "in the book - the French Manual". His interrogator inquired if he could find it in TM 30-620, French Phrase Book. Accused replied, "No, sir, it isn't in there. I had another book" (R39). Thereafter the following colloquy occurred between accused and another member of the court:

"Q. When you asked this Madame Letillier if she was married, as you say, and used this phrase 'Zig-Zig', did you know what that means? When you were talking to her, what did you understand this expression to mean? What does it mean? Do you know what it means?

A. I didn't know what it is unless it means asking for a piece.

Q. Is that your conception of it?

A. I guess so.

Q. But you didn't do that to this woman, Madame Letillier?

A. I never did this to none of them" (R41).

6. Technician Fifth Grade Thomas Gartland, recalled as a witness by the court, testified that one night about an hour after supper accused, having visited the landing strip first, "made the remark to me it looked like it was going to be a nice field. I told him we could do it in about 20 days" (R43).

7. The general defectiveness of the trial proceedings in the instant case has called for a careful scrutiny of the entire record of trial to the end that, in furtherance of justice, the accused's legal rights may be protected, as provided in the Articles of War (CM 194200, Sanderson (1931), 2 BR 125). Noteworthy irregularities and elements of weakness affecting the substantiability of the inculpatory evidence include the following:

(a) The defense counsel, Captain Albert M. Schultz, was the company commander of accused, the officer who signed and swore to the charges, recommended accused's elimination from the service and also was called and testified as a witness for the prosecution (vide CM 194200, supra).

(b) The law member erroneously curtailed defense counsel's cross examination of Augustine Letournier.

(c) There is no showing of even any slight mark or damage to the person of the prosecutrix.

(d) Roger Letellier's testimony that her blouse was torn is wholly uncorroborated by any other witness. Not even the prosecutrix herself testified that it was torn. Moreover there is no evidence of its condition prior to her alleged encounter with accused.

(e) Roger's testimony that prosecutrix told him, at the time he arrived on the scene, that she was attacked by an American soldier is contradicted by prosecutrix' own testimony that, at the moment she saw

Roger and his mother, she said nothing to them. Moreover, all she testified that she told Mrs. Letillier later was that she "knew the soldier that came to our home Friday and it wasn't worth giving him cider". The only testimony with reference to any complaint was prosecutrix' reply to the question, "When did you or your mother make the first complaint to the gendarmes or military police?", to which she replied "Tuesday afternoon".

(f) Prosecutrix testified accused threw her to the ground and was holding her when "two colored soldiers came on the scene and Germaine Letellier. We also hollered. He grabbed his rifle and helmet and ran away". She also testified that she was standing when she saw the colored soldiers; also that when accused left the scene of the alleged assault "he was walking; he was not hurrying" (underscoring supplied).

(g) Germaine Letellier did not testify. The stipulation as to what she would have testified did not include any suggestion whatever that she heard prosecutrix scream, nor any corroboration of Roger's testimony as to (1) his remark to the soldier, (2) prosecutrix' torn blouse or (3) any complaint made by prosecutrix to either Mme. Letellier or Roger.

(h) Although prosecutrix' mother, Mme. Letournier, testified, she failed to testify with reference to any complaint made to her by prosecutrix, the latter's condition or any damage to her person or clothes.

(i) Neither Daniel Castile, "Mr. Marion" or the negro soldiers were called by the prosecution to testify, although theirs would have been the strongest corroboration possible of the prosecutrix' story; and there is no showing that they were not available.

> "It is incumbent upon the state to produce evidence that would naturally be produced in an honest effort to support the charge in an indictment and the non-production of such evidence permits the inference that if it were produced, its tenor would have been unfavorable to the prosecution" (Wharton's Criminal Evidence, Vol.1, p.128).

Moreover all of the above noted contradictions, inconsistencies, omissions and discrepancies in the testimony of the prosecutrix and other witnesses for the prosecution are of particular significance in view of the nature of the offense charged. It is the duty of the Board of Review to scrutinize such evidence carefully, not for the purpose of weighing it but to determine its substantiality, especially in connection with other errors and irregularities noted, in deciding whether or not the record affirmatively shows that the latter injuriously affected the substantial

rights of the accused (CM ETO 2625, Pridgen, and authorities there cited).

(j) According to Captain Schultz' testimony, it was Jeanne Toquet rather than prosecutrix who first identified accused when the two came to the camp for the purpose. Toquet's evidence as to the alleged attack on her was evidently not believed and was discredited by the court who acquitted accused of that particular charge and specification.

(k) Members of the court indicated by their questions propounded to accused while he was on the witness stand that they misunderstood his testimony as to his conversation with Mme. Letellier. The record clearly shows that, in reply to the trial judge advocate's question "Did you ask her whether she was married or not?", accused replied, "Yes. I wanted to see if she could talk English". A member of the court, having ascertained that accused spoke no French, then inquired, "How would you go about asking her (sic) if she was married?". Accused replied - perhaps a trifle ambiguously, "All I know how to go about asking her is 'Zig-Zig'. I guess the Germans say that to them". But when, immediately thereafter, he was asked just what he said when he asked Mme. Letellier "that question", he clearly stated, "It's in the book - in the French Manual". Later, another member of the court asked the accused, "When you asked this Madame Letellier if she was married, as you say, and used this phrase 'Zig-zig', did you know what it means?" Then, before accused had an opportunity to answer, his interrogator continued, "What does it mean? Do you know what it means?" Accused had not testified that he used the phrase 'Zig-zig' to Mme. Letellier but, on the other hand, that, when he asked her if she were married, he employed language found in the French Manual. The rapid, uninterrupted succession of the last two questions may well have deprived him of the opportunity to correct the erroneous assumption involved, whereas the first of the three successive questions clearly shows that at least one member of the court had misunderstood, to accused's prejudice, the latter's testimony in this regard.

Because of the errors noted committed during the trial proceedings and the inherent weakness of the evidence of accused's guilt, it is the opinion of the Board of Review that the substantial rights of the accused were injuriously affected and that the findings of guilty should be vacated (CM 194200, Sanderson (1931), 2 BR 125).

8. The charge sheet shows that accused is 43 years seven months of age and that, with no prior service, he was inducted at Louisville, Kentucky, 4 June 1942.

9. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

4155

1st Ind.

War Department, Branch Office of The Judge Advocate General, with the European Theater of Operations. 20 JAN 1945 TO: Commanding General, IX Engineer Command, APO 126, U. S. Army.

1. In the case of Technician Fifth Grade ORA B. BROADUS (35480777), Company B, 832nd Engineer Aviation Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, in which holding I concur. The holding of the Board of Review and my concurrence therein automatically vacate the findings and sentence (AW 50½; CM 152122, Ind. by Hull, Acting The JAG to WD, 20 July 1922).

2. Under Article of War 50½, the accused may again be brought to trial, by either general or special court-martial, for the offenses charged or for lesser included offenses. If a rehearing is directed, it should be ordered in the final action disapproving the present sentence.

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 4155. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4155). In the event there is a rehearing, the order will not be published until after appellate review of the record of the second trial.

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

7 DEC 1944

CM ETO 4165

U N I T E D S T A T E S	8TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 8, U. S. Army, 10 October 1944.
Private THEODORE W. FECICA (33110952), Company D, 121st Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. 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 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 Theodore W. Fecica, Company "D" One Hundred Twenty First Infantry did, at vicinity west of Argol, France, on or about 0800, 16 September 1944, desert the service of the United States by quitting his organization with intent to avoid hazardous duty, to wit: engage in combat with the enemy, and did remain absent in desertion until he was apprehended at intersection of North 787 and Grade Crossing (60) sixty, on or about 1730, 16 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 Specification except the words "on or about 1730", substituting therefor the words "on or about 1430", of the excepted words not guilty, of the substituted words guilty, 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 30 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

Accused was a member of a machine-gun squad in Company D, 121st Infantry, which was under orders to join in an attack upon a fortified enemy position at 0900 or 1000 hours, 16 September 1944. Notice of the attack and of the time it would occur was given personally by the squad leader to accused and to every other member of the squad two or three hours before the attack was to take place. The company was then situated in the front line about 150 yards from the enemy, in the vicinity of Argol, France (R6,8,9,10,14). About one-half hour before the time set for the attack accused stated to his section leader that he was nervous, sick, and could not make the attack. He requested permission to go to the aid station which was between 2500 yards and five miles to the rear. Although there was nothing unusual in accused's appearance, he received the section leader's permission and left (R9,10,11,13,15,16). That day the company was subjected to considerable fire by the enemy and on the following day it broke through to the fortified position (R14,27). A sergeant in the medical detachment of the 121st Infantry testified that sometime during a three-day period which included the day of the attack, he saw accused at the aid station and assisted him and a wounded soldier who was with him (R24). No record, however, was found showing that accused was treated at the station, although in all cases except minor ones a record was kept of all personnel who received medical treatment (R7,20).

Between 1430 and 1630 hours, 16 September, accused was seen by a military police lieutenant at the intersection of grade crossing 60 and highway 787, about 15 miles from the front line where combat was in progress. He was wearing his uniform but had no weapon. He stated that he belonged to the 121st Infantry, that he had "cracked up" at the front and was looking for a hospital. He asserted that he had been at the aid station where one of the enlisted members of the medical detachment told him to go to the hospital for a rest. The officer ordered accused into a jeep and took him to the adjutant of the 121st Infantry (R16,17,18).

4. The evidence for the defense was substantially as follows:

After his rights were explained to him, accused at his own request was sworn as a witness in his own behalf. He testified that on

or about 16 September he received permission from his squad leader to go to the aid station. He requested to go there because he was very nervous and his stomach was upset. This condition came on during the night preceding the attack. He "shook like a leaf" and did not sleep. He had undergone the same experience through several battles. He left for the aid station at about 0800 hours and met a wounded soldier from Company B. They went to the aid station together and rode on a jeep part of the way. He remembered nothing after he got on the jeep. He had "sinus trouble" and when he has an attack of sinus he can remember nothing. He did not recall what happened from the time he left his company until he found himself back at the regimental command post. He remembered that a military police lieutenant picked him up and spoke to him. He often suffered from "nerves" during combat. This condition lasted a week or a month and during that period his mind went blank. He did not recall when he had lapses of memory in the past. He had never been sent back to the clearing station and had never been at a battalion aid station for rest. He mentioned only one instance to the division psychiatrist when his mind had gone blank. He did not think it necessary to tell him it had happened before. He had gone through high school. He denied that he intended to quit his organization or run away from it or shirk important duty (R28-31,33-35).

The psychiatrist for the 8th Infantry Division testified that he examined accused on 4 October to determine his sanity. He found him responsible for his actions and not mentally diseased. It was possible for a man to be mentally ill for a few hours and to have no trace of his illness afterward. It was impossible to form an intent while suffering from amnesia. He saw no relationship between accused's sinus condition and his loss of memory. Accused did not tell witness that he had suffered from amnesia at any time. Loss of memory for a month would disable a soldier from performing his normal duties. He doubted if accused could have gone through periods of amnesia without being aware of his condition (R31-33).

5. Recalled and examined by the court, accused's squad leader testified that since 28 August 1944 when accused became a member of his squad, he had seen no indication that he was suffering from loss of memory. He observed nothing about accused that would lead him to believe that he was not mentally normal. Accused had never complained to him about any mental disturbance of any kind (R36).

6. (a) When the prosecution rested, the defense moved for findings of not guilty. The motion was denied (R22-23). The defense then proceeded with the trial, presented evidence, but failed to renew the motion at the close of the trial. The motion was thereby waived and it need not be decided whether the evidence before the court when the motion was made was sufficient to support a finding of guilty (CM ETO 564, Neville).

(b) There was undisputed evidence that accused, clearly without authority, went many miles beyond the aid station in a direction away

from the front line. Even if it be assumed that accused had valid permission to go to the aid station, he absented himself without proper leave the moment he left the station to proceed still farther to the rear. The evidence fully warranted a finding that at the time accused so absented himself he did so with the intent to avoid joining in the attack against the enemy (Cf: CM ETO 1404, Stack).

Upon another view of the evidence the court could properly have believed that accused secured permission to go to the aid station by feigning illness, that his real object was to get away from his unit which he knew was about to engage in combat against the enemy, and that he left his company with the intent to avoid participation in the impending attack. If the court believed, as it was warranted to do on the evidence, that the section leader was induced to grant accused permission to go to the aid station by his deliberately false, material representation that he was ill, then the permission so obtained, even if otherwise valid, was inoperative and accused's act in absenting himself pursuant thereto was without proper leave. Whether accused was suffering from amnesia at the time of the alleged offense was a question of fact for the court which, in this case, was resolved against him (CM ETO 1404, Stack). Any testimony by accused that he did not intend to avoid hazardous duty is not compelling as the court might believe or reject such testimony in whole or in part. All the elements of the offense alleged in the Specification were established by the evidence (CM ETO 1664, Wilson; CM ETO 105, Fowler).

7. The charge sheet shows that accused is 30 years of age and was inducted 18 September 1941 at Pittsburgh, Pennsylvania. His period of service is governed by the Service Extension Act of 1941. He had no prior service.

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

9. Confinement in a penitentiary for the offense of desertion committed in time of war is authorized by Article of War 42. Inasmuch as the sentence included confinement at hard labor for more than ten years, 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. 7 DEC 1944 TO: Commanding General, 8th Infantry Division, APO 8, U. S. Army.

1. In the case of Private THEODORE W. FECICA (33110952), Company D, 121st 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. It is noted both from his testimony and from his report to the Staff Judge Advocate that the division neuropsychiatrist examined accused 18 days after the commission of the offense and found him sane, responsible for his actions, and not mentally diseased at the time of the examination. No opinion is expressed as to the mental condition of accused at the time of the offense. The Manual for Courts-Martial, 1928, provides as follows:

> "A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right" (MCM, 1928, par.78a, p.63).

> "The medical officers * * * should ordinarily be required to include in the report a statement in as non-technical language as practicable, of the mental condition of the accused both at the time of the offense and at the time of the examination" (Id., par.35c, p.26).

A medical report on the mental condition of an accused should meet the requirements of the Manual.

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 4165. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4165).

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

(49)

BOARD OF REVIEW NO. 2

CM ETO 4171

25 NOV 1944

UNITED STATES	V CORPS
v.	Trial by GCM, convened near St. Vith, Belgium, 10 October 1944.
Private CLYDE G. McKINNON (11013622), Medical Detachment, 56th Signal Battalion	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 61st Article of War.
Specification: In that Private (then Private First Class) Clyde G. McKinnon, Medical Detachment, 56th Signal Battalion, did, in the vicinity of Arnouville, France, on or about 31 August 1944 absent himself without proper leave from his organization and did remain absent therefrom without proper leave until on or about 20 September 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court martial for absence without leave for four days, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct for five years. The reviewing authority approved the sentence, designated the 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.

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3. Competent uncontradicted evidence establishes the fact that accused absented himself from his organization on the date and under the circumstances alleged and voluntarily returned to his unit on September 20, 1944 (R6,8,10; Pros.Ex."A").

4. After his rights as a witness had been fully explained to him, he declined to take the stand and testify in his own behalf but made an unsworn statement, which was read by the defense counsel, stating that he was "picked up", at the point of a gun, taken some distance in a car, and questioned by persons connected with the "FFI". After some days, he got away and made his way to the Red Ball Highway and eventually got back to his unit in Belgium (R13, Def.Ex.1).

Since he was absent without leave at the time he claims he was seized by the "FFI", this self-serving statement of involuntary restraint, even if true, does not, under the circumstances, constitute a legal defense to the offense charged (MCM 1928,par.132,p.146).

5. The charge sheet shows that accused is 27 years 11 months of age. He enlisted, without prior service, at Portland, Maine, 25 November 1940.

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

7. 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

(51)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 NOV 1944 TO: Commanding General, V Corps, APO 305, U.S. Army.

1. In the case of Private CLYDE G. McKINNON (11013622), Medical Detachment, 56th Signal 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. Accused entered the service by voluntary enlistment on 25 November 1940 and has thus served almost four years in the Army. He has been convicted for absence without leave, by inferior courts martial, on six occasions but has held service ratings of Private First Class and Technician Fifth Grade and received Character and Efficiency ratings of Very good, Excellent, and Satisfactory. While his story about detention by the F.F.I. may not be true, yet it is evident that in the present instance accused showed considerable initiative and effort returning from the neighborhood of Paris to his organization in Belgium. All convictions were for purely military offenses. In view of the extenuating circumstances herein and the theater policy of salvage of manpower, it is recommended that the dishonorable discharge be suspended and the Seine Disciplinary Training Center be designated as the place of confinement. If this is done, a supplementary action should be forwarded for attachment to the record.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4171. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4171).

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

3 JAN 1945

CM ETO 4172

U N I T E D S T A T E S	VIII CORPS
v.	Trial by GCM, convened at Morlaix, Finistere, France, 20,21 September 1944. NOLLE PROSEQUI: Carrol and Freeman Davis. SENTENCES as to Roland, Fellows, Mitchell, William Davis, Nathan, Harris, Chambers: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Technicians Fifth Grade FREEMAN DAVIS (34533501), CHARLIE ROLAND, JR. (34011111), S. T. FELLOWS (34467951), WILLIAM MITCHELL (34005870), and WILLIAM DAVIS (34518809), Private First Class SPRUIL CARROL (34467995), and Privates CEASER NATHAN (34007835), CORNELIUS HARRIS (34271261), and ELI CHAMBERS (34271305), all of 447th Quartermaster Troop Transport Company	

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

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

2. Accused Roland, Fellows, Mitchell, Nathan, Harris and Chambers were jointly tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Grade 5 William Mitchell, Technician Grade 5 Freeman Davis, Private Ceaser Nathan, Technician Grade 5 Charlie Roland Jr., Private Cornelius Harris, Private Eli Chambers, Private First Class Spruil Carrol and Technician Grade 5 S. T. (IC) Fellows all of 447th Quartermaster Troop Transport Company, acting jointly and in pur-

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suance of a common design, did, in the vicinity of Plougar, Finistere, France, on or about 24 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Anna Marie Fourdilis.

3. Accused, William Davis, was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private William (NMI) Davis, 447th Quartermaster Troop Transport Company, while acting jointly and in pursuance of a common design with Technician Grade 5 William Mitchell, Private Ceaser Nathan, Technician Grade 5 Charlie Roland Jr., Private Cornelius Harris, Private Eli Chambers, and Technician Grade 5 S.T. (IO) Fellows, did, in the vicinity of Plougar, Finistere, France, on or about 24 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Anna Marie Foudilis.

Each of the accused, Roland, Fellows, Mitchell, Nathan, Harris and Chambers pleaded not guilty, and all members of the court present at the times the votes were taken concurring, each of said accused was found guilty of the Charge and Specification preferred against said accused jointly. Accused William Davis 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 preferred against him. Evidence of previous convictions was introduced as follows: as to accused, Fellows, one by summary court for absence without leave for one hour in violation of the 61st Article of War; as to accused, Mitchell, one by special court-martial for absence without leave from his post, camp and duties in violation of the 61st Article of War, and two by summary courts, respectively for absence without leave for three days in violation of the 61st Article of War and for wrongfully urinating in the company street in violation of the 96th Article of War; as to accused Nathan, two by summary court for absence without leave for one day and for absence without leave from guard for six hours respectively both in violation of the 61st Article of War; as to accused Chambers, two by summary courts for absence without leave and for absenting himself without leave from properly appointed place of duty after having repaired there to perform said duty respectively both in violation of the 61st Article of War. No evidence of previous convictions was introduced as to accused Roland, Harris and William Davis. All members of the court present at the times the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to

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forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved each of the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused found guilty, and forwarded the record of trial for action pursuant to Article of War 50½.

4. Upon written direction of the Commanding General, VIII Corps, the prosecution entered nolle prosequi to the charges against accused Freeman Davis and Carrol (R7). All of the remaining accused agreed to be tried together (R7).

5. Prosecution's evidence established the following facts:

The seven accused were members of the 447th Quartermaster Troop Transport Company and on 4 August 1944 were bivouacked near the town of Chateau de Kerjean, France (R8,21,26,30). Madame Anna Marie Fourdilis, is a widow, 56 years of age with a daughter who is 30 years old. On 24 August 1944 she resided in Bourg de Plougar, France, as did her friends and neighbors, Messieurs Marcel Moisan, Antione Penvidic and Pierre Charles (R8,9,21,25). A few minutes before 8 pm on that date Madame Fourdilis and the three men last above named, mounted on bicycles, rode to the above mentioned camp of the Troop Transport Company. The purpose of their visit was to obtain gasoline for Madame Fourdilis (R9,21,24). The woman carried bottles of wine in a basket attached to her bicycle and it appears that it was her intention to trade wine for gasoline (R26). The French woman and three Frenchmen entered the camp and encountered some of the colored soldiers stationed therein. They commenced negotations with the soldiers for the purpose of obtaining gasoline, which terminated in failure (R22). After remaining in the camp for about one and one-half hours they were informed they must leave and they were escorted to the camp entrance by a soldier (R9,22,26). They were also accompanied by about twelve or fifteen colored soldiers (11,26,54) of whom three were armed (R26). When they reached the road, Penvidic and Moisan walked ahead pushing their bicycles and Madame Fourdilis and Charles followed afoot also pushing their bicycles. The party proceeded on the road in the direction of Bourg de Plougar (R9,26,27,47). Suddenly a colored soldier seized the woman's bicycle. Penvidic returned to Madame Fourdilis and Charles, and there ensued a melee in which other colored soldiers joined. The woman's and Charles' bicycles were thrown to the ground and they were pulled to the side of the road by a hedge (R9,10,22,47). As they were forced along the side of the hedge they were ordered to hold their hands in the air. One of the colored men had a gun which he aimed at the woman. She screamed and ran toward Moisan, but was prevented from reaching him (R10,11,26). She then attempted to return to Penvidic and Charles but was intercepted by some of the colored men. During this disturbance Moisan had been threatened by a colored soldier who pointed a gun at him. He escaped, however, on his bicycle and went

for assistance (R27). In order to effect her escape, Madame Fourdilis ran along an intersecting road which led to a meadow. A soldier followed her, grasped her by the throat and threw her to the ground (R10,11). He tore her pinafore (R12; Pros.Ex.1) and knickers (R12,13; Pros.Ex.2). He then unbuttoned his trousers and had intercourse with her. During this time another soldier held his hand over her mouth (R13,14). This act of violence was followed by another act of intercourse committed by another soldier. She was then taken by the arms by two negro soldiers and was led about three meters distance and was again thrown to the ground (R15,40), where she was held and a hand was kept across her mouth so that she could not scream. Third, fourth and fifth acts of intercourse were performed in consecutive order, each by a different man (R16,20,33,34,43). Upon the appearance of First Sergeant Amos Richmond, 447th Quartermaster Troop Transport Company, she escaped her captors and ran into an adjoining woods and there met Moisan and Charles and three neighboring farmers (R16,26,35,36,57,58). She also encountered Penvidic (R24).

At the trial Madame Fourdilis identified accused William Davis (when he wore a helmet) as one of her assailants (R17,18) and either accused Roland or Fellows (when they also wore helmets) as the man who first had intercourse with her (R18). She asserted she could identify none of the accused (when they wore no helmets) as being present on the occasion of the attack upon her (R18). Neither Penvidic nor Moisan at the trial was able to identify any of the accused as being present on the road with them that night (R23,28).

6. The evidence for the defense summarizes as follows:

(a) On 15 September 1944 "smears" were taken by the Medical Detachment, VIII Corps, of each of the accused for the purpose of determining if any of them were afflicted with gonorrhea (R62-64). The "smears" were negative (R65,68). However, Harris, William Davis and Fellows had discharges from their penises but no gonorrhea bacilli were present in the same (R66,69,71).

On 4 September 1944 Lieutenant Colonel Arthur J. Sutherland, Jr., Medical Corps, made an examination of the genital organs of Madame Fourdilis. Marked discharges from the mouth of the womb and also from the urethra were evident. "Smears" were taken from those localities and under microscopic examination revealed the presence of gonorrhea (R72). In the opinion of Lieutenant Colonel Sutherland the infection was of recent occurrence (R73).

(b) Accused Harris, William Davis, Roland, Chambers and Fellows each elected to make unsworn statements as follows:

Harris: He had been out of camp for a walk on the evening of 24 August and returned to the camp gate about 6 pm. He then walked up the highway anout "one-half block". He saw a crowd

on the highway ahead of him, but did not know who was in it. He returned to camp and went to bed about dusk. He then heard some one "holler" but did not get out of bed. He remained in bed all night (R76).

William Davis: On the evening of 24 August 1944 after 6 pm he was asleep in his truck. He was aroused by Sergeant Carter who ordered him to "line it up". Sergeant Brooks inquired about gasoline for the truck. Davis obtained it from another truck. Thereafter, he went to the camp gate and started up the road. He encountered Sergeant Richmond who said "come on and lets go back, some of the boys up here have raped a woman". He returned with Richmond to camp, went to his truck and went to bed. He denied he had seen "her at all that night" (R77).

Roland stated that on the evening of 24 August 1944 he "was lining up trucks to go out the next morning". He completed his work about dusk and went to the camp gate where he remained 15 or 20 minutes. He then returned to his truck, obtained his blankets and went to bed. He slept under trees near Sergeant Hughes (R78).

Chambers was in the bivouac area on the night of 24 August 1944. He heard a woman scream and went to the gate where he remained about five minutes. Then he came back to his truck, went to bed and to sleep. He did not have a carbine, but an M-1 rifle (R78).

Fellows admitted that on the evening of 24 August 1944 he was "present with a group of other soldiers around a woman", but asserted he did not touch the woman and had no intention of engaging in sexual intercourse with her (R93).

(c) Accused Mitchell was sworn as a witness on his own behalf and testified as follows:

On the evening of 24 August 1944 he met a Frenchman in camp and left camp with him in order to obtain some wine (R79). On the road he encountered in a group some French civilians, accused, Carrol and Fellows and some other soldiers. When about 100 feet past them accused Chambers appeared carrying a rifle. Mitchell heard some one "shove a bolt home in their rifle". He turned back to Chambers and told him to put his gun down "because he would get us all in trouble". Chambers refused. Mitchell and the Frenchman proceeded up the road when he heard someone "holler". Then a French woman passed him followed by a Frenchman. Mitchell's companion - the Frenchman - became frightened and fled. Mitchell returned to a group of colored soldiers who surrounded a woman who was on the ground. He directed the soldiers "to let her go, that they were going to get us in trouble". On of the men replied "you will be as much in it as we are because you are here". Accused Chamber, Nathan, Fellows, William

Davis, Roland, Freeman Davis (a witness for the prosecution) and Harris were in the group. Freeman Davis "got on" the woman, but he was pulled away. Thereafter Chambers, Harris, William Davis, Nathan and Roland in the order named had intercourse with the woman. The First Sergeant (Amos Richmond) appeared while Roland was "on" the woman. Fellows did not "get on the woman" (R80,81,87). Mitchell did not at any time attempt to violate the woman and tried to prevent the men from "getting on" by remonstrating against their conduct (R81). Mitchell understood that it was his duty to stop the commission of a rape if it occurred in his presence as his commanding officer had instructed him to this effect (R82). He saw the men "pushing and shoving" as they stood about the woman and clamoring for their turn (R83). Fellows was in the group but Mitchell stated he did not notice whether he was awaiting his turn to engage the woman (R85). He admitted he had signed a pre-trial statement which included the declaration that

> "S.T. Fellows was there, but still awaiting his turn and he never got on" (R86).

He also admitted that he stood there and witnessed the five consecutive acts of intercourse and did not interfere. The affair occurred about a block from the camp gate and there was usually a guard on duty at the gate, "* * * there was nothing I could do right at the time. There was nothing I could do. They would say you are here, and you are going to be into it too" (R90). When First Sergeant Richmond appeared, Mitchell walked across the field to the company camp (R88).

(d) Accused Nathan elected to remain silent.

7. Although accused, William Davis, was arraigned and tried upon a separate specification both its form and substance merged it into the specification upon which the other six accused were arraigned and tried. In legal effect all accused were arraigned and tried upon a joint charge and specification.

8. The prosecution identified five of the accused as the colored American soldiers who engaged in acts of sexual intercourse with Madame Courdilis on the night of 24 August 1944 in a meadow near the camp of the 447th Quartermaster Troop Transport Company by the testimony of Technician Fifth Grade Freeman Davis and Private First Class Spruil Carrol. Their testimony (Davis: R33-35,43; Carrol: R49,50) is positive and specific that five of the accused copulated with the woman in the following order:

1. Chambers
2. Harris
3. William Davis
4. Nathan
5. Roland

Freeman Davis and Carrol were originally charged with the rape of Madame Fourdilis but the charges against them were nolle prosequi'd at the commencement of the trial by direction of the appointing authority, the Commanding General, VIII Corps. It may be assumed that they were accomplices of the accused within the application of the following rule:

> "A conviction may be based on the uncorroborated testimony of an accomplice, but such testimony is of doubtful integrity and is to be considered with great caution" (MCM, 1928, par.124a, p132).
>
> "A jury may convict on the uncorroborated testimony of an accomplice, if it satisfies them beyond reasonable doubt of the guilt of the defendant, but it is the usual practice for the judge to advise the jury to acquit where there is no evidence other than the uncorroborated testimony of an accomplice" (9 Am.Jur. Sec.72, p.276).

Abundant corroboration of the testimony of these two prosecution witnesses is found in the record of trial. The victim of the assaults, described five separate acts of violation of her person by five different assailants (R13-16,20). In open court she positively identified accused William Davis, as one of them (R17,18), and asserted that either Roland or Fellows was the first man to attack her (R17). The occurrence of the sexual orgy described by Freeman Davis and indicated by Carrol is substantiated by the testimony of the victim (R11,15), of First Sergeant Richmond (R57,58) and of Sergeant Carter (R55). The presence of Freeman Davis and of accused Mitchell, at the time and place of the alleged offenses is also established by Richmond's testimony (R57,58). Freeman Davis' evidence received further confirmation by accused Mitchell when he testified on his own behalf (R80-84).

Under such status of the evidence the testimony of Freeman Davis and Carrol received substantial corroboration and it was entitled to such weight and value when considered with all other evidence in the case as to the court seemed advisable.

9. "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 to consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent" (MCM, 1928, par.148b, p.165).

With respect to accused Chambers, Harris, William Davis, Nathan, and Roland there is definite, positive and convincing evidence

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that in the order named each had carnal knowledge of Madame Fourdilis. Not only did the victim testify to the acts of complete penetration (R13,15,16,20) but Freeman Davis' pornographic description of the obscene, brutal and barbarous scene removes any doubt as to proof of this element of the crime. The fact that the five named accused each penetrated the genital organs of Madame Fourdilis must be taken as a fact in the case which was established beyond all reasonable doubt.

A casual reading of the record of trial is all that is necessary to convince any fair minded and reasonable person that the woman was subjected by the five named accused to consecutive acts of sexual intercourse through force and violence and without her consent to any of them. She and her three male companions, while proceeding toward their homes on a public highway in the dusk of a summer evening were followed by a group of colored soldiers of which said accused were undoubtedly members. The inference is legitimate and just that their purpose was to obtain carnal connections with her. Suddenly she was set upon by one or more of the negroes. Her companions were frightened into submission and then flight by display of firearms. She was left alone with the negroes and was seized in her attempt to escape. She was then taken into an adjoining meadow and after her first outcry she was muffled to prevent further calls for help. She was thrown to the ground and then ensued a scene of brutal and lustful savagery finding few equals in the whole annals of American legal history. The five accused, disputing and fighting among themselves as to when each should enjoy carnal satisfaction of the woman's body, engaged in sexual intercourse with her in the order above named and without pause between the acts. During the entire period of the orgy she was held on the ground not only by the accused engaged in the sexual act but also by two or more of her assailants. The evidence discloses that a considerable number of negroes - "there was a gang around her" (R51), including the seven accused, surrounding the woman who was prostrate upon the ground. Even to suggest under such circumstances that she was a willing and cooperative party to the acts of intercourse is to insult the intelligence of any fair minded person. The prosecution beyond all doubt proved all of the elements of the detestable crime of rape as against the five a cused above named (CM ETO 4608, Murray; CM ETO 4589, Powell et al; CM ETO 4444, Hudson et al; CM ETO 3740, Sanders et al; CM ETO 3709, Martin; CM ETO 3375, Tarpley).

10. There is no evidence that either Fellows or Mitchell, two of the accused, actually engaged in sexual intercourse with Madame Fourdilis. However, it is shown by competent, substantial evidence that both were present during the prolonged attack upon her. Mitchell was "down there wanting to be next, if he could" (R35,50). He was on his knees by the woman (R57,59). He said

"if we didn't get back and let him get some, he was going to tell the CO" (R35,50)

"all you men want to f--- this woman and leave me alone here with her" (R57)

Fellows was on his knees near the woman as Roland was raping her (R35). "He was down in the bunch with them pushing * * *" (R50). He was three or four feet from the woman (R81), and when Sergeant Richmond appeared he ran away from the scene of the crime (R57,59). Both Mitchell and Fellows

"were trying to get a little like the rest, and the 1st sergeant came up is why they didn't get the chance" (R43).

The distinction between principals and aiders and abetters has been abolished by Federal statute and an aider and abetter may be convicted as a principal (Sec.332, Federal Criminal Code, 18 USCA 550;35 Stat.1152). The distinction is not recognized in the administration of military justice. All are principals (Winthrop's Military Law and Precedents - Reprint p.108).

"Under Sec.332 of the Federal Criminal Code, above quoted, the acts of the principal became the acts of the aider and abetter and the latter may be charged as having done the act himself and be indicted and punished accordingly. By virtue of said statute a principal of the second degree at common law becomes a principal in the first degree (DePreta v. United States, 270 Fed. 73; Conelli v. United States, 289 Fed.791; Kelly v. United States, 258 Fed. 392, certiorari denied 249 U.S. 616, 63 L.Ed. 803). Premised on the above stated doctrine is the established and well recognized rule that an accused may be charged with and found guilty of the crime of rape although he did not actually have intercourse with the victim if the evidence established that he was present at and aided and abetted the ravisher in the accomplishment of the act of intercourse (52 CJ, Sec.50, p.1036; State v. Flaherty, 128 Maine 141, 146 Atl. 7; People v. Zinn, 6 Cal. App. (2nd) 395, 44 Pac. (2nd) 408; People v. Rieto, 14 Cal.App. (2nd) 707, 58 Pac. (2nd) 945; People v. Durand -- Cal.App. (2nd) ---, 134 Pac. (2nd) 305; CM NATO 385 Speed)" (CM ETO 3740, Sanders et al).

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The evidence is clear beyond all doubt that both Mitchell and Fellows were not mere passive spectators of the crimes (Cf: CM ETO 804, Ogletree et al) but were violent, aggressive participants and were endeavoring to secure intercourse with the victim against the competition of other accused. It is probable that only the interception of Sergeant Richmond prevented them from accomplishing their purpose. Mitchell and Fellows were aiders and abetters of the other five named accused in the commission of the rapes. Under the principle of law above set forth they were properly charged and convicted as principals (CM ETO 4589, Powell et al; CM ETO 4444, Hudson et al; CM ETO 3740, Sanders et al and authorities therein cited).

Mitchell, in his testimony as a defense witness, presented a pattern of criminal conduct well known and understood by judges and lawyers. He attempted to benefit himself before the court at the expense of fellow accused by portraying himself as a non-participant in the crimes and as a self righteous individual who desired to prevent the same. At the most his testimony created an issue of fact which it was the duty and function of the court to determine. It was resolved against him and since the court's finding is supported by competent, substantial evidence it is binding upon the Board of Review upon appellate review (CM ETO 3200, Price, and authorities therein cited).

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

Accused	Age Years	Mon.	Inducted Place	Date
Roland	23		Fort Jackson, South Carolina	28 Jan 1941
Fellows	22		Fort Bragg, North Carolina	19 Dec 1942
Mitchell	31	1	Camp Beauregard, Louisiana	17 Jan 1941
William Davis	23		Fort Bragg, North Carolina	26 Dec 1942
Nathan	25		Camp Blanding, Florida	1 Feb 1941
Harris	22	6	Camp Shelby, Mississippi	24 Feb 1942
Chambers	25	7	Camp Shelby, Mississippi	24 Feb 1942

None of accused had any prior service.

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

13. The punishment for the crime of rape under the 92nd Article of War is death or life imprisonment as a court-martial may direct. Confinement in a penitentiary is authorized for the

offense 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 of each accused is proper (AW 42; Cir.229, WD, 8 June 1944, Sec.II, pars.1b(4), and 3b).

[signature] Judge Advocate

[signature] 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. 3 JAN 1945 TO: Commanding General, VIII Corps, APO 308, U.S. Army.

1. In the case of Technicians Fifth Grade CHARLIE ROLAND, JR. (34011111), S. T. FELLOWS (34467951), WILLIAM MITCHELL (34005870), and WILLIAM DAVIS (34518809), and Privates CEASER NATHAN (34007835), CORNELIUS HARRIS (34271261), and ELI CHAMBERS (34271305), all of 447th Quartermaster Troop Transport Company, attention is invited to the foregoing holding of 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 orders 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 4172. For convenience of reference please place the number in brackets at the end of the orders (CM ETO 4172).

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

7 NOV 1944

CM ETO 4177

U N I T E D S T A T E S)	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	
Captain JOSEPH RAMON REMSING (O-1845614); Captain JOHN GREGORY KROLL, Medical Corps (O-469016); First Lieutenant CHARLES EUGENE JEUNELOT (O-1895630); First Lieutenant LeROY WILSON, Jr. (O-1895762); and First Lieutenant WILLIAM GAVIN NOFFSINGER (O-1845289), all of Headquarters and Headquarters Detachment, 54th Replacement Battalion.)	Trial by GCM, convened at Tidworth, Wiltshire, England, 29 August 1944. Sentence: As to each accused: To be dismissed the service.

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 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. Accused were each tried upon their respective Charge and Specification, as follows:

CAPTAIN JOSEPH RAMON REMSING

CHARGE: Violation of the 93rd Article of War.

Specification: In that Captain Joseph R. Remsing, Headquarters and Headquarters Detachment, 54th Replacement Battalion, did, at Edgarley Lodge,

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near Glastonbury, Somerset, England, on or about 1 May 1944, feloniously take, steal, and carry away one (1) Sapphire Ring, value about Forty ($40.00) Dollars, the property of Mr. Montagu Porch.

CAPTAIN JOHN G. KROLL

CHARGE: Violation of the 93rd Article of War.

Specification: In that Captain John G. Kroll, Headquarters and Headquarters Detachment, 54th Replacement Battalion, did, at Edgarley Lodge, near Glastonbury, Somerset, England, on or about 1 May 1944, feloniously take, steal, and carry away one (1) Ivory Powder Box, value about Eight ($8.00) Dollars, and one (1) Silver Finger Bowl, value about Eight ($8.00) Dollars, the property of Mr. Montagu Porch.

FIRST LIEUTENANT CHARLES EUGENE JEUNELOT

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant Charles E. Jeunelot, Headquarters and Headquarters Detachment, 54th Replacement Battalion, did, at Edgarley Lodge, near Glastonbury, Somerset, England, on or about 1 May 1944, feloniously take, steal, and carry away one (1) Gun Metal Inlaid Box, value about Sixteen ($16.00) Dollars, the property of Mr. Montagu Porch.

FIRST LIEUTENANT LeROY WILSON, Jr.

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant Le Roy Wilson, Jr., Headquarters and Headquarters Detachment, 54th Replacement Battalion, did, at Edgarley Lodge, near Glastonbury, Somerset, England, on or about 1 May 1944, feloniously take, steal, and carry away one (1) Locket, (Wolf and Eagle Design), value about Sixteen ($16.00) Dollars, the property of Mr. Montagu Porch.

FIRST LIEUTENANT WILLIAM G. NOFFSINGER

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant William G. Noffsinger, Headquarters and Headquarters Detachment, 54th Replacement Battalion, did, at Edgarley Lodge, near Glastonbury, Somerset, England, on or about 1 May 1944, feloniously take, steal, and carry away one (1) Locket, Indian Deity Design, value about Sixteen ($16.00) Dollars; one (1) Gold Watch Chain, value about Twenty-four ($24.00) Dollars; one (1) Silver Ash Tray with coat of arms, value about Four ($4.00) Dollars; one (1) Mexican Onyx Cigarette Box, value about Forty ($40.00) Dollars; one (1) Mother of Pearl Cigarette Box, value about Twenty ($20.00) Dollars; and one (1) Table Runner, value about Four ($4.00) Dollars, the property of Mr. Montagu Porch.

Accused were asked prior to arraignment if there was any objection on the part of any of them to a common trial and no objection was made. Each accused pleaded not guilty to and was found guilty of the Charge and Specification against him. No evidence of previous convictions of any of accused was introduced. Each accused was sentenced to be dismissed the service. The reviewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, approved the sentence of 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, stating it was "wholly inadequate to the criminal offense of which found guilty", and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows: That Edgarley Lodge, at Glastonbury, Somerset, England, the residence of Montagu Phippen Porch, a British retired Colonial Civil Servant, Nigerian Civil Service, was requisitioned by the War Office for officers' billets and that a group of American officers took possession about 29 January 1944. Two rooms had been reserved by the owner in his agreement with the War Office, a bedroom and a sitting room. The bedroom door was always kept locked, the sitting room was left unlocked so that the officers could use the telephone located there until their own was installed. The keys to the bedroom door, with others all labeled, were concealed under some table cloths and "things" in the right-hand drawer of the sideboard or buffet in the sitting room. No permission

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was at any time given any American officers to go into the bedroom. Porch had a lot of little presents of a lifetime, some inherited, some from the Prime Minister's family, in his dressing room to which access was had only through the bedroom. Porch visited these rooms about 1 May, at which time he noticed nothing missing, but on a visit there the night of 7 July, he discovered many things missing, among others, a locket containing photographs of his father and mother taken on their wedding day, which had been given him by his mother, two rings that had belonged to his wife, a gold chain his mother had given him on his 21st birthday, a big onyx cigarette box, a gun metal Japanese box with inlaid picture of a cock and hen, given him by the Prime Minister's mother, a mother-of-pearl cigarette box and a rose quartz ash tray. Later, he found on further examination other things missing, including an 18th Century ivory powder box, either one or two silver finger bowls, English design, hand-hammered with fruit designs, and a sapphire ring. He did not recall the table cloth. The locket was shield-shaped with a wolf and an eagle on its sides, another locket missing, of almost pure gold, had an Indian Deity design (R17-20). He identified the locket containing his mother's and father's photograph, the sapphire ring and the mother-of-pearl cigarette box shown to him, as part of the missing articles and they were admitted in evidence as prosecution exhibits numbered 1, 2, and 3, respectively. He testified he had given no one permission to take them (R20-21). All of accused were stationed at Edgarley Lodge on or about 1 May 1944 (R17).

Each of accused, after due warning as to his rights, gave a written statement to an investigating officer from the Army 3rd Criminal Investigation Division, which statements were introduced in evidence without objection by the defense, that of Captain Remsing's as Prosecution Exhibit 4, Captain Kroll's as Prosecution Exhibit 5, Lieutenant Jeunelot's as Prosecution Exhibit 6, Lieutenant Wilson's as Prosecution Exhibit 7 and Lieutenant Noffsinger's as Prosecution Exhibit 8 (R22-25). This officer testified that during the investigation, Edgarley Lodge was searched and the mother-of-pearl cigarette box (Pros. Ex.3) was found in a valet-pack belonging to Lieutenant Noffsinger and having his name on it. A tapestry table runner was also found in the same valet-pack under the same circumstances and was admitted in evidence as Prosecution Exhibit 9 (R25-26).

Detective Constable Norman R. Gray, Somerset Constabulary, Bridgewater, Somerset, testified that Prosecution Exhibit 1 was handed to him on 20 July at the officers' billet at Edgarley Lodge by Captain Remsing (R26) and that Prosecution Exhibit 2 was received by him by registered post on 24 July, the wrapper bearing the name and address of Captain Remsing. Stipulations between the prosecution, defense and the various accused, fixing the agreed value of the various items taken in which each accused was interested, and being the values set out in the

specifications, were introduced in evidence (R26-27).

4. For the defense, Lieutenant Colonel Ranald B. Engelbeck, Cavalry, 54th Replacement Battalion, and the commanding officer of all of accused, testified that the character of each accused was excellent and that he desired to retain them as members of his command. Each accused also testified that the incident occurred around 1 May; that one evening they were around the house after duty hours and probably for want of something better to do, decided to see what was in this room. The key was downstairs and one of them, none would say who, secured the key and they all entered the room and looked around; that there were quite a number of trinkets, different ornaments and novelties all over the room. Captain Remsing testified he took the sapphire ring (Pros.Ex.2) as a souvenir (R30). He turned it back to Detective Gray. Each testified he did not know this bedroom was off limits and that he had no reason except curiosity for entering the bedroom; that they knew whose property they were taking and that the articles were the private property of Mr. Porch. Captain Kroll testified to taking the ivory powder box and the silver finger bowl (R33). Lieutenant Jeunelot testified to taking the gun metal box (R34), which he sent home (R34,37). Lieutenant Noffsinger testified that he took the locket with the buddha design on it, the gold chain and the ash tray, which he sent home for safekeeping. The mother-of-pearl cigarette box and the table runner he had in his val-pack. He denied knowing anything about the Mexican onyx cigarette box, although he did admit he sent a little powder box with flower design home with the other things. He admitted that they did not have permission to enter the room and that he had the key in his hand prior to the door being opened and "it may have been" he who actually opened the door (R38-41). Lieutenant Wilson testified he took the gold locket with the intention of keeping it as a souvenir and returned it when the investigation started (R42-44).

5.

> "Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong * * * to another, with intent to deprive such owner permanently of his property therein" (MCM, 1928, par.149g, p.171).

All of the essential elements of larceny occurred herein in the acts committed by each accused and the acts were admitted by each of them. No attempt was made to return any of the property over a period of upwards of two months or until the theft had been discovered and an investigation thereof was being made.

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6. The charge sheet shows that Captain Remsing is 27 years of age and that he entered upon extended active duty as a Second Lieutenant on 28 April 1943; that Captain Kroll is 31 years of age and entered upon extended active duty as a First Lieutenant 3 July 1943; that Lieutenant Jeunelot is 29 years of age and entered upon active duty as a Second Lieutenant 12 May 1943; that Lieutenant Wilson is 24 years of age and entered upon active duty as a Second Lieutenant 12 May 1943; and that Lieutenant Noffsinger is 24 years of age and entered upon active duty as a Second Lieutenant 28 April 1943. All, except Captain Kroll, had prior enlisted service; Jeunelot had served in the National Guard since 1937.

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

[signature] Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

[signature] Judge Advocate

1st Ind. (71)

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

1. In the case of Captain JOSEPH RAMON REMSING (O-1845614); Captain JOHN GREGORY KROLL, Medical Corps (O-469016); First Lieutenant CHARLES EUGENE JEUNELOT (O-1895630); First Lieutenant LeROY WILSON, Jr. (O-1895762); and First Lieutenant WILLIAM GAVIN NOFFSINGER (O-1845289), all of Headquarters and Headquarters Detachment, 54th Replacement Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 417 For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4177).

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

(Sentences ordered executed. GCMO 98, 99, 100, 101, 102, ETO, 10 Nov 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

16 DEC 1944

CM ETO 4178

U N I T E D S T A T E S	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE
v.	
Private JAMES A. PHIPPS (35433893), Detachment G, Supply Division, Base Air Depot #1	Trial by GCM, convened at AAF Station 590, England, 6 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by 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 61st Article of War.

Specification: In that Private James A. Phipps, Det "G" Sup Div Base Air Depot #1, AAF-571, APO 635, U.S. Army did, without proper leave, absent himself from his station at AAF Station 571, APO 635 from about 8 September 1944 to about 22 September 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions, one by summary court and one by special court-martial of absence without leave for 2 and 121 days respectively, each in violation of Article of War 61. He was sentenced to be dishonorably discharged the service,

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to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for five (5) years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Competent uncontradicted evidence, both oral and by morning reports, establishes that accused went absent without leave from his station on 8 September 1944, and that he returned to military control by voluntarily turning himself in to the Military Police on 22 September 1944, (R6,8,9,10,12, Pros. Exs.1,2,3).

4. After his rights as a witness were explained by the court, accused elected to make an unsworn statement wherein he attempted to justify his actions by claiming despondency caused by receipt of letters from members of his family in the States. These facts, in explanation, failed to constitute a legal defense but were matters for consideration by the court and reviewing authority in determining what sentence should be imposed (Pars.78,87, MCM 1928, pp.62,74).

5. The charge sheet shows that accused is 24 years of age, and was inducted into the army at Huntington, West Virginia, 26 June 1942. He had no prior service.

6. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind. (75)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 DEC 1944 TO: Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U. S. Army.

1. In the case of Private JAMES A. PHIPPS (35433893), Detachment G, Supply Division, Base Air Depot No. 1, 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 4178. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4178).

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

(77)

BOARD OF REVIEW NO. 1

9 NOV 1944

CM ETO 4184

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 in the vicinity of Bastogne, Belgium, 15 September 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
First Lieutenant STEWART L. HEIL (O-1298393), Infantry, Headquarters, V Corps.	

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 61st Article of War.
Specification: In that First Lieutenant Stewart L. Heil, Headquarters V Corps being on duty as a combat liaison officer to the Second French Armored Division, did, at Paris, France, on or about 26 August 1944, deliberately abandon his duties as such liaison officer while in a combat situation and absent himself without proper leave from the service of the United States and did remain absent therefrom without proper leave until he surrendered himself at Rozoy,

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(78)

France, on or about 5 September 1944.

CHARGE II: Violation of the 85th Article of War.
Specification: In that * * *, was, at Paris, France, on or about 26 August 1944, found drunk, while on duty as Liaison Officer to the Second French Armored Division.

CHARGE III: Violation of the 94th Article of War.
Specification: In that * * *, did, at Paris, France, on or about 26 August 1944, knowingly and willfully misappropriate and apply to his own use and benefit a motor vehicle of the value of over $50.00, property of the United States furnished and intended for the military service thereof.

CHARGE IV: Violation of the 95th Article of War.
Specification: In that * * *, being on duty as a combat liaison officer to the Second French Armored Division, did at Paris, France, on or about 26 August 1944, deliberately abandon his duties as such liaison officer while in a combat situation and absent himself without proper leave from the service of the United States and did remain absent therefrom without proper leave until he surrendered himself at Rozoy, France, on or about 5 September 1944.

CHARGE V: Violation of the 64th Article of War.
Specification: In that * * *, being on duty as a combat liaison officer to the Second French Armored Division, having received a lawful command from Captain Roy H. Hamill, Headquarters V Corps, his superior officer, to deliver a tactical overlay to Headquarters V Corps at Chilly-Mazarin, France, did at Paris, France, on or about 26 August 1944, willfully disobey the same.

CHARGE VI: Violation of the 96th Article of War.
Specification: In that * * *, did, at or near Paris, France, from on or about 26 August 1944 to 5 September 1944, wrongfully and without authority detain Private Joseph W. Grieshaber, Headquarters Company, V Corps, and require him to act as his driver for his own personal use and benefit.

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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 all charges and specifications. 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, V Corps, approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, withheld the order directing execution of the sentence pursuant to Articles of War 48 and 50½, and forwarded the record of trial for further action thereunder. 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's evidence established the following:

On 26 August 1944 accused was on duty with the Liaison Control Section, Headquarters, V Corps, situate at Chilly-Mazarin, France, about 15 miles from Paris (R6,8). His specific assignment was as one of a team of six liaison officers, under the command of Captain Roy H. Hamill, Cavalry, detailed to the 2nd French Armored Division, whose headquarters was located at the Hotel Des Invalides, Paris (R6-8,11). On or just prior to 26 August accused was instructed by his superior officer, Major Edgar A. Wilkerson, Inspector General's Department, Headquarters, V Corps, to proceed to the French division headquarters and, according to an hourly shuttle schedule, return to Headquarters, V Corps, with information as to the progress of the French division (R8,10). At about 0900 hours 26 August, pursuant to instructions, accused, a driver (Private Joseph B. Grieshaber, Headquarters Company, V Corps), and two French civilians left the V Corps command post in a United States Government command reconnaissance car belonging to the 506th Car Company (R8,19,30). They proceeded to Paris and stopped at the bar of one of the French passengers, named Charley (R19). At this place the street was crowded and an "FFI" truck stopped by them and gave them eight bottles of champagne, two of cognac and about four of wine, which were placed beside the driver (R23). The party remained here one-half hour to one hour, during which time accused consumed a few drinks of "amber color" liquid. Leaving Charley at his bar, the other three went on in the car to the bar of the other French civilian (R20). At this point accused ordered the driver to place the bottles in the trunk of the vehicle and opened a bottle of cognac, from which he drank two inches (R23). They remained at the second place another half hour, during which time accused consumed a few more drinks of cognac. Thereupon accused, Grieshaber and a third Frenchman, Raksanoff, who was to act as guide, started in the car toward the headquarters of the 2nd French Armored Division and encountered shooting in the street (R20,24,28). The three dismounted and accused

entered a house, ascended to the roof and crossed to another building. Later he requested Grieshaber's "gun", but the latter refused to relinquish it (R20-21). They then went to the headquarters of the French division, arriving around 2000 hours (R24).

When accused ascended the stairs in the building, en route to the French division headquarters,

> "he weaved. His form of talk was awful quick. His words fell over each other * * * very excited" (R33).

When they arrived at the headquarters, he

> "was speaking in a very fast and excited manner. His words was jumping over each other" (R24).

> "He weaved. He walked like he was not sure of his footing."

Grieshaber testified that he would not say accused was

> "exactly drunk - more or less in a daze * * * I wouldn't say he was sober * * * Just half and half. A couple of more drinks ... * * * Talking like he had mush in his mouth" (R34-35).

At the French division headquarters, the French guide remained at the gate (to the parking area) and accused and the driver entered. Accused entered the building (R24). Captain Hamill, who was to give information to accused for him to take back to V Corps headquarters (R11), appeared at the parking area and at about 2035 hours conversed with accused (R12,25). Captain Hamill testified that accused's "trousers were a little mussed up - a little dirty", accused was leaning on the vehicle and immediately commenced telling him about chasing some snipers in Paris. He "seemed rather excited" (R13-14). Captain Hamill told accused to return to V Corps and give "to them" a tactical overlay which had been given to accused by the G-3 Section of the 2nd French Armored Division (R13). Accused said "All right," boarded the vehicle and followed Captain Hamill out the gate at about 2100 hours (R13,25). Accused, the driver and the Frenchman then proceeded to a bar owned by a man named Robert, where they had supper and accused drank more cognac. They then went to the home of the Frenchman, Raksanoff. When they returned to the bar, accused "passed out in the car" and the Frenchman carried him into the bar (R25-26, 31).

Accused and Grieshaber passed the night of 26 August at Raksanoff's home. On the morning of 27 August accused and the driver breakfasted there and "went driving around" through Paris again (R28). Thereafter, the driver reported every morning at Charley's

bar "and sometimes (accused) would ride around in the car for a little while". At no time during their ten days in Paris did they go to the headquarters of the 2nd French Armored Division, except for two occasions when the driver drew gas, or to V Corps headquarters. Grieshaber one day asked accused "if we shouldn't start back". Accused said Grieshaber

> "was no one to question him and stated he was working on the order of the FBI with the FFI."

During part of 26 August accused wore an "MP" arm band (R28-29). On the "eleventh or twelfth" day after their arrival in Paris, upon accused's orders they returned to V Corps. When they stopped en route for dinner, accused told Grieshaber "he had been AWOL" (R29-30).

Accused reported back to Major Wilkerson at Rozoy, France, about four p.m., 5 September, between which time and 26 August that officer had not received any communication of any sort from him. Major Wilkerson made efforts to locate accused and reported his absence to the V Corps Provost Marshal, the G-1 Section and (later) the Adjutant General (R9).

Major Sol Radam, Infantry, Headquarters, V Corps, Investigating Officer in the case, warned accused as to his rights, told him that he was there "to help" and that accused should execute a statement "so that anyone reviewing this case could see his side the best" (R15-18). Over objection by the defense on the ground that "it was taken under improper advice to the accused," the sworn statement of accused, dated 7 September 1944, was admitted in evidence (R18; Pros.Ex.A). The statement is prefaced, in part, by the following words:

> "I, the undersigned accused, * * * being advised of my rights not to incriminate myself and of my right to remain silent; being aware that any statement I make maybe used against me in court-martial trail (sic); and without being persuaded by promise, reward or punishment, voluntarily and freely say:"

The statement in general confirmed the prosecution's testimony, except that accused denied drinking anything of an alcoholic nature at either of the homes of the French civilians prior to reaching the 2nd French Armored Division headquarters and elaborated upon his encounter with two snipers, both of whom he killed en route to that headquarters. He also elaborated upon immaterial events at the headquarters.

> "Captain Hamill then handed me an overlay and stated, 'If you will take this back I will apologize to the French for you.'"

> "During all this time things were in a very hectic state. The excitement of being in

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a liberated city with the people not letting you alone for a minute, and idolizing you, made the days pass so quickly that I found myself being effected and swayed by this unusual situation. I did not intend to desert the service of the United States. I did not intend to remain AWOL from my job." (Pros.Ex.A).

4. At the conclusion of the prosecution's case the defense moved for findings of not guilty as to Charge II and Specification (drunk on duty) and Charge V and Specification (wilful disobedience of the order of his superior officer). The court denied the motion as to each (R36).

5. (a) For the defense, Lieutenant Colonel (formerly Major) Edgar Wilkerson testified that prior to 26 August 1944 accused performed his duties in a very excellent manner (R27).

(b) After his rights were explained to him, accused elected to testify in his own behalf. He testified as to his prior military service (see infra, par.8) (R37) and stated he was assigned to V Corps two months prior to the trial. During his period of service, approximately 80 per cent of the ratings given him by his superior officers on his Form 66-1 were "superior". The remainder of his testimony roughly paralleled his sworn statement (Pros.Ex.A) with the following exceptions: He testified that when he was directed to report to the 2nd French Armored Division he was not given any definite instructions as to when to return "as long as one returned with the information available." Referring to the arrival in Paris, he testified

"I was offered drinks at various times, but I refused. I was still on duty". (R38).

After shooting a sniper he was highly nervous.

"I was shaky because of the fact I had killed him. * * * I was excited, talking loudly and with my disheveled appearance and did not make a good appearance as an officer" (R39).

He denied that Captain Hamill told him to deliver the overlay, but admitted that the Captain said

"If you will take the overlay back, I will apologize to the French for you, so there won't be any kick back."

Accused further testified:

"The second day that I discovered I still had the overlay with me, in order not to

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> let it fall into unauthorized hands, I destroyed it due to its military nature.
>
> * * * * *
>
> On the night of the 4th of September, I instructed the driver I had come to my senses and realized what was happening, I instructed my driver we would go back to V Corps" (R40).

He denied having told the driver he was working on an order from the FBI with the FFI (R41).

Upon cross-examination, he testified that when he left Captain Hamill his understanding was that he was to return the overlay to "Headquarters, Victor forward." He admitted that a liaison officer's prime duty was to see reports go quickly from one headquarters to another (R42).

> "I never changed my intention of going back. Merely in my excited condition I was an easy victim * * * of having a drink and settling down."

His condition, "pretty well under the weather," did not warrant his delivering the overlay (R44). The reason he did not return it was that "It was too late to get it there," he was not capable of holding it and he "was not in a very respectable condition" (R47). He believed he knew what he was saying and doing at all times while in Paris (R45).

6. (a) Following accused's pleas the defense moved

> "that the prosecution be required to state the time on 26 August 1944 at which accused was alleged to be drunk as charged under Charge II. Charge I alleges that accused absented himself without leave from his duty on 26 August 1944, so the hour of the alleged drunkenness is material as bearing on his duty status at that time" (R5a).

This motion in effect attacked the Specification of Charge II as indefinite and uncertain in that it contained an insufficient allegation of time. It raised matter properly determinable upon a motion to quash (Winthrop's Military Law & Precedents, Reprint, p.250), and its determination rested within the judicial discretion of the court (Ibid; Cf: CM ETO 895, Davis et al, p.24). The defense could reasonably be expected to assume, as conceded by the prosecution (R5a), that to sustain Charge II and its Specification the prosecution must prove that accused was drunk at some time on 26 August 1944 before the

time on that date when he abandoned his duties and went absent without leave as alleged in the Specification of Charge I (MCM, 1928, par.145, p.160). It is not apparent why the defense needed to be notified, when it made the motion, of the precise time of the drunkenness in order to protect any substantial rights of accused. In the opinion of the Board of Review, there was no abuse of discretion in the court's denial of the motion and the same was free from error.

(b) The question whether accused's statement (Pros.Ex.A) was voluntarily made was one of fact for the court, which it determined in the affirmative, as indicated in its findings of guilty. Such determination is supported by competent substantial evidence of the voluntary nature of said statement, and will therefore not be disturbed upon appellate review by the Board of Review (CM ETO 2007, Harris, Jr., p.10, and authorities there cited).

7. (a) The record contains clear evidence that accused absented himself without leave for the period and under the aggravated circumstances alleged in the Specification of Charge I, in violation of Article of War 61. The Board of Review is of the opinion that the identical Specification under Charge IV does not allege a violation of Article of War 95.

> "the conduct had in view by the article may not consist in conduct unbecoming an officer only, or in conduct unbecoming a gentleman only, but must in every case be unbecoming the accused in both these characters at once. * * * the act which forms the basis of the charge must have a double significance and effect. Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents.
>
> * * * * *
>
> Conduct unbecoming an officer and a gentleman may thus be defined to be: "Action or behaviour in an official capacity, which, in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman; Or action or behaviour in an unofficial or private capacity, which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain

> a member of the honorable profession of arms." (Winthrop's Military Law and Precedents, pp.711-712,713).

Although the facts regarding accused's conduct, as developed by the evidence, particularly his excessive drunkenness and association with French bar keepers, might have constituted a violation of Article of War 95, the Board of Review is not here called upon to decide this question. The only question for determination is whether the Specification of Charge IV alleges a violation of such article. The allegation is of absence without leave for ten days from duties as a combat liaison officer with a division of the French Army, in a combat situation. There is nothing in the allegation indicating conduct unbecoming accused in a capacity other than as an officer. No conduct unbecoming him in his capacity as a gentleman is alleged. The Board of Review is therefore of the opinion that the record is legally insufficient to support the findings of guilty of Charge IV and its Specification (Dig.Ops.JAG, sec.453, pp.341, et seq). The appropriateness of the sentence, however, is not affected as he was properly found guilty of the identical specification under Charge I.

(b) The question whether accused's drunkenness on 26 August 1944, prior to the time of his abandonment of his duties on that date, was

> "sufficient sensibly to impair the rational and full exercise of the mental and physical faculties" (MCM, 1928, par.145, p.160) (Charge II and Specification),

and yet was consistent with his wilfulness in disobeying the order of his superior officer to deliver the tactical overlay (Charge V and Specification) was purely one of fact for the court (CM ETO 3937, Bigrow, and authorities therein cited). In view of the substantial affirmative evidence (including accused's own sworn testimony that he deliberately destroyed the overlay and knew what he was doing at all times) upon this question and upon all other elements of the offenses alleged in Charges II and V and their specifications, the finding of guilty will not be disturbed by the Board of Review upon appellate review. (Drunk on duty: CM ETO 3577, Teufel, and authorities there cited; wilful disobedience: CM ETO 2469, Tibi, CM ETO 3080, Holliday). The denial of the defense motion for findings of not guilty as to these charges and specifications was proper (MCM, 1928, par.71d, p.56).

(c) All the elements of the offense alleged in the Specification of Charge III (misappropriation and misapplication of government vehicle, in violation of AW 94) were established by the evidence (CM ETO 996, Burkhart; CM ETO 3153, Van Breeman). The court was justified in inferring that the market value of the government command reconnaissance car was over $50.00 (CM 228274, Small).

(d) Likewise, accused's guilt of the Specification of Charge VI (wrongful detention of soldier as driver for personal use, in viola-

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tion of AW 96) was clearly established.

8. The charge sheet shows that accused is 34 years seven months of age and had the following service: "Attended TIS as officer candidate 6 Aug 1942, aptd 2d Lt, Inf. AUS 2 Nov. 1942, assigned to TIS 11 Nov 1942, trfd to Hq Co. 106th Inf Div 22 Feb 1943, trfd to Hq Co XII Corps 16 Nov 1943, trfd to Hq Co 271st Inf 18 Mar 1944, trfd to 41st Repl Bn 18 July 1944, trfd to Hq V Corps 25 Aug 1944." According to his testimony (R37), his prior service consisted of six years three months continuous enlisted service from 1928 to 1934 in the regular army. He was "inducted voluntarily" 4 May 1942 and served as an enlisted man until about 5 August.

9. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein indicated, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons above stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge IV and its Specification and legally sufficient to support the findings of guilty of Charges I, II, III, V, VI and their specifications and the sentence.

10. A sentence of dismissal from the service is mandatory under Article of War 85 upon conviction of an officer of the offense of being found drunk on duty in time of war, and is authorized upon conviction of a violation of Articles of War 61, 64, 94 or 96. A sentence of total forfeitures and confinement at hard labor is authorized upon conviction of a violation of any of said Articles of War.

11. The designation by the confirming authority 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. (87)

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

1. In the case of First Lieutenant STEWART L. HEIL (O-1298393), Infantry, Headquarters, V Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge IV and its Specification, and legally sufficient to support the findings of guilty of Charges I, II, III, V, VI and their specifications 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 4184. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4184).

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

(Findings of guilty of Charge IV and Specification thereunder vacated. Sentence ordered executed. GCMO 110, ETO, 20 Nov 1944)

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

BOARD OF REVIEW NO. 2

7 NOV 1944

CM ETO 4193

U N I T E D S T A T E S	)	VIII CORPS
	)	
v.	)	Trial by GCM, convened at Morlaix, Finistere, France, 10 September 1944. Sentence: Dismissal.
	)	
Second Lieutenant ROBERT C. GREEN (O-530347), Infantry, 320th Replacement Company, 48th Replacement Battalion.	)	

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 Specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that 2nd Lt Robert C. Green 320th Replacement Company, 48th Replacement Battalion APO 350 U.S. Army, having received a lawful command from Captain Clifford F. Soukup, his superior officer, to surrender possession of a German motorcycle, did in the vicinity of Grid Coordinate T213440 Lambert Zone 1, France, on or about 12 August 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. The reviewing authority, the

Commanding General, VIII Corps, 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, although finding it grossly inadequate punishment for the grave offense of which accused was found guilty, confirmed the sentence and withheld the order directing the execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution, in substance, is as follows: At about ten o'clock in the morning (R9) of 12 August 1944, Second Lieutenant Norman R. Haertig, supply officer (R7) of 320th Replacement Company, 48th Replacement Battalion, was sent by the commanding officer of his company, Captain Soukup, to pick up a motor bike in one of the fields (R6). He informed accused who was in possession of it that Captain Soukup wanted the motor bike (R8) and was told by accused that the motor bike was not running, that the gears were locked and he wanted to repair it before turning it over (R6,8). Accused had previously talked to Haertig about this motorcycle and stated he was going to give it to the company before he left. Haertig reported to Soukup what accused had said (R6) and that accused had stated that if he (Soukup) wanted the "bike" he would have to come and get it (R7). At about 12:30 p.m., the same day, after receiving Haertig's report, Soukup directed a sergeant of his unit to secure the motor bike and return it to the supply room where it could be picked up (R15). The sergeant conveyed the message to accused who "more or less in a jovial way * * * stated that the Captain would have to take it over his dead body" (R10) and that "if the Captain wanted the motorcycle he would have to come down and get it himself" (R11). He did not turn the motor bike over to the sergeant (R13). The sergeant then reported to the Captain (R11). At approximately 12:30 on the afternoon of 12 August, Captain Clifford F. Soukup, commanding officer of accused's unit, went to the field where accused was (R14). He asked accused why he had not sent the vehicle as directed through the Lieutenant and sergeant and was informed by accused that it was his (accused's) property. Soukup testified that he then informed accused that he was still accused's commanding officer, and to remove the vehicle personally, and he refused. He then informed accused "this is a direct order and you will comply with it immediately", and he (accused) again refused. Soukup then told three or four enlisted men to pick it up and take it to the supply tent at which accused arose, "stepped backward one or two steps and placed his hand on the holster of his pistol and said 'if you move it, you will move it over my dead body'". He did not attempt to draw the weapon. Soukup then placed him under arrest and notified the Provost Marshal who took accused into custody. Accused's attitude was insubordinate and he tried to argue (R15). Accused when approached, was working on the motorcycle and there were some parts on the ground (R16). He had a pistol belt and holster but Soukup did not know whether there was a pistol in the holster

(R17). (The court took judicial notice of Article of War 80 directing the disposal of captured enemy property.)

Second Lieutenant George Clifford Anderson, also of accused's unit (R20) was present when the sergeant asked accused for the motorcycle, as well as when Captain Soukup later came for it. Anderson testified that Soukup told accused "to take it to the orderly room if he had to carry it on his back". There had been some previous talk between the two. Accused "asked the Captain if you want my wife you can get her too or words to that effect". The Captain then said "I am giving you a direct order to take this motorcycle up to the Orderly Room", and there was quite an argument. Accused refused to give up the motorcycle on the ground that it was his (R21) and he was serious. Captain Soukup then placed accused under arrest and left (R22).

4. Private First Class Wilbert D. Bowling of accused's unit, as a witness for the defense, testified that he was within six feet of the parties during the conversation on 12 August between accused and Captain Soukup over a German motorcycle, which accused had and which Soukup came to see about. He did not hear Soukup at any time give accused a direct order to turn the motorcycle over to him and, over objections, he was allowed to testify that it appeared to him that the conversation was in the nature of a personal argument (R24). He testified also that accused was not armed. He admitted, however, he heard only parts of the conversation (R25).

Private First Class Harold C. Frank of the same unit also heard part of the conversation but was sure of nothing except that he did not hear Soukup give accused a direct order to turn over the motorcycle to him (R26).

After being advised by the court of his rights as a witness (R28) accused testified, in substance, that he found a German motorcycle which had been painted and marked by the 4th Armored Division. Its brakes were gone and some of its gears dismantled. He and an enlisted man brought it up to the area and got it so it would run. He told Lieutenant Haertig he wanted him to have the motorcycle, and had promised it to Haertig. He had done a lot of work on it so, when the sergeant came and said the Captain told him to pick it up, "I told him no, since I figured he could be horsing or kidding me is why I refused", the sergeant. Just before that Lieutenant Haertig had come down and said "that he wanted to pick it up for the Captain". Accused told him "when I repaired it I was going to turn it over to him when I left". While he was working on it after the sergeant left, the Captain came and it "seems like he was mad". He wanted to know why the motorcycle was not given to the sergeant and accused stated he wasn't letting everybody have it; that Lieutenant Haertig was to have it when accused had it finished.

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"I said, 'there are boys around here got paratroop boots, P 38's, and I as a 2nd. Lieutenant would have authority to take that stuff away from those boys?' He said 'you certainly do.' I don't know what I said then I forgot. Then, 'if I had my wife there in my tent you as a superior officer would have a right to send a sergeant down to pick her up would you not?' Just before he answered I began to get a little bit mad. I said, 'if you move that you will over my dead body.' At that time he put me under arrest" (R30).

He further testified that he did not hear any direct order given him by Captain Soukup to turn the bike over to him (R30-31). He also admitted that he had nothing to show he was entitled to possession of this vehicle, except that he had found it. Accused's feelings were "sort of personal" though he did "not exactly" get angry (R30-31). Accused was handed a paper marked Prosecution's Exhibit A and asked if it was in his handwriting. He answered, "I couldn't swear to it, no, sir" (R31). He was then asked if his signature appeared on the paper, and he answered, "No, just Green". He was asked if he remembered ever writing it and answered, "I could have but not swearing to it". A member of the court then asked, "Did you or did you not write the note?" and accused answered, "Yes, sir". The note was then admitted in evidence as Prosecution's Exhibit 1. It reads as follows:

"To: Capt. Soukup.

My apologies for my insubordinate and disobedient actions, yesterday. At first I thought I was right, but after thinking and researching, I am offering my apology, and hope you have no ill feelings toward me, as I know you were right, and I would have done the same had I been in your place. I respect your position.

Green" (R32.)

In his opinion the motorcycle belonged to the United States Government and he knew Captain Soukup was his commanding officer (R33). Accused testified he had been in the army approximately 15 months, a commissioned officer ten months, and had attended the Military Academy at Bryan, Texas, prior to entering the army (R32).

5. The disobedience contemplated by Article of War 64 is a disobedience of a wilfull and deliberate character (Winthrop's Military Law and Precedents, 1920 Reprint, p.573). The form of the order is

immaterial provided it amounts to a positive mandate (Winthrop, Ibid., p.574). Captain Soukup, company commander and accused's superior officer, gave a direct order to accused which he refused to obey. The captain's testimony to this effect is corroborated by the testimony of accused. That such refusal was wilful appears from accused's actions and his testimony in court. His note of apology shows it. The right and duty of Captain Soukup as an officer to take possession of captured enemy property in the hands of his subordinates for the benefit of the military service is unquestioned (AW 80), and that his orders or attitude may have appeared arbitrary or unreasonable is no defense (BULL. JAG, Oct 1942, pp.273-274; Winthrop, Ibid., pp.576-577).

6. The charge sheet shows accused to be 22 years of age. He was commissioned a Second Lieutenant at Fort Benning, Georgia, 16 November 1943, with about five months prior enlisted 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 under Article of War 64.

[signature] Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

[signature] Judge Advocate

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1st Ind.

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

1. In the case of Second Lieutenant ROBERT C. GREEN (O-530347), Infantry, 320th Replacement Company, 48th Replacement Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty 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 4193. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4193).

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

(Sentence ordered executed. GCMO 133, ETO, 13 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. 1

4 NOV 1944

CM ETO 4194

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Technician Fifth Grade RICHARD B. SCOTT (38040012), 229th Quartermaster Salvage Collecting Company.	Trial by GCM, convened at Cherbourg, Department of Manche, France, 7 September 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 92nd Article of War.
Specification: In that Technician 5th Grade Richard B. Scott, 229th Quartermaster Salvage Collecting Company, did at Octeville, near Cherbourg, France, on or about 20 July 1944 forcibly and feloniously, against her will, have carnal knowledge of Madame Mari Dupont.

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CHARGE II: Violation of the 93rd Article of War.
Specification 1: In that * * * did, at Octeville, near Cherbourg, France on or about 20 July 1944, with intent to do himbodily harm, commit an assault upon Mr. Joseph Chatel by cutting him on the left side of his body just above the belt line with a dangerous weapon to wit, a bayonet.

Specification 2: In that * * * did, at Octeville, near Cherbourg, France on or about 20 July 1944 with intent to do him bodily harm, commit an assault on Mr. Marcel Dupont, by willfully and feloniously threatening him with a dangerous weapon to wit, a bayonet.

He pleaded not guilty, and, all members of the court present at the time the vote was taken concurring, was found guilty of Charge I and its Specification, guilty of Specification 1, Charge II except the word "cutting", substituting therefor the word "jabbing", of the excepted word not guilty, of the substituted word guilty, guilty of Specification 2, Charge II and of Charge II. 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 evidence for the prosecution shows that on 20 July 1944 Marcel Dupont, a house painter, lived on the ground floor at 78 Rue Sadi-Carnot, Octeville, France, with his wife Marie, and three children. Marie was pregnant. The apartment consisted of a hallway, kitchen, and a bedroom entered from the kitchen (R7-8,16). Joseph Chatel lived above the Duponts on the second floor of the building (R14). About 10:30 p.m. that evening, someone knocked on the door of the house and called "Police". When Dupont opened the door accused, a colored soldier, entered the house uninvited, went into the bedroom, and by

making signs showed Dupont a hole in the window shutter through which the light was shining. After Dupont stuffed a paper "in the hole", accused entered the kitchen without invitation, sat down at the table, pointed to some cider thereon and signified that he wanted a drink. After he was given a glass of the beverage by Dupont, accused took out a small blue dictionary and also some photographs which he showed to Mrs. Dupont (R7-9,16-18). He then put his head on the table, and slept for a few minutes. When awakened by Dupont he stood up and then lay down on the floor. Mrs. Dupont went to summon Chatel who came downstairs. When Chatel reached the bottom stair accused suddenly arose, took out his bayonet and went into the hallway saying "Boche! Boche!" He appeared angry and "unnerved", and "pricked" Chatel on the left side of the waist, piercing the latter's shirt and causing a "small red spot" on his skin. He pointed the bayonet at Chatel several times and indicated that the latter was to return upstairs. Chatel did so immediately (R9-10,12-16,18-19). Accused became "furious" and still holding his bayonet, signified that the Duponts were to return to the kitchen and pushed them "brutally" into the room with his right hand. There, he twice turned out the light but Dupont turned it on again. Accused, by the use of signs, then indicated that the Duponts were to enter the bedroom where the children were sleeping. After the three entered the room accused pointed the bayonet at the husband by thrusting it upwards with an underhand motion, forced him into a corner of the room and took hold of his arms "hard". He then seized Mrs. Dupont by the waist in order to make her lie down on the floor, but she resisted. Placing his bayonet across her throat he made her lie down "by force" near her husband. Whenever Dupont tried to move, accused seized his bayonet and pointed it at him (R10-11,13,16,19-21). He then pushed up the woman's clothes, unbuttoned his trousers and had sexual intercourse with her on the floor. During the act Dupont was crouched in a corner about 40 centimeters away. Accused kept his eyes on him and whenever Dupont moved, seized his bayonet. When he finished, accused suddenly arose and ran out of the house like a wild man (R10-13,20-21). Dupont testified that his wife was trying to push accused away but that she did not shout (R13). The following questions and answers occurred upon cross examination of Mrs. Dupont:

"Q. And isn't it true that you submitted to the act of intercourse without putting up any resistance?
A. This is an impossible thing.

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Q. Did you make any outcry?
A. No. I did not scream for fear of awakening my children.

Q. So rather than awakening your children, you submitted to this rape. Is that right? To this intercourse.
A. I did not submit myself to this intercourse. I resisted as much as I could.

Q. Tell the court what you did toward resisting.
A. I struggled, but he was stronger than I. I was terrorized by fright.

Q. And at the time that this was going on, did accused appear like a wild man, or to be out of his mind?
A. He was very unnerved. He was shaking like this.
(Indicating hands trembling).

Q. Now, just when did this condition start?
A. Only a few minutes, perhaps two or three minutes at the utmost while we were struggling" (R21).

She denied that she put her arms around accused when he became sleepy in the kitchen (R20).

Both Duponts identified accused as the soldier involved (R7,21). The dictionary which accused left behind when he ran from the house was delivered to the "Civil Affairs" at Octeville by Madame Dupont (R21). Both Duponts and Chatel testified that accused did not appear to be drunk (R12,15,20).

About 2:00 a.m. 22 July, Agent Jack Goldsmith, Criminal Investigation Division, United States Army, interviewed accused and obtained a statement from him after he advised him of his rights. The statement was reduced to writing by Goldsmith and signed by accused. About 6:00 p.m. 22 July, after again being warned of his rights, accused executed a second statement. Both statements were identified by Goldsmith

and admitted in evidence without objection by the defense (R22-24; Pros.Exs.1,2). Goldsmith obtained a blue French dictionary from "the Civil Affairs people at Octeville" and showed it to accused who admitted that it belonged to him (R23).

Accused's first statement (Pros.Ex.1), was as follows:

> " My full name is Richard Bunney Scott. I was inducted into the Army of the United States on March 7, 1941, at Dallas, Texas. My rank is Technician 5 Grade. I have been attached to the 229 Salvage Collecting Co. since 1941.
>
> On Thursday, July 20, 1944, I arose at 12 noon and washed my face and had lunch. I then went back to my tent and lay down. I got up and left camp at 1 PM although I didn't have a pass. I told my friend Navy that I was going out for a walk. I didn't have a pass because I worked the day before. I walked up the street to the main highway which runs to Cherbourg. As I was walking along I gave two children some chocolate candy which I had from our rations. Their parents were standing in the doorway and invited me inside. I went and sat down at a table and had some cider. I tried talking with them but could not understand them. I took out my little blue French book and tried to make conversation with them. I left around four oclock. I was wearing my fatigues, field jacket and leggings and helmet. I wasn't carrying my bayonet. I have just been shown a blue French book with my name in it and it is mine. I forgot it at these peoples house. I have just been shown three French civilians. I know two of them. They are Mr. & Mrs. Dupont, and are the people who entertained me thursday afternoon at their house.

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After I left Mr. & Mrs. Dupont's house I walked along the street to a Pub, located near the harbor and had a cognac and some cider. I bought a bottle of cider to carry with me but did not have enough money to pay for it. I had fifteen francs and it cost twenty, but the lady of the pub trusted me for the five francs. I was in the pub from five oclock to 10 P.M. and went back to camp from the pub. I didn't stop anywhere on the way home to camp and arrived there at 10:30 P.M. I said 'Hello I am entering' to the guard at the entrance, and he said, 'Hello' to me. I walked to my tent. It was about 10:34 when I got to my tent and I talked to Williard Navy and Pvt. J. B. Bly, who sleep in my tent. I talked with them for about twenty minutes and went to sleep about 12 oclock. I did not rape the woman that I was shown here tonight".

As accused's second statement (Pros.Ex.2) substantially conformed with his testimony at the trial, such state- is not set forth herein.

4. For the defense, accused testified that about 5:00 p.m. 20 July, he left camp without a pass and went to a "pub" in Cherbourg where he bought a glass of cognac, some cider and also a bottle of cider to take with him. On the way back to camp he knocked at the door of a building he believed to be a pub. Dupont opened the door, shook hands with him and invited him in to the kitchen where he gave him some wine and cider. Accused "was feeling good * * * and I knew exactly what I was doing". He laid his head on the table, felt his chair sliding out beneath him and fell against the wall. When Mrs. Dupont caught him by the hand he arose, sat at a chair by the table and she drew up a chair beside him. The light in the kitchen was out and he "missed" Dupont. Accused arose, and because Dupont was coming toward him, became frightened, shoved Dupont back and switched on the light. Accused left the room and entered the hallway where he found Mrs. Dupont and Chatel. He did not see Mrs. Dupont go upstairs for Chatel (R26-28,33). Chatel was holding a bottle and invited accused to have a drink but the latter refused. Dupont said something to Chatel who ran up the stairs (R28,33). Accused returned to the kitchen

and again laid his head on the table. Dupont entered and motioned that accused was to go to the bedroom. He did so and found Mrs. Dupont. Dupont pulled his wife and accused together and she lay down on the floor and raised her dress. Dupont indicated that accused was also to get down on the floor. He did so, indulged in intercourse with the woman but did not know whether he had an emission. (R28,30). He then arose and offered to pay them 100 francs but the woman would not accept the money. As he left the house Dupont threw his arm around him and kissed him on the jaw (R28). Accused left in the house his blue French dictionary which contained his name (R30,34). He denied that he called out "Police" before entering the house, that he checked the blackout in the dwelling and that he said anything about "Boche" (R31). At no time did he use force on Mrs. Dupont nor did he threaten her or Chatel with a bayonet. She lay down on the floor willingly and he would never have "bothered" her if her husband had not "motioned to me and pointed to me" (R28,32-33). Accused testified that he had no knife or weapon with him that evening and that he left his bayonet at camp (R29,33).

He testified that the statement admitted in evidence as Pros.Ex.1 was false and the second statement admitted as Pros.Ex.2 (which substantially conformed with his testimony) was true. Accused explained the variance between the two statements by testifying that he did not know why his interrogator (Goldsmith) wanted him, and that he was frightened when he made the first statement (R25-26,29-30).

Accused further testified that in 1939 an automobile ran over him in Dallas, Texas. As a result he was unconscious for one week and remained in a hospital for eight months. His head, arm and leg were scarred and his leg had not healed properly since the time of the injury. As a further result of the accident he suffered from restlessness, worry, lapses of memory and his head "bothered" him. He was positive, however, that he fully remembered the events of the evening in question. He "would love to" have the court recommend that he be examined by a medical board (R29,34).

It was stipulated by the prosecution and defense that if accused's company commander, Captain Joseph Emery Jr., Quartermaster Corps, were present he would testify that accused's service was satisfactory (R35).

5. The findings of guilty of the assaults upon Dupont and Chatel with intent to do bodily harm with a dangerous weapon (Charge II and its specifications) were fully supported by the

evidence (CM ETO 764, Copeland and Ruggles; CM ETO 3255, Dove; CM ETO 2707, Womack; CM ETO 2414, Mason).

6. With reference to the offense of rape (Charge I and Specification), the pertinent principles of law involved in the case under consideration are as follows:

> "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 where there is in fact no consent.
>
> * * * * * * * * *
>
> Proff.-- (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).
>
> "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" (52 C.J.,sec.32, p.1024).
>
> "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 C.J.,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 non-consent and actual resistance reasonably manifest" (52 C.J.,sec.59,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 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

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> 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).
>
> "An actual force used by the accused sufficient to create an apprehension of death in the mind of the victim need not be proved. If a less degree of force is used, but coupled with threats to kill or to inflict bodily harm, in fear of which she involuntarily submits, the intimidation practiced will be regarded as constructive force" (Underhill's Criminal Evidence, 4th Ed.,sec.675, pp.1272-1273).

The undisputed evidence showed that at the time and place alleged accused had sexual intercourse with Madame Dupont and that penetration occurred. The only question presented was purely one of fact, namely, whether or not the victim consented to the act of intercourse. The testimony of accused, on the one hand, and the Duponts on the other, is in sharp conflict on this point. According to accused he used no force upon the woman whatsoever and did not threaten her or Chatel with a bayonet. Dupont openly invited him to have intercourse with his wife and she voluntarily lay on the floor and submitted to the act. His offer of payment for the privilege was refused. According to Dupont and his wife, Chatel, in response to the woman's request, came downstairs but was forced to return by accused who threatened and pricked him with his bayonet. Then accused, holding his bayonet, forced them into the bedroom where he seized the husband by the arms "hard" and forced him into a corner by threatening him with the weapon. When the woman resisted accused's attempts to make her lie on the floor, he put his bayonet across her throat and made her lie down "by force". He raised her clothing, unbuttoned his trousers and had sexual intercourse with her. He kept his eye on Dupont and whenever the latter, who was crouched in the corner, moved, accused seized his bayonet. Both Duponts testified that she resisted. The woman testified that she struggled to the best of her ability but

that she was overpowered by accused's superior strength and was "terrorized by fright". She did not in the least voluntarily submit to sexual intercourse. She did not scream because she did not wish to awaken the children who were sleeping in the same room.

Although Chatel had returned to his own apartment when the sexual act was actually committed, he in part corroborated the Duponts' version of the incident by testifying that Mrs. Dupont went up to his apartment and requested his assistance, that when he went down accused threatened him with a bayonet, actually pricked him with it and forced him to return upstairs.

The question as to whether the victim, without intimidation of any kind, fully consented to the act of intercourse or whether it was committed by accused by force, violence, terrorization and against her will, was a question of fact within the exclusive province of the court. As the finding of non-consent is supported by competent substantial evidence, it will not be disturbed by the Board of Review on appellate review (CM ETO 1402, Willison and cases cited thereon; CM ETO 2472, Blevins; CM ETO 1899, Hicks; CM ETO 3141, Whitfield; CM ETO 3740, Sanders et al; CM ETO 3709, Martin).

7. At the close of accused's testimony defense counsel requested that the court recommend, prior to making its findings, that accused be examined by "the medical authorities". The court deferred action on the motion. The stipulation concerning Captain Emery's testimony was then entered and the defense rested its case. Arguments were then made on the motion and the motion was denied, whereupon the defense requested that if accused should be found guilty, the court recommend that "such a hearing be held before execution of sentence be carried out". The law member ruled that "the court will consider that at the time it considers its verdict" (R34-35).

> "Although it was the duty of the court to determine the issue of insanity in all its aspects it was not required to make this determination as an interlocutory question and upon express findings. Determination of the issue as an interlocutory question was discretionary (par.75a, MCM). It is clear that if no express findings had been made upon the

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issue or upon its special elements, the findings of guilty would have sufficed to cover the issue of insanity and all its elements (CM 157854, Ireland; CM 205621, Curtis; CM 211836)" (CM 225837, Gray) (Underscoring supplied).

In view of the foregoing authority the court's action in denying the motion by the defense was not error and the findings of guilty conclusively reflected the determination of the court with respect to the question of insanity.

8. The charge sheet shows that accused is 27 years and 11 months of age and that he was inducted 7 March 1941 at Dallas, Texas, to serve for the duration of the war plus six months. He had no prior service.

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

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

B. Franklin Riter, Judge Advocate

Elwood Hargest, 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 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Technician Fifth Grade RICHARD B. SCOTT (38040012), 229th Quartermaster Salvage Collecting 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. The court denied a motion by the defense that accused be examined by "the medical authorities" and resolved any question of insanity against accused by its findings of guilty. However, as this question was raised during the trial, your attention is invited to the matter for whatever action you may deem desirable, prior to execution of the sentence.

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 4194. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4194).

4. Should the sentence as imposed by the court be carried into execution it is requested that a complete copy of 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 106, ETO, 15 Nov 1944)

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 4203

U N I T E D S T A T E S v. Privates ROBERT L. BARKER (38400355) and GEORGE A. HOOD (38465960), both of Battery A, 473rd Anti-aircraft Artillery Automatic Weapons Battalion (Sep)	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Rennes, Brittany, France, 2 October 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. 1
RITER, SARGENT and STEVENS, Judge Advocates

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

2. Accused, by direction of the appointing authority, were tried together upon the following charges and specifications:

BARKER

CHARGE: Violation of the 93rd Article of War.
Specification 1: In that Private Robert L. Barker, Battery A, 473rd Antiaircraft Artillery Automatic Weapons Battalion (Sep), did at Grandchamp Des Fontaine, France on or about 13 August 1944, with intent to commit a felony, viz: rape, commit an assault upon Anne Marquis, by willfully and feloniously throwing her on a bed and endeavoring to raise her dress and by indecently handling her body.
Specification 2: (Finding of Not Guilty upon Defense Motion)

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Specification 3: (Finding of Not Guilty upon Defense Motion)

HOOD

CHARGE: Violation of the 93rd Article of War.
Specification 1: In that Private George A. Hood, Battery A, 473d Anti-Aircraft Artillery Automatic Weapons Battalion (Sep), did, at Grandchamp des Fontaine, Loire-Inferieure, France, on or about 13 August 1944, with intent to do him bodily harm, commit an assault upon Felix Marquis by shooting at him with a dangerous weapon, to wit, a Thompson submachine gun.
Specification 2: (Finding of Not Guilty upon Defense Motion)

ADDITIONAL CHARGE: Violation of the 93rd Article of War.
Specification: In that * * * did, at Grandchamp des Fontaine, Loire Inferieure, France, on or about 13 August 1944, wrongfully and unlawfully aid, assist and abet Private Robert L. Barker, Battery A, 473rd Anti-Aircraft Artillery Automatic Weapons Battalion (Sep), in assaulting Madam Anne Marquis with intent to commit a felony, viz, rape, by willfully and feloniously restraining Madam Jeanne Raulin from coming to the assistance of the said Madam Anne Marquis during the assault upon her by Private Robert L. Barker.

Following their respective arraignments, each accused was asked if he objected to "common trial" with the other. Defense counsel replied in the negative as to each accused. Each accused pleaded not guilty. Barker was found guilty of Specification 1 of the Charge, except the words "throwing her on a bed", guilty of the Charge, and, upon motion of the defense, not guilty of Specifications 2 and 3 of the Charge. Hood was found not guilty of Specification 2, upon motion of the defense, guilty of Specification 1, except the word "Thompson", guilty of the Charge, and guilty of the Additional Charge and its Specification. No evidence of previous convictions was introduced as to either accused. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority approved each of the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused, and forwarded the record of trial for action pursuant to Article of War 50½.

3. It was established by undisputed evidence that at about 2100 hours, on 13 August 1944, the two accused, both armed, went drinking from cafe to cafe in Grandchamp Des Fontaine, France, and became drunk (R30-31). At about 2200 hours that evening, without invitation or warning, they walked into a house in Grandchamp Des Fontaine where Monsieur Le Mercier and his wife, Monsieur Felix Marquis and his wife Anne, and Madame Jeanne Raulin, mother of Madame Marquis, were seated at a table, having finished dinner (R11-12). Accused Barker was armed with an M-1 rifle and accused Hood with a small machine gun (R13,24,33). Both were drunk and "over excited", talked a great deal, and looked threateningly at Marquis, whom accused Barker, after rolling up his sleeves, approached as if to box with him (R13). Madame Marquis became alarmed and placed herself in front of her husband, whom she told to leave. Accused Barker demanded "wine, wine". Marquis obtained a small bottle of wine and gave it to him. Le Mercier and his wife and Marquis then went out of the house, leaving Madame Marquis and her mother to deal with the two accused (R14). After Madame Marquis declined a drink offered her from the bottle, accused Barker took her in his arms, commenced kissing her, put his hands on her breasts and all over her body (R15,34), and

> "lifted my robe and he touched my thighs and he stopped just at the entrance of my private parts" (R15).

Her mother tried to help her resist, but accused Hood prevented such aid by holding his machine gun at the mother's breast (R16) and striking her on the temple with his fists (R16,34). One of the accused fired his gun at her (R35). The women were beaten by both accused; Madame Marquis described it as

> "a scene of horror -- I know that the small one (Hood) he has beaten -- he put us against the wall and hit us with his fists -- both of us -- both my mother and me" (R17).

Madame Marquis struggled with and resisted accused Barker for an hour and once shouted for help (R16-17). Marquis started to come to her aid from across the street but was stopped by accused Hood (R26-27), who fired at him with his machine gun (R17-18,26). In his struggle with Madame Marquis accused Barker unbuttoned his trousers but his private parts were not exposed (R15). He endeavored without success to put money down the neck of her gown (R22,34), and

> "was all the time fingering my thighs and when I felt he was coming near my private parts I thought I was lost" (R23).

At the end of an hour and a half, while she was cornered by a bed, he dropped his weapon and both women ran out the door and escaped in the fields (R18). Both accused pursued them without success and then

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returned to the house where they remained for a quarter of an hour. They were discovered the next morning in a nearby barn and taken into custody by American police (R19,28-29).

4. Each accused, upon being advised respectively of his rights, elected to remain silent (R40-41).

5. (a) As to accused Barker, the evidence clearly supports the court's findings as to the manner in which at the time and place alleged he assaulted Madame Marquis with the specific intent to commit rape. The findings of guilty were fully warranted (CM ETO 2500, Bush; CM ETO 3093, Romero; CM ETO 3163, Boyd, Jr.; CM ETO 3255, Dove; CM ETO 3644, R. Nelson; CM ETO 4167, Ross).

(b) As to accused Hood:

(1) The uncontradicted evidence clearly supports the findings under Specification 1 of the Charge as to the manner in which at the time and place alleged he assaulted Felix Marquis by shooting at him with a submachine gun. The trial court had a right to assume that he, as a soldier serving in a war combat zone, knew what would be the usual and ordinary results of such action and that he intended such results to occur.

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

It is the opinion of the Board of Review that the record is legally sufficient to sustain the findings of guilty of Specification 1 of the Charge (CM ETO 422, W. Green; CM ETO 1585, Houseworth).

(2) As to the Specification of the Additional Charge, the uncontradicted evidence disclosed that at the time and place alleged accused Hood very actively assisted accused Barker's assault with intent to rape Madame Marquis. He forcibly restrained her mother from giving aid against the assailant and fired at her husband when he started to approach in response to her cry for help.

The distinction between principals and aiders and abettors has been abolished by Federal statute and an aider and abettor may be convicted as a principal (Federal Criminal Code, sec.332, 18 USCA 550;

35 Stat. 1152). The distinction is also not recognized in the administration of military justice. All are principals (Winthrop's Military Law and Precedents - Reprint, p.108).

> "Under Sec. 332 of the Federal Criminal Code, above quoted, the acts of the principal become the acts of the aider and abettor and the latter may be charged as having done the act himself and be indicted and punished accordingly. By virtue of said statute a principal of the second degree at common law becomes a principal in the first degree (DePreta v. United States, 270 Fed. 73; Conelli v. United States, 289 Fed. 791; Kelly v. United States, 258 Fed. 392, certiorari denied, 249 U.S. 616, 63 L.Ed. 803). Premised on the above stated doctrine is the established and well recognized rule that a n accused may be charged with and found guilty of the crime of rape although he did not actually have intercourse with the victim if the evidence establishes that he was present at and aided and abetted the ravisher in the accomplishment of the act of intercourse (52 C.J., Sec.50, p.1036; State v. Flaherty, 128 Maine 141, 146 Atl. 7; People v. Zinn, 6 Cal.App (2nd) 395, 44 Pac.(2nd) 408; People v. Nieto, 14 Cal.App. (2nd) 707, 58 Pac.(2nd) 945; People v. Durand, -- Cal.App.(2nd) ---, 134 Pac.(2nd) 305"
> (CM ETO 4294, Davis and Potts).

Accused Hood could very properly have been charged as a principal and found guilty of assault with intent to rape Madame Marquis upon the evidence presented (CM ETO 4294, Davis and Potts). He was properly charged with the substantive offense of aiding and abetting and the finding of his guilt is supported by substantial evidence (CM ETO 3740, Sanders et al; CM NATO 385, Speed; CM NATO 643, CM NATO 1242; CM NATO 1121, Bray et al; Bull. JAG February 1944, vol.III, no.2, sec.450, pp.61,62). It is the opinion of the Board of Review that the record is legally sufficient to sustain the findings of guilty of the Specification of the Additional Charge (CM ETO 4294, Davis and Potts, and authorities therein cited).

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

Barker is 20 years of age. He was inducted 22 February 1943 at Oklahoma City, Oklahoma.

Hood is 20 years and 11 months of age. He was inducted 16 February 1943 at Tulsa, Oklahoma.

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

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

8. Confinement in a penitentiary is authorized for assault with intent to commit rape and for 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 designation as to each accused of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.229, 8 June 1944, sec.II, pars.1b(4),3b).

/s/ _____ Judge Advocate

Elwood H. Sargent Judge Advocate

/s/ _____ 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, Brittany Base Section, Communications Zone, European Theater of Operations, APO 517, U. S. Army.

1. In the case of Privates ROBERT L. BARKER (38400355) and GEORGE A. HOOD (38465960), both of Battery A, 473rd Antiaircraft Artillery Automatic Weapons Battalion (Sep), 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 the 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 4203. For convenience of reference please place that number in brackets at the end of the orders: (CM ETO 4203).

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

25 NOV 1944

CM ETO 4219

U N I T E D S T A T E S	VIII AIR FORCE SERVICE COMMAND
v.	Trial by GCM, convened at AAF Station 547, England, 10 October 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for four years. Federal Reformatory, Chillicothe, Ohio.
Private KENNETH K. PRICE (35638022), 35th Depot Repair Squadron, attached 1915th Quartermaster Truck Company (Aviation), 2d Strategic Air Depot.	

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 charges and specifications:

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Private Kenneth K. Price, 35th Depot Repair Squadron, attached 1915th Quartermaster Truck Company (Aviation), 2d Strategic Air Depot, AAF Station 547, did, at or near Woodhurst, Huntingdonshire, England, on or about 21 August 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with James McLaren, a minor.

CHARGE II: Violation of the 96th Article of War.
Specification: In that * * * did, at or near Woodhurst, Huntingdonshire, England, on or about 21 August 1944, willfully and wrongfully expose his penis in an indecent manner to James McLaren, a minor.

He pleaded not guilty to and was found guilty of the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for four years. The reviewing authority ap-

proved 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 prosecution showed by the testimony of James McLaren, a 13 year old boy (R21,24; Pros.Ex.2), that on 21 August 1944 near Woodhurst, Huntingdonshire, England, accused, a private in the United States Army (R25), was driving a jeep and the boy riding a bicycle in the same direction when accused accosted the boy and invited him to ride in the jeep. James accepted and got in the jeep, accused having placed the bicycle over the hood of the car. After a short conversation, accused stopped the car and committed the act of sodomy per os by inserting the boy's penis in his, the accused's, mouth. Accused then requested James "to suck him". The boy refused; whereupon accused got in the back of the car and "rubbed" his own penis (R7-18). Accused drove James home. The boy's aunt, his guardian, with whom he lived, testified that on the date in question she saw Jimmie drive up in an American jeep with an American soldier and that the boy, under her questioning, told her "something terrible had happened, and he was scared ----- and it took me nearly an hour to get out of him what had happened." (R19-21). Accused made a voluntary statement in writing to the investigating officer in which he said that on the day and at the place in question, he had met a boy on a bicycle and had taken him into his jeep; that the boy started to play with accused's penis and had sucked it. According to accused this boy initiated the sex play. In this statement, accused told - before recounting the boy's "aggressive" action - that he, accused "finally stopped the jeep in a clear place on the road and the boy undid my trousers and took out my penis" (R24-26,Pros. Ex.3). After the boy had testified, he was questioned carefully by the court as to his understanding of the nature and obligation of an oath. The boy's answers to these particular questions and the character of his testimony in general (R7-18,19) show that the court in accepting the boy's sworn testimony did not abuse the discretion vested in it in this connection (Dig.Op.,JAG,1912-1940,Sec. 395 (58) p.238; CM 123055 (1918)).

4. Advised fully of his rights, accused elected to remain silent.

The defense called as its witness Captain Louis M. Foltz, Medical Corps, Chief of Neuro-Psychiatric Section, 49th Station Hospital. He testified that he had examined accused several times between 11 and 18 September 1944, and that his findings were that accused had a tendency toward homosexuality. He testified further that the acts of accused were due to a mental condition; that accused was not normal mentally; and that he had "drives which can not be controlled by himself". His diagnosis was "Constitutional psychopathic state, sexual psychopathy bisexuality". On examination by the court, this witness said that at the time accused committed offenses of the kind at issue, he knew right from wrong but would be unable to adhere to the right because of abnormal emotional drives. The Captain concluded by saying that "according to the medical definition of insanity", accused was not insane (R27-41).

At the conclusion of this testimony the defense asked for the appointment of a Medical Board to inquire into the mental condition of accused. This motion was denied.

5. The evidence clearly shows that accused committed the offenses as alleged in the charges and specifications.

As stated, the court denied the motion of accused for the appointment of a medical board to inquire into the mental condition of accused. There was nothing before the court from which it appeared that such inquiry ought to be made in the interest of justice. The psychiatrist called by the defense testified that accused was not medically insane (not psychotic), that he knew the difference between right and wrong, but was unable to adhere to the right because he was a psychopathic personality. As pointed out in CM 244490, Peace, and in CM ETO 3717, Farrington, the law makes a distinction between a psychotic and a mere psychopathic personality, between the inability of a psychotic to adhere to the right and the inability of a constitutional psychopath without psychosis, to adhere to the right. Such inability in a psychotic constitutes mental irresponsibility, a defense for misconduct (MCM,1928,par. 78,p.63). The inability of a constitutional psychopath who is without psychosis to adhere to the right is not mental irresponsibility and does not constitute a defense for wrong doing (CM 244490,Peace; CM ETO 3717, Farrington). "An accused is presumed to have been sane at the time of the offense charged until a reasonable doubt of his sanity at the time appears from the evidence" (MCM,1928,par.112,p.110). The evidence presented by the defense cannot be said to have created such doubt. The court is required to inquire into the mental condition of an accused only "whenever at any time * * * it appears to the court for any reason that such inquiry ought to be made in the interest of justice" (MCM,1928,par. 63,p.49). The record shows no abuse of discretion by the court in its ruling on this motion (Dig.Op.JAG.1912-40,Sec.395(36)p.227,CM 193543, 2 B.R.85).

6. Accused is 22 years of age. He was inducted at Fort Thomas, Kentucky, 2 November 1942 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 sodomy, in violation of Article of War 93, is punishable by imprisonment for five years. Penitentiary confine-

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ment is authorized (CM ETO 2380, Rappold; CM 187221, Sumrall; D.C. Code, secs. 24-401(6;401), 22-107(6;7)). The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, is authorized (Cir.229,WD,8 Jun 1944,sec.II,pars.1a(1),3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind. (121)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 NOV 1944 TO: Commanding General, VIII Air Force Service Command, APO 636, U.S. Army.

1. In the case of Private KENNETH K. PRICE (35638022), 35th Depot Repair Squadron, attached 1915th Quartermaster Truck Company (Aviation), 2d Strategic Air Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the 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 4219. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4219).

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

CM ETO 4222

25 NOV 1944

UNITED STATES	XIX TACTICAL AIR COMMAND
v.	Trial by GCM, convened at Headquarters, XIX Tactical Air Command, 9 September 1944.
Private ALBERT J. POLITI (32346952), Company D, 932nd Signal Battalion Separate (TAC)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for seven years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1. In that Private Albert J. Politi, Company D, 932d Signal Battalion Separate (Tactical Air Command), XIX Tactical Air Command, did, at the Commune of St. Colombe, Canton of St. Saveur le Vicomte, France, on or about 2015 hours 4 August 1944, unlawfully enter the dwelling of Mr. and Mrs. Jean Osmont, of the Commune of St. Colombe, Canton of St. Saveur le Vicomte, France, with intent to commit a criminal offense, to wit, larceny therein.

Specification 2: In that Private Albert J. Politi, Company D, 932nd Signal Battalion Separate (Tactical Air Command), XIX Tactical Air Command, did, at the Commune of St. Colombe, Canton of St. Saveur le Vicomte, France, on or about 2015 hours, 4 August 1944, feloniously take, steal, and carry away "French" money, value of about three thousand (3000) francs,

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valued at about $60.00 in United States currency, the property of Mr. and Mrs. Jean Osmont, Commune of St. Colombe, Canton of St. Saveur le Vicomte, France.

He pleaded not guilty to and was found guilty of the Charge and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for ninety-three days in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for seven years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Training Center, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. For the prosecution, Mme. Augustine Osmont testified that at approximately six o'clock on the evening of 4 August 1944 accused, "with his little dog", entered the courtyard of her home in search of something to drink. He was admitted into the house and was given some cider (R8). About a quarter of an hour later, witness' husband came home and accused drank another glass of cider with the husband. Thereafter, both accused and M. Osmont left the house, whereupon Mme. Osmont also left "to milk the cow". She locked the door prior to her departure and placed the key in her pocket (R9). In the house when she left, in a pocketbook in a bureau drawer, were about 3000 francs in the following denominations: "Three notes of 500 francs each, liberation currency; new bills. Several 100 franc notes on the Banque de France; one 50 franc note of liberation money" and several other bills and coins of smaller denominations (R9,34). Mme. Osmont "was away for about an hour and a half" and on her return she found that one of the windows of the house had been opened and that the money was gone (R9-10).

M. Jean Osmont testified that he came in from the fields at about "6:00 that evening of August 4th", and at that time found accused at his home drinking a glass of cider. With the accused was a "little black and white dog". M. Osmont talked with accused for a time and at about "6:00 o'clock or ten to 6:00" accused left the house (R5). M. Osmont then again went out into the field and did not return to the house until about seven o'clock. At this time he discovered that one of the windows had been pushed open and that about 3000 francs belonging to himself and his wife were missing (R6).

Mme. Blanche Jibaut, a neighbor, testified that at approximately five o'clock on 4 August 1944 she saw accused, accompanied by a "little black and white dog", enter the courtyard of Mme. Osmont's house. Later, after Mme. Osmont "left to go milking", Mme. Jibaut saw the accused return to the courtyard (R11). He tied his dog in the courtyard, entered the house through the window, remained there about ten minutes, emerged from the house through the window, and departed (R11-12).

Jean Lescot, an eleven year old neighbor boy, testified that "around 8:00 or 8:30" on 4 August 1944, he saw the accused enter the house of Mme. Osmont through the window and also saw him come out of the house by the same means about fifteen minutes later. When he left, he was accompanied by a dog which was "white with black spots on his back" (R15-16).

Complaint was made by the Osmonts to the American authorities and an investigation was initiated as the result of which accused was questioned and his possessions searched (R17-18). At this time accused produced 120 francs and informed the investigating officer that "that was all the money he had" (R17). Further search resulted in the discovery of 1900 francs in one of accused's shoes (R18,35,37). The money found was described at one point in the record as "Three 500-franc notes, Invasion money; several 100-franc notes Banque de France Money, and one 50-franc note Invasion money, and several other small notes" (R18). However, this same witness, upon being recalled, stated that all the bills found were "invasion money" (R35). The Bills were all "new and fresh" (R37). When questioned with respect to the possession of this amount, accused stated that he had won the money at poker (R36,37). However, he could not remember the names of any of the men with whom he had played (R36). All of the French witnesses identified accused as the man in question and also they identified the dog (R20).

The accused's company commander testified that accused joined his company in July of 1944, that accused's service record showed he had received a partial payment of $10 on 15 July 1944 and that accused had received no further pay since that date (R8,19).

4. Accused, after having been advised of his rights as a witness, testified that at about 1600 hours on 4 August 1944, when returning to camp with his dog, he noticed that the dog was thirsty so he stopped at the house of M. and Mme. Osmont and asked for some water for the dog (R29,30,32,33). He then asked for some cider for himself and, with the permission of the occupants, entered the house and had several drinks (R30,33). He left the house about 1700 hours and returned to camp shortly thereafter. At approximately 1830 or 1900 hours, he went to the first showing of a movie which was being given in a village some 300 yards from his camp (R24,29,30). As he left the movie, he met a Private Egan, talked with him a few minutes, and, at about 2100 hours, returned to his bivouac area (R33). After his return he "stayed around and wrote letters" (R33). He admitted that 1900 francs had been found in his possession but stated that he had received a partial payment of $10 in July and had won the rest of the money by gambling (R32). He expressly denied the commission of the offenses alleged (R31).

Private James J. Fennell, Company D, 932nd Signal Battalion, testified that accused had won money gambling in the early part of July and, "about the latter part of July", had repaid to the witness a loan formerly made by the witness to the accused (R21). At the time of the repayment of the debt, accused had "quite a bit" of money (R21).

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Private John A. Pacheco, 563rd Signal Aircraft Warning Battalion, testified that he had attended the movies on the evening of 4 August 1944, where he saw the "first show", which started at 1800 hours and lasted until approximately 1945 hours. He testified that he had seen accused and his dog at the movie and that, to the best of his knowledge, accused did not leave the theatre while the picture was being shown (R24,25).

Private Paul Petrella, Headquarters, XIX Tactical Air Command, testified that on 4 August 1944 he was the operator of the "machine" at the movie which accused attended on that night and that the first showing of the picture started at 1830 hours and ended 2035 hours (R25,26).

Private James V. Egan, Company D, 932nd Signal Battalion, testified that on 4 August 1944, while on the way to the movies at about 2030 hours, he met accused and asked him what movie was being shown. Accused told him and the witness then went on to the "second show", arriving there at about 2030 or 2045 hours (R27).

It was stipulated that the distance from the site of the theatre where the movie was shown to the scene of the offense was approximately three miles (R26).

5. There was substantial evidence to support the court's findings of guilty of the offenses charged. M. and Mme. Osmont testified that on 4 August 1944, upon returning to their home after a short absence, they discovered that one of the windows had been pushed open and that 3000 francs were missing. Two prosecution witnesses testified that on the night in question they saw accused open the window of the Osmont home, enter the house through the window and leave the house shortly thereafter in the same manner as he entered. Approximately one week later a search was instituted and 1900 francs were found in the possession of the accused. During the course of this search, accused stated that he had only 120 francs. When the larger amount was found, his only explanation was that he had won the money gambling with soldiers whose names he could not remember (R36). The considerations that the denominations of the bills found corresponded at least roughly with the denominations of certain of the missing bills and that these bills were "new and fresh" further decrease the credibility of accused's explanation. It is true that there are certain conflicts in the evidence with respect to the times when accused was seen at the Osmont home and that accused attempted to show that he was at a movie during at least a portion of the period in question. However, it is well known that the average witness usually does not make careful note of the exact time of the occurrence of an event concerning which he later testifies, and that, for this reason, testimony with respect to the exact hour at which a given event occurred is often merely approximate. In any event, there was positive testimony that the accused entered the Osmont home, and the possibility of mistaken identity is greatly reduced by the inference which arises from the fact that the soldier in question was accompanied by a dog which was identified in court as the dog of accused. The issues raised by accused's express denial of guilt and his attempt to establish an alibi were questions of fact for the court and the court's determination of these issues may not,

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under the evidence presented in this case, be disturbed by the Board of Review upon appellate review (CM ETO 1953, Lewis).

6. The charge sheet shows that accused is twenty-five years of age. He was inducted at Fort Jay, New York, on 2 June 1942, to serve for the duration of the war plus six months. He had no prior service.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 NOV 1944 TO: Commanding General, XIX Tactical Air Command, APO 141, U. S. Army.

1. In the case of Private ALBERT J. POLITI (32346952), Company D, 932nd Signal Battalion Separate (TAC), 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 4222. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4222).

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

CM ETO 4233

23 NOV 1944

U N I T E D S T A T E S	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private MATTHEWS G. WASHINGTON (38050107), 961st Quartermaster Service Company	Trial by GCM, convened at Rennes, Brittany, France, 3 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 12 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification 1: In that Private Matthews G. Washington, 961st Quartermaster Service Company, did, at or near Le Rheu, Brittany, France, on or about 1 September 1944, feloniously take, steal and carry away one wallet, value about $1.20, one fountain pen, value about $4.00, and about 13,000 francs, lawful money of France, value about $260.00, the property of M. Jean Desevedary.

Specification 2: In that * * * did, at or near Le Rheu, Brittany, France, on or about 1 September 1944, in the nighttime feloniously and burglariously break and enter in the dwelling house of Julian Simon, with intent to commit a felony, viz larceny therein.

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

Specification: In that * * * did at or near Le Rheu, Brittany, France, on or about 1 September 1944, unlawfully and without the consent of the lawful occupant break and enter the dwelling house of Mlle. Denise Boisgerault.

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

Specification: In that * * * did, without proper leave, absent himself from his organization near Le Rheu, Brittany, France, from about 0100 hours 1 September 1944, to about 0645 hours 2 September 1944.

He pleaded not guilty, and was found, "of Specification 1, Charge I: Guilty, except the figures '$1.20' and '$4.00', substituting therefor respectively the figures '$1.00' and '$3.00', of the excepted figures, not guilty, of the substituted figures, guilty"; guilty of Specification 2, Charge I, and of Charge I; of Charge II and its Specification; and of the Specification, Charge III, "guilty, except the figures '0645' and figure '2', substituting therefor the figures '0900' and '1', of the excepted figures, not guilty, of the substituted figures, guilty" and guilty of Charge III. Evidence was introduced of two previous convictions, one by summary court for overstaying pass in violation of Article of War 61, and one by special court-martial for absence without leave from bivouac march, camp area and guard, in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for fifteen years. The reviewing authority approved "only so much of the findings of guilty of Specification 1 of Charge I as involves findings that the accused did, at the time and place alleged, feloniously take, steal and carry away one wallet, value about $1.00, and one fountain pen, value about $3.00, the property of M. Jean Desevedary," and "only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twelve years," designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The testimony of the French witnesses was given through an interpreter. The evidence for the prosecution shows that about one o'clock on the morning of 1 September 1944 there was a knock on the door of a farmhouse in the French village of Le Rheu, Ille et Vilaine, occupied by the refugee family and relatives of Julien Simon. The visitor announced he was an American and wanted cognac. He tried toopen the locked door and then fired his rifle into the door, the bullet going through the lower part of a bed. The occupants all went into the loft from where they heard the intruder break a window (R8-10). About half past six the next morning, Emile Jubault, a grandson of Julien Simon and one of the family who went to the loft, accompanied the police to the neighboring house of Miss Denise Boisgerault,

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where he saw a black American soldier sleeping in a bed. He identified accused from among other colored soldiers in the courtroom as the soldier he had so seen in bed. The times given herein are suntime, which is two hours earlier than American time - "One o'clock suntime means three o'clock American time" (R11-12).

Jean Desevedary was one of the occupants of the farm house of Julien Simon the night of 31 August, 1 September 1944, having been working on the farm the previous day. He had left his clothes in the loft when he went to bed. He testified to the same visit of the intruder and the events during the night (R13-14). He had 13,200 francs in his jacket, which he had taken off about eight o'clock that morning and left in the only bedroom in the house. In the jacket was also a fountain pen marked Bayard, worth 150 francs. The money was in a wallet worth 50 francs. He testified that he looked out of the loft window and saw the black soldier break the window with his knife and go through the window into the room (R15-16). He could hear the intruder moving around in the house and things drop on the ground. He did not see but heard the intruder leave the house (R17-18). The intruder remained about three-quarters of an hour (R34). As soon as the soldier entered the house, all the occupants left the loft and entered a shed next door and about a half hour after hearing the intruder leave, they all returned to the house. They found the cupboards and trunks had been opened and contents thrown on the ground. On the ground was also a heap of ashes besides which he found papers that had come out of his wallet. His jacket was still hanging where he left it but the wallet with the money and the fountain pen were missing (R17-18). The next morning he also went to the neighboring house of Denise Boisgerault, who had come to advise them, and he there found a negro lying on a bed asleep. He found an American carbine on an adjoining bed, and he took that and a knife which he removed from a sheath in the negro's belt. The knife had some putty on it that came from the window. He testified further that the soldier he saw out of the loft window and the one he saw in the bedroom were the same soldier whom he identified in court as accused. American military police arrested the soldier that morning, but he was so drunk he had to be carried out to the car (R19-20). Before putting accused in the jeep they searched his two breast pockets and found there witness's wallet and that of accused. There was no money in witness's wallet. They searched him fully at camp and found witness's fountain pen and a bottle of eau do cologne which belonged to Emile Jubault, one of the other occupants of the farm house. Accused had about 2000 or 3000 francs on his person also. Witness could not identify the money as his. No permission had been given to anyone by witness to take his wallet, money or fountain pen (R21-24). The soldier had also urinated against the cupboard in the farmhouse (R26).

Denise Boisgerault testified that she and her godmother were alone in her home on the night of 31 August and 1 September 1944, when at about two o'clock, suntime, they heard knocking on the door, then they heard the breech of a rifle being opened and shot was fired into their door. They heard the intruder talk in American language. The door was locked, but as he was near the window, they left by the door on the other side of the house and ran away. Witness returned in the morning about six o'clock and found the house in disorder, but no one there (R28-31). Rose Boisgerault, the

godmother, testified that she remained in a field till about six o'clock in the morning when she returned to the house but hearing the soldier snoring, she did not enter. Through a window which was broken she could see disorder in the house. She saw Jean Desevedary open her front door and go in, coming out with a rifle and a knife. She waited outside until the soldier was carried away (R35-38). He had been lying in bed with his clothes on (R39). He came about two o'clock and was carried out, sleeping, between five and six o'clock suntime (R40).

Master Sergeant Adrian P. Sharp, Headquarters and Headquarters Detachment, 534th Quartermaster Group, testified that he was sent to "bring in a man who was causing a disturbance the night before"and found him at a farmhouse, laying on a bed, in a stupor, fully clothed. He could not be awakened and was carried out to the jeep. He was unarmed, but a Frenchman handed him a knife and a carbine. A billfod, a fountain pen and some papers were found on him. Witness identified accused as the soldier he brought in (R40-43). During the investigation of the charges against him and after being fully advised of his rights as a witness, accused made a signed statement which was admitted in evidence (R48) as Prosecution's Exhibit No. 3, in which he admitted entering the two houses, firing some shots, and going to bed in the second house, where he was picked up by the "M.P." in the morning. A stipulation was entered into in court between the prosecution and the defense agreeing that the wallet of Jean Desevedary was of a value of $1.00 and the fountain pen in question, $3.00 (R49).

The morning report of the 961st Quartermaster Company for 1 September 1944 was admitted in evidence without objection as Prosecution's Exhibit No. 4 (R50). It shows accused "dy to AWOL 0100, AWOL to conf 0900 post stockade awaiting trial" 1 September 1944.

4. The defense produced no witnesses and accused, being advised of his rights as a witness, elected to remain silent (R52-53).

5. "Burglary is the breaking and entering in the night of another's dwelling house, with intent to commit a felony therein --" (MCM, 1928, par. 149d, p. 168).

"Housebreaking is unlawfully entering another's house with intent to commit a criminal offense therein --" (Ibid, par. 149e, p. 169).

"Larceny is the taking and carrying away by trespass of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein (Ibid, par. 149g, p. 171).

The essential elements of all the offenses charged are clearly shown. Accused committed the offense of larceny (Specification 1, Charge I) when he took and carried away the wallet and fountain pen of Jean Desevedary.

He committed the offense of burglary (Specification 2, Charge I) when he broke into the house of Julien Simon in the night time with the intent to commit a felony, that is, larceny, therein. He committed the offense of housebreaking (Charge II and its Specification) when he unlawfully and without the occupant's consent, entered the home of Denise Boisgerault. His absence without leave (Charge III and its Specification) is fully proved by the morning report of his unit.

6. Accused is shown by the charge sheet to be 26 years and 6 months of age. He was inducted without prior service, at Houston, Texas, 20 November 1940.

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. Confinement in a penitentiary is authorized for the offense of housebreaking by Article of War 42 and sec. 22-1801 (6:55) and 24-401 (6:401) District of Columbia Code. 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

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 23 NOV 1944 TO: Commanding Officer, Brittany Base Section, Communications Zone, European Theater of Operations, APO 517, U. S. Army

1. In the case of Private MATTHEWS G. WASHINGTON (38050107), 961st Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4233. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4233).

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

CONFIDENTIAL

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

(135)

BOARD OF REVIEW NO. 1

19 JAN 1945

CM ETO 4234

U N I T E D S T A T E S	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Technician Fourth Grade IVORY LASKER (39908499), and Private EARL HARRELL (39122327), both of 415th Engineer Dump Truck Company	Trial by GCM, convened at Rennes, Brittany, France, 25 September 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

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:

LASKER

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fourth Grade Ivory Lasker, 415th Engineer Dump Truck Company did, at or near L'Hermitage, Brittany, France, on or about 26 August, 1944, aid and abet Private Earl Harrell, 415th Engineer Dump Truck Company, in forcibly and feloniously, against her will, having carnal knowledge of Mademoiselle Therese Mainguy, by standing guard with a rifle at the time of the said carnal knowledge and preventing Mister Pierre Roussel from coming to the said Mademoiselle Therese Mainguy's assistance.

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HARRELL

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Earl Harrell, 415th Engineer Dump Truck Company, did at or near L'Hermitage, Brittany, France, on or about 26 August, 1944, forcibly and feloniously, against her will, have carnal knowledge of Mademoiselle Therese Mainguy.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification preferred against him, three-fourths of the members of the court present when the vote was taken concurring in the case of accused Lasker, and all members of the court present when the vote was taken concurring in the case of accused Harrell. No evidence of previous convictions was introduced against accused Lasker. Evidence was introduced against accused Harrell of one previous conviction by special court-martial for breaking restriction, illegally using a Government vehicle, twice disobeying the order of an officer and behaving disrespectfully toward an officer, in violation of Articles of War 63 and 96. All members of the court present at the time the vote was taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, the Commanding Officer, Brittany Base Section, Communications Zone, European Theater of Operations, approved each of the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution showed that accused Harrell had two scars on his right cheek (R27,52,56), and that his complexion was darker than that of Lasker (R20,56). The "yellow" soldier, Lasker, was taller and thinner than Harrell (R16,18,26-27,35).

On 26 August 1944 Madame Marie Mainguy, age 41, and her daughter Therese, age 18, lived at Pont Barre, Department of Ille et Vilaine, France, about one kilometer from L'Hermitage (R10-11,33). Monsieur Joseph Leveque, age 36, of L'Hermitage was working at the Mainguy farm that evening (R45). About 6 pm that day (R36), Therese was working in a beet field behind the stables, clad in a blue and white dress with a striped white handkerchief on her head (R11,34). She heard a girl shout on the road and saw two colored soldiers talking to a girl. Therese ran to the house and hid inside, and her mother went outside

(R11-12). The two soldiers then came to the house (R33-34). At the trial Madame Mainguy (R33,36-37), Therese (R11) and Leveque (R45) identified both accused (who were in an assembly of five colored soldiers), as the two men who came to the house. Accused Lasker had a bicycle (R26,36) and was dressed in "cotton working clothes", and accused Harrell was "in khaki" (R34). They asked Madame Mainguy for cognac or brandy and when she refused their request they departed (R33-34). Therese returned to work in the beet field (R11-12).

About 7 pm her mother called Therese and at the same time both accused returned to the house. Therese circled some heaps of straw which were in front of the dwelling and accused "also went around the heaps". The girl ran into the stable and then, because she did not feel safe, went up into the hayloft (R11-12,34,36). The soldiers entered the house and indicated to Madame Mainguy that they "wanted the young girl working in the beets with a blouse and a handkerchief". Madame Mainguy said she did not understand and called to Leveque who was in the courtyard. When he entered the house the "less black" soldier, Lasker, pointed his rifle at him, and "the blackest one", Harrell, said "Boche here, Boche here", and searched the kitchen and two rooms on the "downstairs floor" and the milk-shed. Both accused searched the outbuildings including the stable (R12-13,34-35,45-46). Each accused was armed (R14) and Harrell continually asked for "the young girl" (R12). Madame Mainguy called three men who passed by the house and when they entered, they were ordered to "Stay there". Lasker, who was on one knee, pointed his rifle at the three men and Leveque, and had his finger on the trigger (R35,46-47). Leveque was then allowed to resume his work in the courtyard where the soldiers showed him some photographs (R46-47). Harrell took Madame Mainguy to the beet field and ordered her to "call the young girl". She repeatedly said she did not understand. Finally the soldiers departed and Madame Mainguy told Therese she could come down from the hayloft (R13,35).

Therese then "looked after" the cows and pigs and was in the courtyard when she again saw accused coming back on the road. Because her mother told her not to stay in the house if the soldiers came, she went to the home of Pierre Roussel, age 47, who lived about 700 meters away, told the occupants she was running away from the black soldiers and that she came to hide. She was told "we are three men here and we shall be able to stop them", and Roussel said "we will pass you as my daughter and you come along and eat with us". Therese removed the handkerchief from her head and changed from a blue to a black blouse because she thought accused were looking for her. Accused "looked through" the adjoining farm, came to Roussel's home and knocked on the door (R14, 37,39). When Roussel opened it accused walked directly to Therese

who was eating, said that she had seen "Boche" and indicated that they had seen her working in the field wearing a blue blouse and a handkerchief. When she pretended not to understand them, Harrell "directed" his rifle at her, took her by the hand and forced her to go outside. Roussel accompanied her at her request and the "tall yellow soldier", Lasker, stood at the door with his gun. The other Frenchmen continued to eat. Harrell wanted her "to show them where the Boche had passed" but she said she had seen no Boche and that she was a friend of the Americans. She was then allowed to return to the house with Roussel (R14-16).

Both accused also entered the house again, smoked, and again told her she had seen the "Boche" but Therese denied it. After accused remained quiet for about five minutes Harrell said "Yes, yes, yes you have seen the Boche. Come along". He again seized her by the hand, "directed" his rifle at her and made her "go out by force". The girl, who had said Roussel was her father, seized the latter's hand. Lasker remained by the door holding his rifle (R16-17,39). Harrell said he "had seen Boche -- an aviator", but Therese "said all of the time no". After she was permitted once more to reenter the house to eat, accused talked to each other for about ten minutes. They then went to her, took her by the hand and told her to go outside. When she said, "no, no, no", Harrell "showed" her his rifle. When she again took Roussel by the hand Harrell said "No, no not father" and drew her outside. However she maintained her grip on Roussel's hand. Harrell repeatedly said "the Boche" and she insisted she had seen no Boche. Lasker said "no, no" to Harrell who continued to draw her along. As Lasker "did not wish to come" Harrell said to him "I command -- I order". Lasker, however, continued to remain near the house and when Harrell had drawn the girl about 40 meters from the house, he called "James" to Lasker who then joined them (R17-18, 26-27). Therese was still holding Roussel by the hand and Harrell threatened Roussel with his rifle and also told Lasker "to direct his rifle" on Roussel. Both accused ordered Roussel to lie down. As Roussel "did not wish to obey" Lasker "charged" his rifle by putting three or four bullets in it and Harrell also "charged" his rifle. Roussel then lay down and Lasker remained behind him on his knee "with his rifle towards me watching me if I should go" (R18-19, 39-40). When Therese "saw that she was going by herself" with Harrell, she started to shout when they were about 30 meters from the farm occupied by Joseph Depail. Harrell said "'Salope'" ("dirty bitch'") and when she shouted again he said "'Salope'" continually and struck her face. It was "very dark" as he walked ahead of her and drew her along by the arm. She

> "fell down and I wanted to save myself -- wanted to run away. Then he took me and I shouted all the time. And then when he was holding me he put his hand on my mouth.

Whilst I was down and while I was crying all the time, he put his hand on my mouth and there by force he took off my pants".

She was on the ground because "he has taken me in his arms and put me on the ground" (R19) where he "did what he wanted to do", and "took off his trousers also.". His "private part" entered into her "private part" and stayed there for five minutes. When Joseph Depail, a neighbor, approached, Harrell took his hand off her mouth and raised up on his hands. She warned Depail to hide the rifle which accused had left on top of a hedge. After removing the weapon, Depail came up to them. Harrell stood up (R20,42-43), put on his trousers and shook hands with him. Therese left for Depail's house, where she hid under a pile of hay. Harrell followed, looking for her and his rifle. He "went in the house through all the doors and said 'young girl is gone'". Meanwhile, Lasker remained 40 meters from Roussel's house with his rifle directed at Roussel whom he kept lying on the ground (R21-22). Depail showed both accused where he had hidden the rifle by an oak tree. Harrell took it and Depail pointed out to them "the direction that they had to go away". Both accused shook hands with him and left (R43-44).

Roussel testified that he heard Therese shouting but could not go to her aid because Lasker was always behind him "directing his rifle on me" (R40). He could not see the girl from his location (R41). Therese testified that she could see Roussel and Lasker before she lay on the ground (R21-22).

Therese and her mother identified a pair of men's ankle high brown leather shoes, fastened by a leather strap and buckle, which were received in evidence without objection, as those worn by Harrell at Roussel's house (R23,35-36; Pros. Exs.1, 2). She identified also a pair of white cotton step-ins which she wore immediately before the alleged attack. These were received in evidence, without objection (R23-24; Pros.Ex.3). At the guardhouse in Rennes, France, following the alleged attack, she identified each accused and selected Harrell from a group of about 40 soldiers, Lasker from a group of ten or 12 (R24-25). She did not consent to sexual intercourse with Harrell (R25).

Captain James E. Greer, 127th General Hospital, a laboratory technician, examined the step-ins identified as Pros. Ex. 3 on 12 September 1944. His tests proved that the garment contained bloodstains but were negative as regards spermatazoa (R28-29).

Doctor Leon, a medical practitioner of Pace, France, examined Therese on 27 August 1944 (R30). She had bruises on her thighs, scratches on both legs and complained of pain in her wrists, although they showed no marks. In examining her organs he "only found some irritation. On the side were some traces of dried sperm" which "showed to me that sperm had been thrown out". She had re-

cently had sexual intercourse, in his opinion. "The hymen was very large and had not been torn. There was no trace of blood" (R31). There had been penetration (R32).

On 4 September 1944 Technical Sergeant Paul E. Pauly, Agent of the Provost Marshal, 12th Military Police, Criminal Investigation Section, interviewed Harrell at CID Headquarters in Rennes, France, cautioned him regarding his rights and read to him the 24th Article of War (52). Harrell voluntarily signed a statement reading as follows:

> "I am Pvt Earl Harrell 39122327 and I remember the night of 26 August (Saturday) 1944. About 1900 hours I left camp and went to a tavern in a nearby village. There I met about 4 white boys and 5 or 6 colored soldiers. I had a few drinks and in a little while T/4 Ivory Lasker came in. Lasker had a drink and then we left together. Lasker had a bicycle and we pushed it along. We were both carrying carbines. Lasker suggested we take a short cut back to camp. Soon we met some ageable women. There were standing in a yard near the road. There were some children with them. They asked for cigarettes and in return they gave us quite a few drinks of a strong kind of liquor. In a while, after Lasker and I finished what looked like a quart bottle of liquor, we went on to a farm house. Maybe we had a couple of drinks there. We both went in that farm house. We met there some men and women and at least one young girl. I remember fiddling or feeling around with some girl. I remember having intercourse (skrewing) with some girl in a little while, but I do not know what girl it was. Sgt Lasker was with me all the time that night. I do not know if Lasker skrewed any girl that night. I woke up in my tent in camp next morning. I still felt drunk. I missed my cartridge belt after I woke up and went back down the road which Sgt Lasker told me about and found it. I was drunk and don't know much about what all I did do. When I left camp that evening I was sober. I was wearing a garrison cap, I think, an O.D. shirt, O.D. trousers, and light brown ankle fashioned shoes. I carried a cloth zipper closed small handbag in which I had cigarettes and candy I thought I might give away" (R53; Pros. Ex.4).

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The prosecution requested the court not to consider this statement as evidence against Lasker (R53). On 5 September 1944, Pauly also interviewed Lasker at CID Headquarters, cautioned him regarding his rights and read to him the 24th Article of War (R53-54). Lasker voluntarily signed a statement reading as follows:

"My name, rank and serial number are the same that are shown above. On Saturday, August 26, 1944, I left camp accompanied by Pfc Johnny Tate, on our bicycles, and proceded to a village about a mile from camp. This village is in the opposite direction from Rennes, on the main highway. We did not have any drinks in the village at this time. Tate and myself went to a farm house and we exchanged cigarettes for cognac. We were their abount an hour and then returned to the village. Tate left me and rode away with some young lady on a bicycle. I then went into a tavern and met Earl Harrell. He bought me a drink and we sat around and talked for a while. It was then about four thirty P.M and then we decided to visit the farm house, where I had been with Tate previous. We then exchanged gum, hard tack and cigarettes for two small bottles of cognac. After drinking cognac we went to the next farm house which was about one hundred feet away. We again exchanged candy, for two cups of cognac. While there we drank the two cups of cognac. We then visited another farm house about seventy five or one hundred yards away. We talked to some man about getting more cognac. We exchanged cigarettes for two small glasses of cognac. We drank same. We left there and walked down the road talking to one another about different things for about two hours. We then returned to the farm house, where we talked to the man concerning cognac. A lady was in the doorway and she gave us a half a cup apiece of cognac, in exchange for hard tack. We left there and Earl asked me to walk down to the village with him and I refused, because I had to get up early the next morning. At that time it was about nine forty five P.M. It was just beginning to get dark. I proceded without Earl and returned to camp. All during the afternoon and evening I had my bicycle with me. Earl did not have any. I returned to camp shortly after ten o'clock P.M. and went to bed. During the afternoon and evening I was dressed in my G.I. coveralls, wearing a steel helmet and carrying my carbine rifle on my shoulder. What Earl

Harrell did after I left him, I don't know. During the evening I was with Earl, he was wearing OD shirt and trousers, garrison cap, broke down in the middle, and a pair of brown boot shoes. He also had with him his carbine rifle.

I know of no reason why Earl Harrell of my company should implicate me in this matter, unless he was angry, because I wouldn't return to the village with him.

Before I sign this statement I wish to say that when I returned to camp I had, had, plenty to drink" (R54; Pros. Ex.5).

The prosecution requested the court not to consider this statement as evidence against Harrell (R54). Pauly obtained from Harrell the pair of shoes received in evidence as Pros. Exs. 1 and 2, which were taken from his duffle bag (R55-56). The duffle bag was identified by Pauly as the one Harrell claimed as his. It was also offered and received in evidence without objection (R56; Pros. Ex.6).

Second Lieutenant Gilbert F. Weiss, 415th Engineer Dump Truck Company, appointed investigating officer as to charges against each accused, advised them both regarding their rights under the 24th Article of War and went over with each of them their respective statements previously made to Agent Pauly (R57; Pros. Exs.4,5). He had known each accused since March 1943 (R57). Lasker was always a good worker and never had any trouble. Harrell's reputation in his company was "just fair" (R58).

On 27 August 1944 Lasker told Private First Class Johnny Tate, 415th Engineer Dump Truck Company that "Earl and him met one or two pretty nice girls" (R59-60). On the 26th of August, Tate was in L'Hermitage with Lasker until "four or four-thirty" (R60) and then saw him "back on post" about "eight or eight-thirty * * * just about dusk dark" (R61).

4. For the defense, Technician Fifth Grade James Colquitt, 415th Engineer Dump Truck Company, testified that on 26 August 1944 at about "ten or ten-thirty" Lasker came to his tent and asked if he had checked the stoves that night. He did not know whether or not Lasker had been drinking (R62-63).

After the rights of each accused were respectively explained to him, Harrell elected to make an unsworn statement and Lasker elected to be sworn and to testify in his own behalf (R65-66).

Harrell stated that "on that evening" he left camp and went to L'Hermitage. He was out with about five white boys and four colored boys and they sat and drank several drinks. Sergeant Lasker came in and took a couple of drinks that Harrell bought him. They left together. Lasker had a bicycle which they pushed along the road. They met some women and children in a yard and exchanged cigarettes for cognac. They went down the road and met "this little short fellow that just came in here - this little Frenchman" whom they knew. He told them where they could get more cognac. As they went to another farmhouse, the Frenchman asked them about gasoline, but Harrell said he did not have any with him. At the farmhouse

> "as near as I can remember we were in the company of some women but I was a little too far gone to remember very much about what went on. And then I remember I was back in camp the next morning" (R66).

He added that

> "I said I was in the company of some women. I do remember being with a woman but to me she was an older woman than this girl and I can't say I ever remember seeing her. Of course, to me then -- I was drinking sure enough -- but she didn't look anything like her. That is all, sir" (R67).

Lasker testified that in the afternoon of 26 August 1944 he left camp with Tate, each riding his bicycle. They went to L'Hermitage and rode around a while. They decided to get some cognac from "the little short fellow that identified me here". They went to his house, drank cognac, stayed about an hour and gave candy and gum to his five daughters. Later Lasker went to a tavern in L'Hermitage and met Harrell at about four-thirty or five o'clock. Harrell bought him a drink and they went back to the house where he has been with Tate. The little short fellow was not there but his wife was and she let them have two bottles of cognac and a glass of cognac. They drank one bottle, a small bottle, and then went one hundred yards to the next farmhouse where they stopped in and in exchange for gum and candy received cognac. They then went almost 75 feet to the next farmhouse where "this little short fellow" was raking the yard. Lasker asked him about getting cognac, but the man didn't know where it could be obtained. They then walked around about two hours and came back to where "this fellow was raking the yard" and asked him again about some cognac. "And the woman was standing in the door there and she called us in and gave us cognac". He decided he had enough to drink and left Harrell who "insisted that I go to the village with him" and proceeded back to camp alone. He arrived there a little after ten o'clock (R67-68).

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Cross-examined, he stated that Harrell wore that evening the same shoes that had been introduced in evidence (R69). Examined by the court, he denied that he had ever seen Therese before or that Harrell had ordered him to hold his rifle on anybody that evening (R71). On recross-examination, he did not know why Harrell had implicated him in this matter. In his opinion, Harrell was "too drunk to recognize or even know who was with him". The last time he saw him he was staggering up the road (R80).

5. In rebuttal, the prosecution showed by further testimony of Therese that the alleged offense was committed between 9:00 and 9:15 pm sun time and that accused came to the farm for the last time at 7:30 pm (R81), that they were "not at all drunk -- not at all -- not at all", that "they did not at all give the impression of being drunk only ferocious" and repeated her former testimony as regards the part played by each accused (R82-83). Madame Mainguy again identified both accused as the men she saw three times at her farm on 26 August 1944. Neither of them was drunk (R92). She had never seen Lasker before that day (R82-85). Leveque stated that neither accused was drunk (R92). He never sold or offered to sell cognac or cider to either accused, but did give a small glass of brandy to Lasker. Leveque had a wife and four children (R85). Depail testified he came to the aid of Therese when he heard her screaming at about 8:45 pm sun time. The soldier who attacked her was not drunk. He was sober (R94). According to Roussel neither accused was drunk on 26 August. They were both sober (R98-99). When he heard Therese shouting it was about "half past eight or quarter of nine sun time" (R99).

6. Accused were charged separately for violations respectively of Article of War 92. The Specification in the case of Harrell alleges that he did "at or near L'Hermitage, Brittany, France, on or about 26 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Mademoiselle Therese Mainguy". In the case of Lasker, the Specification alleges that at the same time and place he did

> "aid and abet Private Earl Harrell, 415th Engineer Dump Truck Company, in forcibly and feloniously against her will, having carnal knowledge of Mademoiselle Therese Mainguy, by standing guard with a rifle at the time of the said carnal knowledge and preventing Mister Pierre Roussel from coming to the said Mademoiselle Therese Mainguy's assistance".

The convening authority in forwarding these charges for trial directed that the accused be tried at one time by the same court-martial "if neither accused objects".

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After the arraignment of each accused, the defense presented on behalf of Lasker a motion to sever, to which the prosecution did not object. The court denied the motion (R8-9) and the prosecution went forward with its evidence. During the course of the trial, the prosecution asked the court to reconsider the motion of the defense for severance on the ground that the court erred in ruling on the motion and "if the trial proceeds it will be void to both defendants" (R48). Following a discussion of the law between the prosecution, the defense, the law member and the president of the court (R48-50) a recess was taken (R51). Thereafter, the defense announced that accused Lasker had been advised of his rights as to severance of the trial and, after consultation with defense counsel, had decided to withdraw his motion and "to continue the trial as it is now progressing" (R51). The defense withdrew its motion to sever and stipulated that

> "all of the evidence introduced thus far in the case may be considered as against both defendants just as if no motion has been presented at the beginning of the trial" (R51).

Since the record of trial shows that neither accused personally voiced his assent to being tried with the other, the question arises whether any substantial right of either accused was injuriously affected as a result of his being so tried.

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

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

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The Board of Review in CM ETO 895, Davis et al, considered its authority on appellate review of the court's denial of a motion for severance and approved the following doctrine in cases where two or more accused are jointly charged:

> "Unless such privilege is conferred by statute or court rule * * * defendants jointly indicted are not entitled to a severance or separate trials as a matter of right. Both at common law and under statutes declaratory thereof, the grant or denial of a severance or a separate trial to defendants jointly indicted rests in the discretion of the trial court, which, in the absence of good cause therefor, may in the exercise of its discretion properly refuse separate trials, and whose grant or denial of a separate trial or severance will be upheld in the absence of an abuse of discretion clearly shown. The court should, however, in passing on an application for a severance exercise a sound discretion, so as to prevent injustice and should not proceed arbitrarily nor capriciously. What constitutes an abuse of discretion in denying severance or separate trials necessarily depends largely on the whole situation as revealed in each particular case, by the circumstances as disclosed at the time the application for severance was made * * *"
> (23 CJS sec.933a, pp.217-218).

The evidence showed that accused might with legal propriety have been charged jointly with the rape of Therese, in which case as the above authorities indicate, the granting of severance of trials would have been for the decision of the court in the exercise of its sound judicial discretion and in the absence of proof of abuse of that discretion its decision would not be disturbed on appellate review.

In the instant situation, when the motion for a severance was made by the defense no reason therefor other than that "the evidence in some manner might prejudice the Tec 4 Ivory Lasker case" was advanced. Nothing in Harrell's confession or in his unsworn statement alleged the commission of any offense by Lasker. Similarly, nothing in Lasker's statement to Pauly or in his testimony described any improper conduct by Harrell. The consent of defense counsel that accused be tried together and the stipulation that the evidence

offered prior thereto should be considered as evidence in the case, following a conference between accused and defense counsel, create a strong implication that each accused did in fact consent to the consolidated trial. The evidence of the prosecution standing alone shows the guilt of each accused as alleged beyond any reasonable doubt. Had each been tried separately the same evidence on behalf of the prosecution would have sustained separate findings of guilty of each accused. While it should have appeared in the record of trial that accused each personally consented to their being tried together, the Board of Review is of the opinion that no substantial right of either accused was injuriously affected by reason of the absence of the formal consent in the record (CM ETO 4589, Powell et al and cases therein cited; CM ETO 4444, Hudson et al; CM ETO 4172, Davis et al).

7. As to accused Harrell, the Manual for Courts-Martial defines the elements of the crime of rape as follows:

> "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).

In this instance, the victim's description of the circumstances under which she was sought and pursued by both accused, forced to accompany Harrell to a secluded spot, after he had threatened her protectors with his rifle, and forcibly compelled to have sexual intercourse with him, his voluntary confession, the corroborating testimony of Depail who came upon them while the act was in progress, and the evidence disclosed by the doctor's examination, all showed the guilt of accused Harrell as alleged

beyond any reasonable doubt. Her non-consent was beyond question. The court's findings are supported by a wealth of substantial competent evidence and are final and binding upon appellate review (CM ETO 3709, Martin and cases therein cited).

8. 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).

It was not necessary for the proof to show that Lasker actually entrapped and imprisoned the victim while Harrell engaged in sexual intercourse with her. In truth his presence at the rape was not essential to his liability as an aider and abetter (Parisi v. United States (CCA) 279 Fed. 253,255; Jin Fuey Moy v. United States, 254 U.S. 189, 65 L.Ed. 214; Colback et al v. United States (CCA), 10 Fed. (2nd) 407). Prosecution's evidence did, however, show beyond reasonable doubt that, with Harrell, Lasker sought and pursued Mademoiselle Mainguy. With his rifle he compelled Roussel to lie on the ground a short distance from the point where she was being raped by Harrell and prevented Roussel from attempting to succor the young woman. A plain case of aiding and abetting the commission of the principal crime was thereby established (CM ETO 3740, Sanders et al and authorities therein cited).

All of the members of the court present at the time the vote was taken concurring, each accused was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The sentence is legal as to Harrell, since he was convicted of rape, for which a life sentence is one of the alternative mandatory punishments (AW 92). The sentence is also legal as to Lasker. 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 (CM ETO 3740, Sanders et al, pp. 24-25, and authorities there cited).

9. The charge sheets show that accused Harrell is 26 years three months of age and was inducted 28 January 1943. Accused Lasker is 26 years seven months of age and was inducted 1 February 1943. Neither accused had any prior service.

10. The court was legally constituted and had jurisdiction of the persons and offenses. No errors 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.

11. Penitentiary confinement is proper as to Harrell under Articles of War 42, 92 and sections 278, 330, Federal Criminal Code, 18 USCA 457, 567. It is also proper as to Lasker who, as an aider and abetter, may be punished as a principal (CM ETO 3740, Sanders et al, p.25). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused is proper (Cir. 229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations: 19 JAN 1945 TO: Commanding General, Brittany Base Section, Communications Zone, European Theater of Operations, APO 517, U. S. Army.

1. In the case of Technician Fourth Grade IVORY LASKER (39908499) and Private EARL HARRELL (39122327), both of 415th Engineer Dump 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 and this indorsement. The file number of the record in this office is CM ETO 4234. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4234).

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

18 DEC 1944

CM ETO 4235

U N I T E D S T A T E S	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Privates JOSEPH T. BARTHOLOMEW (38379845) Battery C, 578th Field Artillery Battalion and ALVIN A. BRISCOE (38378145), Battery B, 578th Field Artillery Battalion	Trial by GCM, convened at Rennes, Brittany, France, 6, 10 October 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for one year, Seine Disciplinary Training Center, Paris, France.

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

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

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

BARTHOLOMEW

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Joseph T. Bartholomew, Battery "C", 578th Field Artillery Battalion, did, in the vicinity of Pleudihen, Cotes-du-Nord, France, on or about 6 August 1944, wrongfully and unlawfully commit an aggravated assault upon Mademoiselle Odette Bourcoeur by striking her with his fist, and tearing her clothes and attempting to throw her upon the ground.

Specification 2: (Finding of not guilty).

BRISCOE

CHARGE: Violation of the 96th Article of War.

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Specification 1: In that Private Alvin A. Briscoe, Battery "B", 578th Field Artillery Battalion, did, in the vicinity of Pleudihen, Cotes-du-Nord, France, on or about 6 August 1944, wrongfully and unlawfully commit an aggravated assault upon Mademoiselle Odette Bourcoeur by striking her with his fist, tearing her clothes and attempting to throw her upon the ground.

Specification 2: (Finding of not guilty).

Accused, in open court, consented to be tried together. Each pleaded not guilty and each was found not guilty of Specification 2, and guilty of Specification 1 and of the Charge. No evidence of previous convictions was introduced as to either accused. 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 five years. The reviewing authority, as to each accused, approved only so much of the sentence as provided for dishonorable discharge the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year, designated the Seine Disciplinary Training Center, Paris, France, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. As to Specification 1 of the Charge of which each accused was respectively found guilty, there was evidence presented by the prosecution as follows:

At about one o'clock (R15) on the afternoon of 6 August 1944, Mademoiselle Odette Bourcoeur, age 18, and Mademoiselle Annick Chouin, age 16, both of Pleudihen, Cotes du Nord, France, were walking along a road about one kilometer from that town (R6,8,11,16). They observed that three colored American soldiers were following them and therefore "hastened on without running". The soldiers "directed their rifles" at the girls and ran up to them (R7,9,13). According to Odette's testimony, the two accused "got hold" of her and the other of the trio, not identified, took hold of Annick.

"They took our arms and they made movements which were more or less delicate, * * * more or less rude" (R7,8).

Both accused struck Odette in the face causing her nose to bleed and giving her a "little cut" on the lips (R14). They tried to throw her on the ground but did not succeed as she "struggled against it. I resisted" (R11). According to the girls' testimony Odette's clothes were not torn (R8,14). Meanwhile the unidentified negro pointed his rifle at Annick (R10) and pulled her into a field where he tore her dress and apron (R12). At this moment Captain Murray R. Goldstein, 578th Field Artillery Battalion and a Lieutenant Short, his "motor officer", came

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along in a jeep and saw three soldiers and two girls "struggling in a field, about fifteen yards off the highway". The officers stopped the car and shouted. The soldiers started to run but accused Bartholomew was caught, and the other two continued out of sight. The girls who "had been yelling and screaming", ran up to the officers "in a very disheveled condition and shouting" (R18-19). Goldstein noted that they "seemed to be cut up, their clothes were torn" (R20) and they "seemed pretty hysterical" (R22). The officers disarmed accused Bartholomew, who

> "started to explain that he was not attacking the girls, but had only been trying to protect the two men, especially his friend Briscoe, from getting into trouble, but that he could not, he did not have any success with them"(R19).

Goldstein observed that the fly of accused Bartholomew's pants was open and that the girls

> "gestured at him, as though he was one of the men attacking them" (R19,22).

Shortly thereafter, Captain Richard V. Riddell, Medical Corps, 578th Field Artillery Battalion, saw Odette and Annick at the command post where they were brought by Goldstein and Short after the alleged attacks. He observed that

> "one was a bit disheveled, her dress had been torn, and one had some evidence of slight lacerations around her mouth and nose. There was a small amount of blood" (R23).

They appeared to him "around sixteen", one

> "five feet two or three, and the other was two or three inches taller, both moderately plump, well filled out" (R24).

On 8 August 1944, Captain William H. Bollinger, 578th Field Artillery Battalion, the investigating officer, interviewed both accused and advised each of them of his rights under the 24th Article of War. Accused then voluntarily signed separate sworn statements which were received in evidence without objection (R24-25,26). Accused Bartholomew's statement reads:

> "We were over by a house drinking cognac with two young ladies. The girls wanted to go further up into the woods. We all went down the road where we met Captain Goldstein and Lt. Short. When Captain Goldstein rode up, the girls started to run. He made the girls get in the jeep and I told him I wasn't doing anything but talking" (Pros. Ex.1).

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Accused Briscoe said in his statement:

"We had been drinking cognac that we had gotten from a house near "B" Btry. We met two young ladies. We talked to them, and we walked a little ways with them. When we got to the end of the road we saw Captain Goldstein and Lt. Short coming in a jeep. Knowing that I was out of my battery area in violation of orders I ran. When I first saw Captain Goldstein we were standing about 15 feet from the road" (Pros. Ex.2).

4. After his rights were explained to him, each accused elected to remain silent (R27-28).

5. The court adjourned on 6 October 1944 and reconvened 10 October 1944. On 9 October 1944, Second Lieutenant Frederick T. Donald was appointed Assistant Trial Judge Advocate of the court, vice Second Lieutenant Mora D. Womack, Assistant Trial Judge Advocate, relieved. The record fails to show the presence at or absence from the trial of Lieutenant Donald. His absence, however, "in no wise affected the validity of the proceedings or rights of accused" (CM 130217 (1919), Dig. Op. JAG, 1912-1940, sec.395(54), p.235).

6. With reference to the evidence disclosed at the trial and the Specification of which each accused was respectively found guilty, two questions are presented: first, does the evidence show any greater offense committed by each accused than mere assault and battery, for which the maximum punishment is specifically limited to six months confinement at hard labor and two-thirds of one month's pay per month for a like period (MCM, 1928, par.104c, p.100); second, if a greater offense than assault and battery was committed by each accused, is it sufficiently alleged in the specifications?

(a) With reference to the first question, the evidence demonstrates that each accused could properly have been charged with assault with intent to commit rape. The manner in which the girls were pursued by both accused, both armed with rifles, the enforced separation of the girls by the accused and the third unidentified soldier, their striking Odette in the face with their fists, their attempt to throw her on the ground, her resistance, cries and after the attack, her disheveled appearance, the prompt flight of the three soldiers, the fly of one of whom was open, upon the arrival of two officers, all present a pattern of conduct from which the court, had each accused been charged with assault with intent to commit rape under the 93rd Article of War, could properly have inferred the intent of each of them to conclude their assault with the rape of Odette. In instances where young women and female children of various ages have been subjected by accused to assaults in which "indecent" conduct is prominently featured, it has been held that such offenses are of greater seriousness than assault and battery, and that no

maximum penalty is provided in the table of maximum punishments for such offenses (MCM, 1928, par.104c, p.97; CM 188606, Paparis (1 B.R. 129); CM ETO 3869, Marcum; CM ETO 2195, Shorter; CM ETO 571, Leach; CM 210762, Valeroso). In the Leach case, above cited, the victim, a girl age 11 years, was taken by the wrist and led by the accused from a highway to a bank where he lifted her over a hedge, put his hand on her hips and pulled her down on the grass. He removed her knickers, unfastened his trousers "in the front", "took his thing out" and put it between her legs. Pressing her side hard, accused moved his body up and down for five minutes. Suddenly he jumped up and sprang over the hedge, leaving the girl lying in the field. Accused Leach was charged under the 96th Article of War; the specification alleged that he did "unlawfully and indecently assault a British civilian female, named Joyce Brown, aged eleven years". In the Marcum case, above cited, the victim was a girl of eight years, similarly assaulted, the specification under the 96th Article of War charging that accused did "wrongfully, unlawfully and feloniously take indecent liberties with Sylvia May Sanders, a female under nine years of age, by fondling her and placing his hands upon her leg and private parts". In the opinion of the Board of Review, the conduct of each accused in the instant case, in striking the victim in the face and attempting to throw her on the ground, together with all the surrounding circumstances, constituted evidence from which the court could find accused guilty of that type of indecent assault and battery described in the cases above cited. Although the victims in the Leach and Marcum cases cited above were 11 and eight years of age respectively, the Board of Review is of the opinion that in cases of indecent assault the questions of age or sex of the victim are immaterial.

(b) The second question is then presented whether the Specification, alleging, as to each accused, that he did

> "wrongfully and unlawfully commit an aggravated assault upon Mademoiselle Odette Bourcoeur by striking her with his fist, and tearing her clothes and attempting to throw her upon the ground",

sufficiently alleges the offense of an "indecent" assault of the nature referred to above.

In the case of Norton v. State, 14 Texas 387,393, the court said:

> "An 'aggravated assault' is, at the common law, one that has, in addition to the mere intent to commit, another object, which is also criminal; but it may be doubted whether at common law the term had a technical and definite meaning. It seems rather to have been a phrase used by the commentators and text-writers, in contradistinction to 'common assault', to include all those species of assault which, for various reasons, have come to

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> be regarded as more heinous than common assaults, or had been singled out and made the subject of special legislative provisions. In the criminal codes of some of the states of the Union, the term 'aggravated assault' is given a definite and peculiar meaning of its own."

In the case of Ellers v. State (Tex.), 55 S.W. 813, it was held that an assault becomes aggravated when committed by an adult male on the person of a female child. In the case of Commonwealth v. DeGrange, 97 Pa. Super., 181, 185, an indecent assault was defined as the taking by a man of indecent liberties upon the person of a female without her consent and against her will, but with intent to commit the crime of rape. It has been held that an indecent assault is an "aggravated assault" and simple assault is necessarily included therein (State v. Waid, 67 P. (2d) 647,648, 92 Utah 297).

The terminology of the Specification against each accused is inapt in the use of the word "aggravated", which appears to be merely the conclusion of the pleader. Nevertheless, combined with allegations of striking the victim, tearing her clothes and attempting to throw her upon the ground, it may reasonably be said to have fairly apprised each accused that he was charged with a more serious offense than simple assault and battery and punishable by a more severe sentence, namely, an indecent assault upon a young woman (see subpar.(a), supra). The Board of Review in its appellate function has heretofore exercised the power to construe and interpret specifications in accordance with the true intent and meaning of the pleader (CM ETO 3803, Gaddis et al, and authorities therein cited). The guiding principles in such construction and interpretation are found in the following authorities with respect to indictment and informations, quoted in CM ETO 3740, Sanders et al:

> "The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle, that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and 'sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'" (Cochran v. United States, 157 U.S. 286,290, 39 L.Ed., 704,705, 15 S.Ct.628; Rosen v. United States, 161 U.S. 29,34,40 L.Ed., 606, 607, 16 S.Ct. 434, 480, 10 Am. Crim. Rep.251).

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"Section 1025 Revised Statutes (U.S.C. title 18, sec.556) provides:

> '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.'

This section was enacted to the end that, while the accused must be afforded full protection, the guilty shall not escape through mere imperfections of pleading.
It, of course, is not the intent of sec.1025 to dispense with the rule which requires that the essential elements of an offense must be alleged; but it authorizes the court to disregard merely loose or inartificial forms of averment. Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment" (Hagner v. United States, 285 U.S. 427,431,433, 76 L.Ed., 861,865,866).

Section 1025 Revised Statutes (18 USCA sec.556) is the counterpart of the 37th Article of War, which in pertinent part reads as follows:

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

The meaning and effect of the language contained in these "statutes of amendments and geofailes" (Black's Law Dictionary - 3rd Ed., p.1017) is further clarified by many decisions. An indictment which will enable a person of common understanding to know what is intended is sufficient (Nickell v. U.S. (Or.1908) 161 Fed 702, 88 C.C.A. 562). An indictment or information is sufficient under these statutes, if the offense be described with sufficient clearness to show a violation of law, to enable the accused to know the nature and cause of the accusation, and to plead a judgment, if one be rendered, in bar of further prosecution for the same offense (U.S. v. Behrman (N.Y. 1922) 42 S. Ct., 303,

258 U.S. 280,66 L.Ed. 619; Dierkes v. U.S. (C.C.A., Ohio, 1921) 274 Fed. 75, certiorari denied (1921) 42 S. Ct. 55, 257, U.S. 646, 66 L. Ed. 414; Dr. J. H. McLean Medicine Co. v. U.S. (C.C.A. Mo. 1918) 253 Fed. 694; Knauer V. U.S. (Iowa,1916) 237 Fed. 8,150 C.C.A. 210; U.S. v. Prieth (D.C. N.J. 1918) 251 Fed 946). Further these corrective statutes are applicable where the only defect complained of is that some element of the offense is stated loosely and without technical accuracy (See U.S. v. Dimmick (D.C. Cal 1901) 112 Fed.352, affirmed Dimmick v. U.S. (C.C.A. 1903) 121 Fed.638). (See also cases cited 18 USCA, sec.556, pp.43-44).

The language of Specification 1 as to each accused informed him that he was charged with an "aggravated" assault, that the person so assaulted was a woman and that he struck her with his fist, tore her clothes and attempted to throw her upon the ground. In the opinion of the Board of Review, while the specification does not describe with technical accuracy an indecent assault, neither accused was misled by the language used and was sufficiently apprised that he was so charged.

7. The charge sheet shows that accused Bartholomew is 32 years of age and was inducted 1 February 1943 to serve for the duration of the war plus six months, and that accused Briscoe is 29 years of age and was inducted 6 January 1943 to serve for a similar period. Neither accused had prior service.

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

9. The period of confinement adjudged in the sentence is within the authorized maximum (CM ETO 571, Leach; CM ETO 2195 Shorter; CM ETO 3869, Marcum). Confinement of each accused in Seine Disciplinary Training Center, Paris, France, is authorized (TWX No. 53842, ETOUSA, 12 October 1942).

_____ Judge Advocate

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1st Ind. (159)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 DEC 1944 TO: Commanding General, Brittany Base Section, Communications Zone, European Theater of Operations, APO 517, U. S. Army.

1. In the case of Privates JOSEPH T. BARTHOLOMEW (38379845), and ALVIN A. BRISCOE (38378145) respectively of Battery C and Battery B, 578th Field Artillery, 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 4235. For convenience of reference please place that number in brackets at the end of the orders: (CM ETO 4235).

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

24 NOV 1944

CM ETO 4238

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Saint Vith,
	)	Belgium, 1 October 1944. Sentence:
Private HARVEY P. FLACK (6669000), Antitank Company, 22d Infantry.	)	Dishonorable discharge, total forfeitures, and confinement at hard labor for 40 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
	)	
	)	

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

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

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

CHARGE I: Violation of the 63rd Article of War.

Specification: In that Private Harvey P. Flack, Antitank Company, 22nd Infantry, did, in the vicinity of Corbeil, France, on or about 25 August 1944, behave himself with disrespect toward Captain Oscar B. Willingham, his superior officer, by saying to him, "No, Sir, I want to be attended to now", or words to that effect.

CHARGE II: Violation of the 65th Article of War.

Specification 1: In that * * * did in the vicinity of Corbeil, France, on or about 25 August 1944, draw a weapon, to wit, a German automatic pistol against Technical Sergeant James A. Phillips, Antitank Company, 22nd Infantry, a noncommissioned officer, who was then in the execution of his office.

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Specification 2: In that * * * did in the vicinity of Corbeil, France, on or about 25 August 1944, attempt to strike Technical Sergeant James A. Phillips, a non-commissioned officer, on the body with his fist, while said Technical Sergeant James A. Phillips was in the execution of his office.

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

Specification 1: In that * * * did in the vicinity of Corbeil, France, on or about 25 August 1944, draw a weapon, to wit, a German automatic pistol against Captain Oscar B. Willingham, his superior officer, who was then in the execution of his office.

Specification 2: In that * * * having received a lawful command from Captain Oscar B. Willingham, his superior officer, to give him, the said Captain Oscar B. Willingham, the pistol, did in the vicinity of Corbeil, France, on or about 25 August 1944, willfully disobey the same.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of all the charges and specifications with the substitution of the word "Belgian" for "German" in Specification 1, Charge II, and in Specification 1, Charge III. Evidence was introduced of one previous conviction by special court-martial for breach of restriction, in violation of Article of War 96. 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 40 years. The reviewing authority approved only so much of the findings of guilty of Specification 1, Charge III, and Charge III, as involve findings that the accused did, at the time and place alleged, lift up a weapon, to wit, a Belgian automatic pistol, against Captain Oscar B. Willingham, his superior officer, who was then in the execution of his office, in violation of Article of War 64; approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, andforwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence introduced by the prosecution showed that on 25 August 1944, accused was a private in the antitank Company, 22nd Infantry, which on the day in question was stationed near Corbeil, France. About 1630 hours on that date and at that place, accused was brought before his com-

pany commander, by the charge of quarters, for disciplinary action. The company commander, Captain Oscar B. Willingham, 22d Infantry, who testified and was a witness to all that followed, told accused to return to his platoon, that he would attend to him later. Accused replied; "No, Sir, I want to be attended to now". Accused repeated this and, as the company was getting ready to move, the Captain called for guards to place accused in confinement. Technical Sergeant James A. Phillips, of this same company, who responded to the call and who testified in corroboration of Captain Willingham, grabbed accused and forced him into an adjoining room where accused broke away and attempted to strike Phillips. Sergeant Phillips dodged the blow and bodily rushed accused into the court yard. Here accused drew a Belgian .38 caliber pistol and pointed it at Phillips. The captain, a witness to all this, rushed out and, at that time being in the execution of his office, said to accused, "Give me that damned gun". Accused pointed the pistol at his captain, said he would not and warned him not to come any closer. The captain repeated his order to accused to surrender the gun and moved in closer. Accused said "I am not giving you that gun and I don't want you to come any closer to me". By this time Captain Willingham was "fairly close" to accused, so he jumped in anddisarmed him. The pistol was loaded (R5-8,11,12). The captain and Sergeant Phillips were fully corroborated in this testimony by First Lieutenant William C. Hurst of the 22d Infantry (R8-11). Lieutenant Hurst said accused had been drinking, but did not appear to be badly under the influence of intoxicants (R9). Phillips testified accused "walked straight as a normal man would" (R12). Captain Willingham testified, "Well, Private Flack was drinking but Private Flack knew well enough what he was doing. He was not drunk" (R6).

4. Accused, advised of his rights, elected to remain silent. He called no witnesses.

5. The testimony establishes each factual allegation of each specification except that accused did not draw a German pistol at Captain Willingham, as alleged in Specification 1, Charge III, but rather pointed the pistol of Belgian make, at his commanding officer. This variance, immaterial, between proof and allegation was corrected by the reviewing authority who properly found the expression "did lift up" a pistol more accurately descriptive of accused's conduct in pointing the pistol than the words "did draw", those used in the allegation. "The raising in a threatening manner of a firearm * * * would be within the description, 'lifts-up' (Winthrop)" (MCM, 1928, par.134a, p.148). The proof shows that at the time of the assault, Captain Willingham, the superior officer of accused, was in the execution of his office. The proof also shows accused guilty of each charge and specification, except as noted above.

CONFIDENTIAL

6. The charge sheet shows that accused is 23 years eight months of age. He enlisted at Fort Benjamin Harrison, Indiana, 25 October 1939. His service is governed by the Extension Act of 1941. He had no prior service.

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

8. The offense of lifting up any weapon against a superior officer being in the execution of his office shall be punished by death or such other purishment as a court-martial may direct (AW 64).

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

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 24 NOV 1944 TO: Commanding General, 4th Infantry Division, APO 4, U. S. Army.

1. In the case of Private HARVEY P. FLACK (6669000), Antitank Company, 22d 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. It is noted that accused has five years service; one previous conviction for a minor offense was introduced; the offenses were all charged as military offenses; and although the pistol was loaded, it was not fired. While accused was not drunk, liquor was an element influencing his misconduct. It appears to be a case where suspension of the dishonorable discharge and confinement in a disciplinary training center should be considered.

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 4238. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4238).

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

CONFIDENTIAL

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 4239

U N I T E D S T A T E S	8TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 8, U. S. Army (France), 11 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private WILBURN LOWE (34107423), Company K, 28th 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 Private (then Private First Class) Wilburn Lowe, Company K, 28th Infantry, did, at St. Eflex, France, on or about 2100 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 and shirk important service to wit: attack on enemy and remaining absent until he surrendered himself to his company at 1600 20 September 1944.

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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 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. Competent, substantial evidence established the pertinent facts that accused on the afternoon of 14 September 1944, while his company was bivouacked in the rear assembly area on the Crozon Peninsula,(France), received actual notice that his company was under orders to move that evening to the forward assembly area preparatory to an attack upon the enemy early the next morning. Without authority of any kind, he left his organization late that afternoon after he had knowledge of and before the advance movement started, and remained absent from his command until 20 September when he voluntarily surrendered himself to military control. During his absence his organization, commencing on 15 September, participated in the battle which resulted in the surrender of the enemy forces on the peninsula on 19 September. It is no mere coincidence but a highly incriminating fact that accused's absence commenced immediately prior to this important action and terminated after the conclusion of the conflict. By his timely and conveniently arranged absence he avoided the hazards and perils of battle endured by his fellow soldiers. All the elements of the offense charged were proved beyond reasonable doubt (CM ETO 4570, Hawkins, and authorities therein cited).

4. The charge sheet shows that accused is 25 years of age. He was inducted 11 July 1941 to serve for one year. (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 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 a court-martial may direct (AW 58). Penitentiary confinement is authorized for desertion in time of war (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania,

as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b, 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, 8th Infantry Division, APO 8, U. S. Army.

1. In the case of Private WILBURN LOWE (34107423), Company K, 28th 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 4239. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4239).

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

(171)

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

BOARD OF REVIEW NO. 2

18 NOV 1944

CM ETO 4245

UNITED STATES	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE.
v.	
Private NICK J. CATALANO, Jr. (36643266), Section 4, Maintenance Division, Base Air Depot No. 1.	Trial by GCM, convened at AAF STATION 590, England, 6 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by 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 61st Article of War.

Specification: In that Private Nick J. Catalano, Jr., Section 4, Maintenance Division, BAD No. 1, AAF 590, APO 635, U. S. Army, did, absent himself without proper leave, from his command at AAF 590, APO 635 from about 14 August 1944 to about 17 September 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by special court-martial for absences without leave for 7 and 39 days, respectively, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the review-

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

3. The prosecution showed that accused was transferred from the 17th Replacement Control Depot to Base Air Depot No. 1 on 11 August 1944 and there assigned to the Maintenance Division, Section 4, for duty (R5; Pros.Ex.1). He was quartered at "hut No. 05", was missing from roll-call on the evening of 14 August 1944 and, though searched for could not thereafter be found (R6,8,9,10; Pros.Ex.1). He had no permission or authority to be absent (R6). Accused was returned to army control by Military Police who apprehended him because he had no pass, on 17 September 1944 (R13;14; Pros.Exs.2,3). Neither the Commanding Officer, Adjutant or 1st Sergeant of accused's organization knew or could identify him. However, he was identified by the hut chief of "hut 05" where both were quartered (R5,7,8,10).

4. Accused elected to remain silent, and no witnesses were introduced to testify on his behalf.

5. The evidence of record is amply sufficient to establish the commission by accused of the offense alleged (MCM, 1928, par.78, pp.62,63; CM ETO 3643, Boyles).

6. The charge sheet shows that accused is 20 years of age. He was inducted into the army, without prior service, at Chicago, Illinois, on 20 February 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 of trial is legally sufficient to support the findings of guilty and the sentence. 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).

(Signature) Judge Advocate

(Signature) Judge Advocate

Benjamin R. Sleeper Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 NOV 1944 TO: Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U. S. Army.

1. In the case of Private NICK J. CATALANO, Jr. (36643266), Section 4, Maintenance Division, Base Air Depot No. 1, 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 4245. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4245).

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

7 DEC 1944

CM ETO 4249

U N I T E D S T A T E S	LOIRE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private FRANK J. LITTLE (32595267), 3890th Quartermaster Truck Company	Trial by GCM, convened at Palais de Justice, Le Mans, France, 3 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

1. At the conclusion of the prosecution's case in chief the defense entered a special plea whereby it was contended that the Commanding General, Loire Section, Communications Zone, European Theater of Operations, did not possess authority to appoint the court before which accused was arraigned and was being tried. The contention is based on the following facts:

(a) Base Section No. 2, Communications Zone, European Theater of Operations, was established effective 1 June 1944 by General Order 57, 30 May 1944, European Theater of Operations. Brigadier General Leroy P. Collins was appointed Commanding General of said base section by the aforesaid general order. His duties commenced 1 June 1944.

(b) Pursuant to Article of War 8, the President of the United States, on 23 June 1944 empowered the Commanding General, Base Section No. 2, Communications Zone, European Theater of Operations, to appoint general courts-martial (WD Cable WAR-54815, 23 June 1944).

(c) Base Section No. 2 aforesaid was "redesignated" Loire Section, Communications Zone, European Theater of Operations, by General Order 45, Communications Zone, European Theater of Operations, 5 September 1944.

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(d) By direction of the President, Brigadier General Leroy P. Collins was announced as Commanding General, Loire Section, Communications Zone, European Theater of Operations, by General Order 50, Communications Zone, European Theater of Operations, 19 September 1944.

(e) Pursuant to Article of War 8, the President of the United States, on 29 September 1944, empowered the Commanding General, Loire Section, Communications Zone, European Theater of Operations, to appoint general courts-martial (WD Cable WAR-38301, 29 September 1944).

(f) The court before which the instant accused was arraigned and tried was appointed by the Commanding General, Loire Section, Communications Zone, European Theater of Operations, by paragraph 3, Special Order 20, 27 September 1944.

From the foregoing recitation of facts it is apparent that Loire Section, Communications Zone, European Theater of Operations, is the same identical jurisdiction as Base Section No. 2, Communications Zone, European Theater of Operations. The effect of General Order 45, 5 September 1944, Communications Zone, European Theater of Operations, was simply to change the name of the jurisdiction. The word "designate"

> "means to mention by distinctive name; to identify by name, to point out, to name, to make known and to distinguish from others" (12 W & P Perm, pp.277, 278).

The prefix "re" contained in the word "redesignated" possesses the meaning of

> "again; - used chiefly to form words, esp. verbs, of action, denoting in general repetition (of the action of the verb), * * *" (Webster's New International Dictionary, 2d Ed., p.27).

Therefore, when General Order 45, 5 September 1944, Communications Zone, European Theater of Operations, "redesignated" Base Section No. 2 as Loire Section, it simply renamed it. It did not affect its fundamental existence. Base Section No. 2, Communications Zone, European Theater of Operations, continued as theretofore under the name of Loire Section, Communications Zone, European Theater of Operations. The Commanding General, Base Section No. 2, Communications Zone, European Theater of Operations, had been empowered by the President of the United States under Article of War 8 to appoint general courts-martial on 23 June

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1944, and this power remained operative and unimpaired notwithstanding the change in name of the jurisdiction. Consequently when the Commanding General of Loire Section appointed the instant court by paragraph 3, Special Order 20, 27 September 1944, Loire Section, Communications Zone, European Theater of Operations, he was exercising the authority theretofore conferred upon him by previous grant. The court was regularly and duly constituted and had jurisdiction both of the accused and of the offense of which he was charged.

The subsequent grant of court-martial jurisdiction to the Commanding General, Loire Section, Communications Zone, European Theater of Operations, as evidenced by War Department Cable WAR-38301, 29 September 1944, did not in any respect impair the previous grant of authority. It was requested in order to simplify administration. As an administrative measure such direct empowerment of the Commanding General, Loire Section, Communications Zone, European Theater of Operations, was desirable inasmuch as it eliminated historical research with respect to the exercise of general courts-martial jurisdiction by the Commanding General of the Loire Section, Communications Zone, European Theater of Operations. However, it neither lessened nor increased the original authority held by him under the grant from the President of 23 June 1944.

The Board of Review, therefore, concludes that the court properly denied the plea to the jurisdiction of the court.

2. The record of trial has been examined by the Board of Review. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 7 DEC 1944 TO: Commanding Officer, Brittany Base Section, Communications Zone, European Theater of Operations, APO 517, U. S. Army.

1. In the case of Private FRANK J. LITTLE (32595267), 3890th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the 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 order 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 Article of War 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 4249. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4249).

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 DEC 1944

CM ETO 4250

U N I T E D S T A T E S	ADVANCE SECTION COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private LEROY BOOKER (34566720), 4255th Quartermaster Truck Company	Trial by GCM, convened at Neauphle-Le-Chateau, France, 27 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. United States Penitentiary, Lewisburg, Pennsylvania.

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 93rd Article of War.

Specification: In that Private Leroy Booker, 4255th Quartermaster Truck Company (TC), did, at or near Belleme, France, on or about 31 August 1944, with intent to commit a felony, viz, rape, commit an assault upon Madame Yvonne Lemaire by throwing her on the ground, kissing her and feeling her person.

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

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

3. The evidence for the prosecution established, without conflict or dispute, the following facts: On the afternoon of 31 August 1944 Monsieur and Madame Robert Lemaire, of 20 Rue des Suisses, Paris, were traveling by motorcycle on a roadway "a little way out of" Belleme, France. Upon reaching a hill Madame Lemaire dismounted for the purpose of walking up the incline to lighten the load while her husband continued to ride the motorcycle (R13,19). He had gone about 100 meters, when a colored American soldier approached Madame Lemaire. She related his conduct, through an interpreter, as follows:

> "Suddenly I saw a soldier coming. I continued to walk and then when the soldier came up to me and took me in his arms he twisted my wrist. He broke my bracelet. He threw me on the ground, and then he made me go into the woods, but I didn't want to. * * * I fell on the ground* * * I got up. I was screaming all the time. * * * He pulled me hard by the arm. I fell down and he fell on top of me, and then he kissed me * * * one time * * * and then he touched my legs * * * above the knee. /He did not rub her legs/ * * * my dress was pulled up by being on the ground * * * I told him to leave me alone * * * he kept persisting" (R14,17,18).

Madame Lemaire continued to scream and struggle throughout this ordeal (R16-17). Her husband heard her screams and turned back but when he reached her the soldier had disappeared (R14,19). He found his wife trembling and with her clothing torn and soiled (R14,19). They went to Belleme and reported to the American Military Police. Accompanied by the latter, Monsieur Lemaire returned to the scene of the assault. They found accused "coming out of the woods" some distance from where the attack

occurred (R19). He was definitely and positively identified, by the victim, as her assailant both in court and also immediately after his apprehension (R13,15,18,19). Accused was under the influence of intoxicating liquors, at the time of the assault but was not drunk (R23,24,25).

4. Accused was advised of his rights, by the court, but declined to take the stand and no evidence was offered in his behalf.

5. Assault, with intent to rape is -

> "An attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished * * * The intent to have carnal knowledge * * * must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force * * * and penetrate the woman's person. Once an assault with intent to commit rape is made it is no defense that the man voluntarily desisted" (MCM, 1928, par.149 1, p.179).
>
> "* * * Intention is a fact which cannot be positively known to other persons * * * and the matter must be an inference which the jury must find from established facts * * *" (1 Wharton's Cr.Ev. sec.79, p.96).

After grabbing the victim's arm, accused took her into the woods and threw her on the ground, where he fell on top of her. At the same time he kissed her and touched her leg above the knee. The struggle lasted for some minutes. The conduct of accused supports the inference that he assaulted Madame Lemaire with the intent to have sexual relations with her without her consent and to overcome any resistance by force; further that his purpose was defeated only by her resistance and the approach of her husband. The evidence of the commission, by accused, of the offense alleged is thus adequately established (CM ETO 489, Rhinehart; CM ETO 3510, Furlong).

6. The accused is 26 years of age. He was inducted into the army at Fort Benning, Georgia on 18 January 1943 and had no prior service.

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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. Confinement in a United States Penitentiary is authorized for the offense of assault with intent to commit rape (AW 42, sec.276, Federal Criminal Code (18 USCA 455)). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place for confinement is proper (AW 42, Cir.229, WD, 8 June 1944, sec.II, as amended).

Judge Advocates

Judge Advocates

Judge Advocates

1st Ind.

War Department Branch Office of The Judge Advocate General with the European Theater of Operations. 14 DEC 1944 TO: Commanding General, Advance Section Communications Zone, European Theater of Operations, APO 113, U.S. Army.

1. In the case of Private LEROY BOOKER (34566720), 4255th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4250. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4250).

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

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CONFIDENTIAL

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

BOARD OF REVIEW NO. 2

1 DEC 1944

CM ETO 4253

U N I T E D S T A T E S	) BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	)
Private ERVIN W. BARKER (34134746), 196lst Engineer Aviation Depot Company.	) Trial by GCM, convened at Rennes, Brittany, France, 7 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 93rd Article of War.
Specification 1: (Not Guilty)
Specification 2: In that Private Ervin W. Barker, 196lst Engineer Aviation Depot Company, did, at or near Morlaix, Brittany, France, on or about 5 September 1944, with intent to commit a felony, viz, rape, commit an assault upon Jeanne Vivier by threatening her with a carbine, forcing her to the ground, lying on her, placing his hand between her thighs, unbuttoning his pants and exposing his organ.

He pleaded not guilty, and was found not guilty of Specification 1 and guilty of Specification 2 and of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dishonorably

discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. For the prosecution, Mlle. Jeanne Viviet testified that, as she was cycling along the road south of Morlaix at approximately 1400 hours on 5 September 1944, she was halted by an armed soldier who directed her to leave the road and to follow him along a pathway (R.8,9,14). Thinking that he was acting in an official capacity as a road guard, Mlle. Viviet complied with his directions (R.9). About twenty meters from the road, the soldier seized her by the wrist and threw her to the ground in such a manner that she "was laying entirely under" him. The soldier then unbuttoned his trousers. Mlle. Viviet shouted and struggled but the soldier stopped her by putting his hand over her mouth and by threatening her with his weapon (R.10-11). Accused then forcibly separated Mlle. Viviet's legs and put his "private part" between them (R.11). About this time two cyclists came down the road with the result that accused became apprehensive and released Mlle. Viviet. Mlle. Viviet then "fled away" and effected her escape. Although she suffered scratches and bruises as the result of the incident, the soldier did not succeed in having intercourse with her (R.11,12). Mlle. Viviet made complaint to the authorities and an identification parade was held at which she identified accused as her assailant because he was very black, had thick lips and a small moustache (R.13,20). Her testimony with regard to her identification of the accused was corroborated by two agents of the Criminal Investigation Division who testified that Mlle. Viviet not only identified accused at the identification parade but did so swiftly and without hesitation (R.20,26). These witnesses further testified that they accompanied Mlle. Viviet to a location designated by her as the scene of the alleged offense where they found that the ground was "roughed up" and "trampled" and that there were "toe marks in the ground, or marks where the soft dirt had been dug up and the grass was disturbed or pressed down" (R.21,26). One of the agents also found a small comb and a broken pin.

4. Accused, after being advised of his rights as a witness, testified that on 5 September 1944, he was posted as a guard on the road at the entrance to his camp near Morlaix. He assumed his post at about 1100 hours and at approximately 1200 hours a driver came by to relieve him in order to enable him to eat his noon meal. He did not desire to eat so he stayed on his post. The relief stayed with him until approximately 1400 hours, and then he was joined by a Private First Class Harris who stayed and talked with him until about 1500 hours at which time accused was relieved (R.32,33). He admitted that he saw several French girls pass his post on the afternoon in question but, in so far as can be gathered from the record, he apparently denied ever having seen Mlle. Viviet until she identified him at the identification parade (R.34,35).

It was stipulated between prosecution and defense, the accused consenting, that if Private Raymond Harris were present in court he would testify that at 1410 hours on 5 September 1944, he joined accused at his guard post and remained there with him until the time accused was relieved at approximately 1500 hours. It was also stipulated that Private Harris had made a prior statement which was to some extent inconsistent with the statement introduced in evidence.

5. The testimony of Mlle. Viviet, when considered together with the mute evidence of struggle afforded by the condition of the terrain at the scene of the incident, is amply sufficient to show the commission of an assault. From the considerations that the soldier in question threw his victim to the ground, lay on top of her, separated her legs, unbuttoned his trousers and pressed his "private part" against her, the court was justified in inferring that the assault was made with intent to commit rape. Mlle. Viviet identified accused as her assailant from a group of seven men and did so promptly and without vacillation or hesitation. She also identified him in court. The court was not bound to accept the rather inconclusive testimony of the accused tending to show that he was not the soldier involved in the attack. The evidence is amply sufficient to support the court's finding of guilty of the offense charged.

6. The victim of the assault is described as Jeanne Vivier in the specification and is referred to as Jeanne Viviet in the evidence. Despite this variance, the specification is sufficiently accurate to inform the accused of the offense with which he was charged and to protect him from a second prosecution for the same offense. The variance is therefore not fatal (People v. Gormack, 302 Ill. 332, 134 N.E. 756, 29 A.L.R. 1120 (1922); 31 C.J. 847; CM ETO 3679, Roehrborn).

7. The charge sheet shows that accused is 24 years and three months of age. He was inducted at Camp Shelby, Mississippi, on 21 October 1941. He had no prior service.

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

9. Penitentiary confinement for 20 years is authorized for the offense of assault with intent to commit rape (AW 42; sec. 276, Federal Criminal Code, 18 U.S.C. 455)). 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

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 1 Dec 1944 TO: Commanding General, Brittany Base Section, Communications Zone, APO 517, U.S.ARMY.

1. In the case of Private ERVIN W. BARKER (34134746), 1961st Engineer Aviation Depot Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4253. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4253).

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

CM ETO 4262

24 NOV 1944

U N I T E D S T A T E S	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE.
v.	
Private ROLAND D. HOPPES (37254204), Squadron "O", 17th Replacement Control Depot (Avn)	Trial by GCM, convened at AAF Station 582, 5 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by 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 61st Article of War.

Specification: In that Private Roland D. Hoppes, Squadron "O", 17th RCD (Avn), AAF 569, APO 635, ASC, USSTAF, did, without proper leave, absent himself from his proper station at AAF 569, APO 635, from about 23 July 1944, to about 2 September 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by General Court-martial for two absences without leave for 5 and 29 days, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence but reduced

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

3. By introduction in evidence of the morning report of accused's unit (R7) as well as testimony by two sergeants that he could not be found on his station during the period of his alleged absence (R8-10) and accused's own oral statements to the investigating officer (R12-13), the unauthorized absence from his station was conclusively shown. He was apprehended by the Military Police at 2300 hours on 2 September 1944, hiding under a bed and covered up by a quilt in the house of a civilian (R14). He had no permission to be absent (R12).

4. Defense presented no witnesses and accused remained silent (R15).

5. The charge sheet shows accused to be 26 years, ten months of age. Without prior service, he was inducted at Wichita, Kansas, on 7 April 1942.

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

7. The offense of absence without leave in violation of Article of War 61, is punishable as a court-martial may direct. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is proper (AW 42; Cir.210,WD,14 Sept. 1943,Sec.VI as amended).

[signature] Judge Advocate

_____ Judge Advocate

Benjamin L Cooper Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 24 NOV 1944 TO: Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U. S. Army.

1. In the case of Private ROLAND D. HOPPES (37254204), Squadron "O", 17th Replacement Control Depot (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 4262. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4262).

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

1 DEC 1944

CM ETO 4266

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private A. B. GUEST, (38448574), 416th Engineer Dump Truck Company.	Trial by GCM, convened at Cherbourg, France, 19 September 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for seventeen years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private A. B. Guest, 416th Engineer Dump Truck Company, did, at Manche, France, on route 801 about 7 miles West of Cherbourg, on or about 14 August 1944, with intent to commit a felony, viz, rape, commit an assault upon Miss Emilienne Lecomte, by wilfully and feloniously stopping her on the road, forcing her into a lane, throwing her to the ground, pulling up her clothes, getting on top of her, and holding her against her will.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. The accused was sentenced to be dishonorably discharged the service, to for-

feit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of seventeen years. The reviewing authority approved the sentence, designated the Eastern Branch, United Stated 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 20 year old prosecutrix, Emilienne Lecomte, testified that a truck passed her on the road at about 10 o'clock on the morning of 14 August 1944 as she was riding her bicycle from St. Croix to Cherbourg. The lone driver, a colored American soldier, clearly identified as the accused, diminished his speed and invited her, by signs, to join him in the truck. She undertook to ignore his invitation and to proceed upon her bicycle, but the truck kept impeding her progress by crowding her from one side of the road to the other. Finally the accused alighted and seized the handlebars of her bicycle (R9).

> "I stepped down", she testified. "He took me by the side and drove me by force to the gate . * * * I tried to defend myself. Then he pushed me against the gate. Then I said to him I would come with him to Cherbourg. * * * He answered nothing I understood. It was then I tried to run away. He caught me. * * * He pushed me and laid me on the ground. I struggled much. It is then that he laid himself on me. * * * He raised up my dress, right up to my trousers (R10) * * * and put his hand between us" (R13).

He did not, however, touch any parts of her body (R10) nor attempt to take off or unbutton any of his own clothing (R13). When she screamed, he stopped her with his hand on her mouth. Again, she testified

> "I screamed and at that moment passed the American motor vehicle. * * * He [accused] got up. Then I was able to get away".

She went to the roadside where she saw two white American soldiers. Accused remained on the road behind her. One of the newly arrived Americans spoke to accused in English, a language which the prosecutrix did not understand (R10). After that, "two soldiers of the American Military Police arrived on motors", one of whom drove accused's truck to Cherbourg (R11).

Private Edward J. Courtney, Company D, 707th MP Battalion, testified that on the date in question

> "We were riding in towards Cherbourg and I noticed a truck parked on the left hand side of the road at an angle with the rear and in the center of the road.

We stopped to investigate and I looked around and noticed someone on the right hand side of the road about 150 feet from us, waving his arms. I went down and there was a Lieutenant, one private and one colored soldier and a young lady".

As to the lady's condition,

"She was standing side of the road trembling and very nervous and she was rather dirty on her back and shoulders, and around her waist there was mud and particles of grass".

Witness was then permitted to testify, over defense counsel's objection, as to statements made by the lieutenant in the presence of the accused. In announcing his ruling, the law member stated,

"The accused having been present, the statements made by other parties may be considered by the court as an admission by him" (R14).

The witness then proceeded to testify as follows:

"The Lieutenant said they found this soldier off the road in the bushes. There is a small lane off to the right of the road that cuts into the hedge rows and as they were passing by he heard a scream. He backed the jeep up and seen this soldier with the girl, laying in the bushes. The girl was laying on her back and the soldier had his hand over her mouth to stifle any screams and immediately the jeep stopped, they both got up and came toward the road. The Lieutenant asked me to place this man under arrest on a charge of attempted rape".

The accused said that he paid the prosecutrix 50 francs and that she had thrown it in the bushes. Witness thereupon searched for but failed to find it (R15).

Over defense counsel's objection (R17), there was received in evidence a written statement taken by two C.I.D. agents, signed and sworn to by accused 15 August 1944, which amounts, in effect, to a confession (Pros.Ex.A); also a subsequent "certificate", likewise subscribed and sworn to by accused before the investigating officer 22 August 1944, reciting that accused's rights under Article of War 24 had been explained to him and that his former statement was true and correct (R29; Pros.Ex.B).

4. For the defense, accused took the stand under oath for the limited purpose of establishing the inadmissibility of his confession (R25). Upon the conclusion of his testimony, his confession and subsequent certificate (Exs.A and B), both of which had been read to the court, were excluded from the evidence and the court was instructed to disregard them (R32). Accused then made an unsworn statement in which he admitted soliciting intercourse with prosecutrix, offering her 50 francs

"if she would jig-jig with me and she said to me 'Oui'. When I pulled the 50 francs out and when I said 'jig-jig', she said 'no'. From what I could understand she wanted the 50 francs but she did not want to jig-jig. During the course of the argument I put my arm around her shoulders, casually - just laid my arms around her. She didn't seem to resent or anything. She told me from what I could understand by pointing to my truck and the road to Cherbourg, she would go to Cherbourg. She seemed to think I was meaning that. I said 'Cherbourg - jig-jig?' and she said 'Oui'. So I thought for perhaps 10 seconds and said if she could go to Cherbourg with me and jig-jig, she might as well out there. But she didn't seem to understand. I couldn't talk much French - just what the average soldier knows looking in the handbook, when all the while my intentions was anything but towards violence against her. I merely was trying to persuade her to warm her up and get her to consent, if she was going to Cherbourg to jig-jig with me she might as well out there on the road. After that I got her by the arm and coaxed her to the lane. She went without a struggle or anything. After she got in the lane I offered 50 francs again and she threw it in the bushes. She tried to run, after. She tried to run and I caught her by the arm. My idea of catching her by the arm was only to see if she could in some way explain in English that she didn't mean to have anything to do with me. She tore loose and I let go. She looked as if she wanted to lead me on and then changed her mind. She tried to tear loose and during the course of tearing loose she fell upon the ground. In falling upon the ground she pulled me down to keep her from falling. I went down on one knee and then I was just holding her and she was holding me and I - when I tried to get up there was a jeep come along".

Prosecutrix "hollered", the jeep backed up, accused "turned her loose and come down the road". The lieutenant and driver who alighted from the jeep searched accused and took a statement from the prosecutrix. "During that time two MP's came along", who "brought me in Cherbourg and booked me" (R33).

5. The two most compelling (although not the only) corroborations of prosecutrix' story are (1) the military policeman's statement of what "the lieutenant" said, admitted over objection, under the guise of an admission on the part of the accused, and (2) accused's confession, the latter originally admitted in evidence and read to the court but subsequently excluded therefrom.

The first - the military policeman's version of what the lieutenant said - would, of itself, be inadmissible as hearsay, although made in the presence of the accused, unless accused's answer was so evasive as to constitute a tacit admission, tantamount, in that respect, to silence or failure to deny (Wharton's Criminal Evidence, vol.2, par.657, p.1093). The accused's answer "that he had paid her 50 francs and she had thrown it in the bushes" was, under the circumstances, an evasive answer, involving a failure to deny any part of the lieutenant's statement to the witness as to what he had actually observed, but merely asserting - in confession and avoidance, as it were - an alleged unreported preliminary transaction between accused and the prosecutrix. The evidence was therefore properly admitted.

With this powerful corroborative evidence properly before the court, as well as the prosecutrix' straight-forward story, the admissions involved in accused's unsworn statement and the corroboration furnished by the remainder of the military policeman's testimony, it does not affirmatively appear that the impact upon the minds of the court of the reading of accused's confession and subsequent certificate affirming it, later excluded with instructions to disregard both, affirmatively prejudiced any substantial right of the accused (CM ETO 1486 - MacDonald and MacCrimmon). Substantial competent evidence sustains the court's inference of intent to commit rape (CM ETO 882 - Biondi and White).

6. The accused is 20 years and 11 months of age. He was inducted into the Army at Camp Robinson, Arkansas, 26 January 1943. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized. A penitentiary would have been appropriate.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(198)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 1 DEC 1944 TO: Commanding General, Headquarters Normandy Base Section, Communications Zone, APO 562, U. S. Army.

1. In the case of Private A. B. GUEST, (38448574), 416th Engineer Dump Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4266. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4266).

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

CM ETO 4269

22 NOV 1944

U N I T E D S T A T E S v. Private LEROY LOVELACE (35717885), 4195th Quartermaster Service Company	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM convened at Cherbourg, France, 12 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Designation of place of confinement withheld.

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 93rd Article of War:

Specification 1: In that Private Leroy (NMI) Lovelace 4195th Quartermaster Service Company did, at Tourlaville, Manche, France, on or about 11 August 1944, with intent to do him bodily harm, commit an assault upon Private First Class Horace L. Maynor 4195th Quartermaster Service Company, by striking the said Private First Class Horace L. Maynor with a dangerous weapon to wit, a knife.

Specification 2: In that Private Leroy (NMI) Lovelace 4195th Quartermaster Service Company did, at Tourlaville, Manche, France, on or about 11 August, 1944, with intent to commit a felony, viz, murder, commit an assault upon Private First Class Horace L. Maynor 4195th Quartermaster Service Company, by willfully and feloniously shooting the said Private First Class Horace L. Maynor 4195th Quartermaster Service Company, in the legs with a caliber .30 Carbine.

He pleaded not guilty to and was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and

allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, withheld the designation of the place of confinement and the order directing the execution of the sentence and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution established by competent, substantial evidence that accused as alleged in Specifications 1 and 2 respectively, struck his victim first with a knife and immediately thereafter shot him in the legs with a caliber .30 Carbine. He did not stop firing until the gun jammed and then said "I ought to kill him". It was shown clearly that accused acted deliberately and violently in the commission of these offenses.

4. After being advised of his rights to testify in his own behalf (R25) accused elected to make a sworn statement and described in detail his attacks by knife and carbine on his victim (R26-28) as previously testified to by prosecution witnesses.

5. In the opinion of the Board of Review there is abundant competent evidence of a most substantial character of all of the elements of the offense of assault with a dangerous weapon to wit, a knife, with intent to do bodily harm (CM ETO 1959, Lawes; CM ETO 3494, Martinez) and that of assault with intent to commit murder (CM ETO 78, Watts; CM ETO 533, Brown; CM ETO 1289, Merriweather) and the court could not properly have done otherwise than find accused guilty of the crimes charged.

6. The charge sheet shows that accused is 23 years of age and was inducted 19 November 1942. His period of service is governed by the Service Extension Act of 1941. He had no prior service.

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

8. Confinement in a penitentiary is authorized for the offense of assault with intent to do bodily harm with a dangerous weapon and also for the offense of assault with intent to commit murder by AW 42 and section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, 8 June 1944, par.1b(4),3b).

_____ Judge Advocate

Ellwood Kitchingman 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. 22 NOV 1944 TO: Commanding Officer, Normandy Base Section, Communications Zone, European Theater of Operations, APO 562, U.S.Army.

1. In the case of Private LEROY LOVELACE (35717885) 4195th Quartermaster Service 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. It is noted that the action in this case did not designate the place of confinement. Such designation should be included in the action approving the sentence. It is requested that a supplementary action designating the place of confinement (Form 10, p.275 MCM) be executed and forwarded to this headquarters for insertion in the record of trial. Confinement in a penitentiary is authorized for each of the offenses of which accused was found guilty in violation of Article of War 93, i.e., assault with intent to do bodily harm with a dangerous weapon and assault with intent to commit murder by AW 42 and sec. 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper. (Cir.229, 8 June 1944, par.1b(4),3b).

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 4269. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4269).

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

CM ETO 4275

2 DEC 1944

U N I T E D S T A T E S	FIRST UNITED STATES ARMY
v.	Trial by GCM, convened in the vicinity of Soumagne, Belgium, 26 September 1944. Sentence: As to CRAWFORD: Dishonorable discharge (suspended), total forfeitures, and confinement at hard labor for five years. 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England. As to HARRIS: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Privates BERNARD E. CRAWFORD (35409680), and BUDDY R. HARRIS (7087435), both of Battery "A", 551st Field Artillery Battalion.	

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:

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

Specification: In that Private Bernard E. Crawford, Battery A, 551st Field Artillery Battalion, and Private Buddy R. Harris, Battery A, 551st Field Artillery Battalion, acting jointly and in pursuance of a common intent, and in conjunction with Private Eugene F. Stahl, Battery A, 551st Field Artillery Battalion, did, in the vicinity of Senonches, France, on or about 28

August 1944, wrongfully and without authority take, use and operate a motor vehicle, property of the United States, value about Nine Hundred ($900.00) Dollars.

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

Specification 1: In that Private Bernard E. Crawford, Battery A, 551st Field Artillery Battalion, did, without proper leave, absent himself from his camp in the vicinity of Senonches, France, from about 0900 hours 28 August 1944 to about 0930 hours 29 August 1944.

Specification 2: In that Private Buddy R. Harris, Battery A, 551st Field Artillery Battalion, did, without proper leave, absent himself from his camp in the vicinity of Senonches, France, from about 0900 hours 28 August 1944 to about 0930 hours 29 August 1944.

Each pleaded not guilty to and was found guilty of their respective charges and specifications. Evidence was introduced of three previous convictions of accused Crawford, two by special court-martial and one by summary court for absence without leave for 19 days, 29 days, and 18 days, respectively, in violation of Article of War 61; and of one previous conviction of accused Harris, by summary court, for seven days absence without leave, in violation of Article of War 61. 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, accused Crawford for ten years and accused Harris for eight years. The reviewing authority approved the sentences but reduced the period of confinement of each to five years, suspended the dishonorable discharge as to accused Crawford until the soldier's release from confinement and designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of his confinement; designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement of accused Harris and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The undisputed evidence for the prosecution shows that about nine o'clock on the morning of 28 August 1944, both accused were observed in the bivouac area of the battery changing a tire on a jeep. After they changed it, they got in the jeep and drove off through the field. Although no vehicle had been dispatched to them (R8,9), and neither of them had authority or permission to be absent with the vehicle (R13) or otherwise (R17), and though search was made through the bivouac area for each accused and the jeep (R13), they were not found until they and the jeep

were seen back in the area the next morning "between 9:30 and 10 o'clock" (R8-9). They had not occupied their bunks the night of 28 August (R9). The jeep was the property of the United States (R19).

4. Private Eugene F. Stahl of accused's unit, who disappeared with accused, testified as a defense witness that they did not go out of the battery area but that they drove a little way into the woods, some "300 yards or so, deep into the woods", to do some maintenance work on the jeep. They got to drinking, camped by the jeep and went to sleep. A Frenchman came along with some cognac

> "and we got tangled up with the cognac he had brought us. We stayed there a while and got sort of drunk and just went to sleep and woke up in the morning and brought the jeep back to the spot where we had come from".

Accused Harris was the driver of the jeep and the others "were just there to help him" (R20-21). They worked on the vehicle approximately a half hour or so when the Frenchman came along and brought them three bottles of cognac. They drank it all and went to sleep about three o'clock in the afternoon, waking up about nine o'clock the next morning (R22-23). Each accused elected to remain silent after being advised of his rights as a witness (R24).

5. The charge sheet shows accused Crawford is 28 years of age; without prior service, he was inducted 15 July 1942, at Columbus, Ohio. Accused Harris is 23 years of age and without prior service enlisted 26 June 1940, at Augusta, Georgia.

6. 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 as to each accused.

7. Confinement for five years is authorized for the offense of taking and using, without the consent of the owner, a motor vehicle for the profit, use or purpose of the taker (AW 42, District of Columbia Code, sec.22-2204(6:62). The offense of absence without leave, in violation of Article of War 61, is punishable as a court-martial may direct. The designated places of confinement are proper.

Judge Advocate

Judge Advocate

Judge Advocate

(206)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 DEC 1944 TO: Commanding General, First United States Army, APO 230, U.S. Army.

1. In the case of Privates BERNARD E. CRAWFORD (35409680), and BUDDY R. HARRIS (7087435), both of Battery "A", 551st Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 4275. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4275).

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

2 DEC 1944

CM ETO 4280

U N I T E D S T A T E S v. Privates HARVEY DENNIS (33589269), EDWARD H. DIVERS (33527411), and WILLIE CASH (36501708), all of the 217th Port Company, 386th Port Battalion.	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Rennes, Brittany, France, 6 October 1944. Divers Acquitted. Sentence as to Dennis and Cash: Dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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1. The record of trial in the case of the 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 93rd Article of War.

Specification: In that Private Willie Cash, Private Harvey Dennis, and Private Edward Harry Divers, all of the 217th Port Company, 386th Port Battalion, acting jointly, and in pursuance of a common intent, did, at La Vierge Noire, Ploujean (Finistere), Brittany, France, on or about 31 August 1944, with intent to commit a felony, viz, rape, commit an assault upon Yvonne Boubennec, by willfully and feloniously striking, handling, and throwing to the ground the said Yvonne Boubennec and bruising her about the face, legs, and right thigh.

Each pleaded not guilty to and, three-fourths of the members present at the time the vote was taken concurring in each finding of guilty, accused

Dennis and Cash were found guilty of the Charge and Specification. Accused Divers was found not guilty and acquitted. Evidence was introduced of two previous convictions by summary court, as to accused Cash, for absence without leave for ten and one-half hours and for five hours respectively, in violation of Article of War 61. Three-fourths of the members present concurring when the vote was taken, accused Dennis and Cash were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence 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. The evidence introduced by the prosecution, including the testimony of Madame Yvonne Boubennec and five other French civilians, one a medical man, shows that at the time and place alleged in the Specification, the prosecutrix was riding her bicycle on a road when she was stopped by at least two of three soldiers who were passing, grabbed, blindfolded, pulled and dragged into the bushes off the road, where each of the two soldiers in turn held her down on the ground by force while the other attempted to undo her pants. One of the two finally cut a hole in her pants over her privates. The soldier who first held prosecutrix down, sitting on her chest to do so, unbuttoned his pants and exposed his private parts. During this episode, the woman struggled and resisted. Her screams were fortunately heard by French civilians who called for the military police and the two soldiers, her assailants, took off (R10-19). Prosecutrix identified accused Dennis as one of those who attacked her (R18). Four French civilians saw the prosecutrix at the time and place in question, as she came out of the bushes, also one or two negro soldiers who passed through the bushes. The woman was bleeding in the face, her robe was torn and she was weeping. A handkerchief bearing the name of one of accused, "Willie Cash", was found at the scene (R19-31; Pros.Ex.1). Doctor Maurice Le Cars, a French physician, examined the prosecutrix on 2 September and found scratches on her face and legs and a bruise on the inside of one of her thighs (R31,32). Private Grant Hopson of the 217th Port Company, witnessed the incident and substantially corroborated the story of prosecutrix. He said he didn't think "she wanted to go in" the bushes. She was "hollering a little bit." He saw two soldiers holding her and identified accused Dennis and Cash as the two. He knew them as members of the 217th Port Company, 386th Port Battalion (R32-34). Accused Cash and Dennis voluntarily made and signed, written statements. Accused Cash in his statement made a complete denial that he was with Dennis while he was out of camp that day or that he knew anything of the incident in question. Accused Dennis admitted that at the time and place in question he had assisted in carrying a woman off into the bushes; that "she was struggling and screaming"; that after five minutes some people came along and he and his companions ran away. (R38-41;Pros. Exs3,4). Accused Divers, who was acquitted, testified on his own behalf. He largely corroborated the testimony of the prosecutrix and identified accused Dennis and Cash as her assailants (R45-49).

4. Accused Dennis and Cash, advised of their rights as witnesses, elected to remain silent.

5. The evidence as to the identity of Dennis and Cash and as to their attack on Madame Boubennec at the time and place and with the intent alleged in the Specification was conclusive. It was an assault and battery which employed force. She did not consent, but resisted. The intent was to overcome resistance and to have sexual connection by the use of such force as was necessary. This was an assault with intent to rape, in violation of Article of War 93, the article under which the Charge was laid (MCM, 1928, par. 148b, p. 165; CM ETO 3749, Ward). Each accused was properly found guilty as a principal to this offense.

6. Accused Dennis is 22 years of age. He was inducted on 3 March 1943, at Fort George G. Meade to serve for the duration of the war plus six months. He had no prior service.

Accused Cash is 30 years old. He was inducted on 25 May 1942, at Fort Custer, Michigan, 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 persons 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 as to Dennis and Cash.

8. The offense of assault with intent to commit rape, in violation of Article of War 93, is punishable by imprisonment for 20 years (MCM 1928, par. 104c, p.99). Confinement in a United States Penitentiary is authorized (AW 42; 18 USC 455).

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

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1st Ind.

War Department Branch Office of The Judge Advocate General, with the European Theater of Operations. 2 DEC 1944 TO: Commanding General, Brittany Base Section, Communications Zone, APO 517, U.S. Army.

1. In the case of Privates HARVEY DENNIS (33589269), EDWARD H. DIVERS (33527411), and WILLIE CASH (36501708), all of the 217th Port Company, 386th Port 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 to DENNIS and CASH, 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 4280. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4280).

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

CM ETO 4285

17 NOV 1944

U N I T E D S T A T E S	8TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 8, U.S. Army, 20, 25 September 1944.
Private (formerly Private First Class) ANDREW GENTILE (33388770), Company L, 28th 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 (then Private First Class) Andrew Gentile, Company L, 28th Infantry, being present with his company while it was engaged with the enemy, did, at or near Gousenou, France, on or about August 23, 1944, shamefully abandon the said company, and seek safety in the rear, and did, fail to rejoin it until he surrendered himself to Captain Stedman F. Stauffer Jr., at or near Bourg-blanc, France, on or about August 26, 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 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

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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 herein is substantially similar to that in the companion case of CM ETO 4093, Martin M. Folse, in which case also the accused was a member of Company L, 28th Infantry. On the basis of the holding by the Board of Review in that case, the record of trial herein is held legally sufficient to support the findings of guilty and the sentence. The defense motion which in effect was one for findings of not guilty was properly denied (R13) (CM ETO 3722, Skamfer).

4. The charge sheet shows that accused is 22 years of age and was inducted 11 December 1942 to serve for the duration of the war plus six months. He had no prior service.

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

6. The penalty for 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).

[signature] Judge Advocate

(SICK IN HOSPITAL) 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 NOV 1944 TO: Commanding General, 8th Infantry Division, APO 8, U.S. Army.

1. In the case of Private (formerly Private First Class) ANDREW GRIFFIN (33388770), Company L, 28th 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 4285. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4285).

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

CM ETO 4287

24 NOV 1944

U N I T E D S T A T E S	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE.
v.	
Private GEORGE W. ALLEN, (34811536), Section 6, Squadron B, Maintenance Division, Base Air Depot #2.	Trial by GCM, convened at Blackburn, Lancashire, England, 11 October, 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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 charges and specifications:

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

Specification: In that Private George W. Allen, Section 6, Squadron B Maintenance Div, Base Air Depot No. 2, AAF 582, APO 635, did at Blackburn, Lancs, England, on or about 6 September 1944, with intent to commit a felony, viz, rape, commit an assault upon Mrs. Renee Anne Kerry, by willfully and feloniously striking the said Mrs. Renee Anne Kerry on the face and body with his fists.

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

Specification: In that * * * did at Blackburn, Lancs, England, on or about 6 September 1944, wrongfully take and use without proper authority a certain motor vehicle to wit: ¼ ton 4 x 4 truck, the property of the United States of a value of more than $50.00.

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

3. At about 1400 hours on 6 September 1944, a ¼ ton 4 x 4 truck, number 20327792, was dispatched to accused as driver for the purpose of enabling him to make a trip from Army Air Force Station 582 to Burtonwood (R5,6,7,10; Pros Ex 1). No deviations from the normal route from post to destination and return were authorized (R6,7). On the evening of 6 September 1944 accused was seen at a dance in the city of Blackburn (R14). While there, he introduced himself to Mrs. Renee Anne Kerry and asked her to dance with him (R28). She accepted and, during the evening, with her friend Mrs. Margaret Duxbury, accompanied accused to a hotel where they each had three glasses of beer after which they returned to the dance (R14,15). When the dance ended, accused offered to drive Mrs. Kerry and Mrs. Duxbury home in "his car" (R15). On the way to Mrs. Kerry's home, accused was stopped by a police officer who told accused his "silencer was not working properly and he'd have to get it attended to" (R15). Mrs. Duxbury was dropped off near her home and accused and Mrs. Kerry continued on their way, but, apparently at Mrs. Kerry's suggestion, stopped at a corner some three minutes walk from Mrs. Kerry's home (R16). At this time accused put his arm around Mrs. Kerry, tried to kiss her and "his hand started wandering". Mrs. Kerry told accused to stop and "a struggle started" (R16). During the course of the struggle accused pushed Mrs. Kerry into the back of the vehicle, tried to lift her clothing and asked her to "let me have a little bit of you know what I mean" (R16,17). Mrs. Kerry refused with the comment that accused could have "plenty of people in the town." Accused replied "I don't want it from other people, I want it from you" (R17). After further struggle, accused ceased his advances, and again started the vehicle. During this portion of the journey Mrs. Kerry "managed to fling the door open at the right side, and I could see someone on the roadway, and I shouted out 'Help', but he pushed me back and kept on driving". Accused drove to another point some five miles from the location where he had first stopped, resumed his advances and "the fight started again" (R17). She testified that accused had his hands "all over the place", that is, "all over me" (R18). During the course of the struggle, Mrs. Kerry knocked the rear window out of the vehicle. The fight again abated and accused again drove off. As accused was driving slowly, Mrs. Kerry got out of the vehicle through the aperture left by the displaced rear window and started to run down the road. Accused stopped, caught her and again pushed her in the back of the vehicle. At this time accused hit her several times on the face and chin (R18,19). During the course of the struggle accused asked her several times to have intercourse with him (R27) and he put his hands under her clothing and touched her "private parts" several times (R18)

She never at any time consented to his actions (R27). After this Mrs. Kerry didn't "remember very much more" since she was by that time "absolutely exhausted" (R18). She next remembered accused calling her name and "bringing me around". When she regained consciousness, her clothing was disarranged and, to the best of her recollection, her skirt was up around her neck. Accused then took her home (R19). She had found his cap in the car seat and she kept it (R19). Accused when shown the cap stated that he had one just like it (R29). Mrs. Kerry suffered scratches and bruises as the result of the encounter (R20,33,36). Certain of her clothing was torn and stained with blood (R20,22,33, Pros Ex 2-8). At the time Mrs. Kerry returned to her home she was experiencing a discharge from her sexual organs which she testified was not a usual menstrual discharge since the flow accompanying her last menstrual period had ceased some three days previously (R25). Subsequent to the attack, Mrs. Kerry was examined by two physicians. One of these physicians testified that his examination disclosed a number of surface stratches and minor bruises on her face and body. He also found evidence of hemorrhage and stated that, in his opinion, a discharge such as that described by Mrs. Kerry would probably be the result of "rough handling." (R34). The second physician testified that his examination disclosed bruises over both of Mrs. Kerry's eyes and her lips, a "very marked" bruise underneath her chin, and slight bruises on her shoulders, ankles and the inner aspects of her knees and thighs (R36). It was also the opinion of this physician that a discharge such as that described by Mrs. Kerry would not be due to a recurrence of the menstrual flow but "definitely .... from some other cause -- a scratch, a cut, some bruising of the delicate mucous membrane" (R37).

The prosecution introduced a statement made by accused to the British constabulary after having been advised of his rights which contained recitals which were, in broad outline, similar to the testimony given by Mrs. Kerry. However, the statement contained no admissions of any violent treatment toward or any struggle with her (Pros Ex 9). The prosecution also introduced a statement made by accused to the investigating officer after having been similarly advised of his rights which also contained recitals generally in accord with the testimony given by Mrs. Kerry, except that accused did not state that any fight or struggle had taken place and expressly denied striking or hitting the victim (Pros Ex 10). In both statements accused stated that the vehicle used on the night in question was "jeep #20327792". An examination of this vehicle on the day after the alleged assault disclosed that the rear window was "completely gone" and "the exahust - where it joins the muffler was broken, so that the engine was a little louder than it should be" (R9). It was stipulated that the ¼ ton 4 x 4 truck numbered 20327792 was the property of the United States and had a value of more than $50 (R10).

4. After being advised of his rights as a witness, accused made an unsworn statement in which, after first admitting that his previous written statement was true, he said he and "the girl" had had some drinks and that

she "seemed to be feeling pretty hot -- what I call 'tight'" when they left the dance hall. He also stated that the girl was willing to permit him to take her home in the jeep, and, once on the way home, was willing to go for a ride with him. He further asserted that he had proceeded at her direction to a location which the girl stated was "nice and quiet". After their arrival there, the girl got in the back seat of the jeep voluntarily and "we started necking around, like young folks do, so she didn't resist at all, and I started to play *** with her knees *** and then she said 'No', and I rode on home" (R42).

It was stipulated that if Technical Sergeant E. L. Bell were present in court he would testify that accused had been under his immediate supervision since November of 1943, that accused was a good driver, that both his general reputation and his reputation for truth and veracity were good and that accused, on numerous occasions, had been specifically requested by various officers on the post to act as their driver on matters of official business. (R41).

5. The testimony of Mrs. Kerry, taken together with the testimony of the two physicians with reference to her condition after the incident, clearly indicates that she was the victim of an assault and battery on the evening in question. There was evidence that accused pushed her in the back of the vehicle, lifted up her clothing, asked her to "let me have a little bit of you know what I mean", and said "I don't want it from other people, I want it from you." There was also evidence that accused made repeated advances to Mrs. Kerry, put his hands under her clothing, touched her genital organs and struck her about the face. Her testimony indicates that she offered violent resistance and made attempts to escape which were thwarted by the accused. She denied consenting to his advances. While Mrs. Kerry may have tacitly invited certain advances by dancing and drinking with accused during the evening and by accepting his invitation to take her home, this fact did not justify accused's later conduct in the face of her protests and resistance. There was ample evidence to support the inference that the assault was accompanied by an intent to have carnal knowledge of the victim by force and without her consent. The court was, therefore, warranted in finding accused guilty of Charge I and its specification (CM ETO 2966, Fomby). There was also substantial competent evidence to support the finding of guilty of Charge II and its specification (CM ETO 492, Lewis).

6. The charge sheet shows that accused is 21 years and ten months of age. He was inducted at Fort McClellan, Alabama, on 7 July 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 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 a penitentiary is authorized for the crime of assault with intent to commit rape (AW 42; sec 276, Federal Criminal Code (18 USCA 455)). The designation of the Federal Reformatory, Chillicothe, Ohio, is proper (Cir. 229, WD, 8 June 1944, Sec II, par. 1a(1),3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations 24 NOV 1944 TO: Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U. S. Army.

1. In the case of Private GEORGE W. ALLEN (34811536), Section 6, Maintenance Division, Base Air Depot #2, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4287. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4287).

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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BOARD OF REVIEW NO. 1

11 NOV 1944

CM ETO 4292

U N I T E D S T A T E S	VIII CORPS
v.	Trial by GCM, convened at Morlaix, Finistere, France, 6-7 September 1944. Sentence: to be hanged by the neck until dead.
Private First Class JAMES E. HENDRICKS (33453189), 3326th Quartermaster Truck Company	

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, and the Board submits this its holding to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE I: Violation of the 92nd Article of War.
Specification: In that Private First Class, James E. Hendricks, 3326th Quartermaster Truck Company, 80th Quartermaster Battalion (Mobile), did, at Plumaudan, Cotes du Nord, France, on or about 21 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Victor Bignon, a human being by shooting him with a rifle.

CHARGE II: Violation of the 93rd Article of War.
Specification 1. In that * * * did, at Plumaudan, Cotes du Nord, France, on or about 21 August 1944, unlawfully enter the dwelling of Victor Bignon, with intent to commit a criminal offense, to wit, rape therein.

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Specification 2. In that * * * did, at Plumaudan, Cotes du Nord, France, on or about 21 August 1944, with intent to commit a felony, viz: rape, commit an assault upon Noemie Bignon, by willfully and feloniously grasping her and pointing a rifle at her and attempting to have sexual intercourse with her.

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 specifications. 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 General, VIII Corps, approved the sentence and forwarded the record 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 following facts were proved by the prosecution's evidence:

On 21 August 1944 there resided at Percoud, in Plumaudan, Cotes du Nord, France, Constint Bouton and his family, consisting of his wife, Marie-Louise Arrot Bouton, and his three sons, Raymond, Charles and Rene (R12,37-38,84). Their habitation consisted of a one-room house and a cellar or basement (R13). At about 11 p.m. on that date a colored American soldier, without permission, entered the Bouton domicile while the family was present (R38,84). The soldier wore a raincoat, helmet and yellow shirt and carried a gun. He was thin and of average height (R40-41,85).

He asked for "Madame" or "Mademoiselle" (R84,85). When he received a negative answer he followed Madame Bouton about the room and attempted to kiss her, but was prevented from doing so by the action of her husband and sons (R38-39). In order to pacify him the son, Raymond, gave him two eggs, which he placed in the right pocket of his raincoat (R39,40,42,43,85). After receiving the eggs he left the house (R39,85).

Across the road from the Bouton domicile resided, on said date, Victor Bignon with his wife, Noemie (Bougis) Bignon, his daughter, Jeannine, age 18 years, and a farmer's boy, Roger Robert, age 12½ years (R7,8,25-26). The Bignon menage consisted of one room. Beds were located in three corners of the room, which was entered by a single door (R8,28). At a time soon after 11 p.m. on 21 August 1944 the entire family was abed. A heavy knocking was made upon the door (R8,10,26,27) accompanied by a demand to open it (R8,27). The voice also spoke the words "ouvrir-ouvrir-Mademoiselle", which expression was repeated several times (R11,12,27). Admission to the house was denied the stranger. He then fired a shot through the door and pounded on it with the butt of his weapon (R8,27). In order to prevent his entrance Monsieur and Madame Bignon arose from their

bed and leaned and pushed against the door (R8,9,19). About five minutes later a second shot was discharged through the door. The bullet struck Bignon on the head and he fell to the floor (R8,9,27,28). His death was instantaneous, as the left front area of the skull was blown away and part of his brains were spread on the floor (R6-7; Pros. Exs.1,2). The second shot also wounded Madame Bignon (R8,18,27). After the fatal shot was fired the door was forced open and a black American soldier entered. He wore a raincoat and helmet, carried a gun, and was of average size (R9,10,19,21,27,31). He grabbed the young woman, Jeannine, by the arm and tore her pinafore in which she had clad herself upon arising from her bed. The pinafore was admitted in evidence as Prosecution Exhibit 3(R17-18,27). Immediately thereafter Madame Bignon, Jeannine and Roger Robert hurriedly left the Bignon house and sought refuge and protection in the Bouton house across the road. Bignon's body remained on the floor behind the open door (R9,12,27,29). The colored soldier, carrying a gun and wearing a raincoat, accompanied Madame Bignon, Jeannine and Roger (R13, 27,29). During the movement to the Bouton house he grasped Jeannine by the arm (R29). The mother, daughter and Roger were admitted to the Bouton home (R13,29,39) and Jeannine went into the cellar (R13,29). The soldier encountered Charles Bouton in the court yard of the house and aimed his gun at him. The boy became frightened and ran from the house. He remained hidden in a neighboring field while the colored man was in the house (R86). The negro entered the room of the Bouton house immediately thereafter. He was the same soldier who had previously visited the Bouton home and received the gift of two eggs (R39,40,42). There were present in the room Madame (Bougis) Bignon, Roger Robert, and Rene Bouton (R13,40). The colored man menaced them with his gun, forced Rene and Roger to lie on a bed and ordered them to "keep still". They remained passive (R16,40). He then turned his attention to Madame Bignon and directed her to the bed upon which Rene was lying (R14,15,40). He attempted to "force her" (R14,40). "She struggled and shrieked so as to keep him away and not be forced" (R14,16,40). As soon as he entered the room he exposed his penis which was erect (R15). Madame Bignon, in her effort to protect herself, grasped his penis in her hand (R15,16) and he had an emission (R16). During the course of the struggle the colored man raised the woman's dress and pointed his gun at her, but did not succeed in securing sexual connection with her (R16,41) nor did he touch her private parts (R16). The woman finally freed herself from her assailant when he aimed his gun at her and hid behind a table. The negro then left the house (R16,18).

Additional evidence with respect to the identification of accused as the perpetrator of the homicide and the concomitant offenses will be summarized in connection with the subsequent discussions of same.

4. The accused elected to remain silent and the defense introduced no evidence (R97).

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5. (a) Specification 1 of Charge II alleges facts constituting the crime of housebreaking (MCM, 1928, par.149(e), p.169). There is substantial evidence that the colored soldier who forced his way into the Bignon domicile after killing the owner entertained the specific intent to rape one or more of the female occupants thereof. Evidence of his demands for "Mademoiselle", and of his prompt attack upon Jeannine, the young girl, when he gained entrance, followed by his pursuit of the mother and daughter when they sought refuge in the Bouton home, coupled with his lustful actions toward Madame Bignon immediately thereafter, is adequate to prove the unlawful intent. No other inference can possibly be drawn from this evidence. The record is legally sufficient to support the findings of guilty (CM ETO 78, Watts).

(b) Specification 2 of Charge II charges assault with intent to commit rape upon the person of Madame Bignon. The evidence proves all elements of the offense beyond reasonable doubt. No extended comment is necessary (CM ETO 3309, Tapp, and authorities therein cited). The fact that the man abandoned his attack before accomplishment of his purpose as a result of his victim's successful defense of her virtue does not affect his guilt (MCM, 1928, par.149l, p.179; CM ETO 3309, Tapp).

(c) Charge I and its Specification allege the crime of murder. The facts are simple and few and the legal principles involved are elemental. A colored American soldier, armed with a lethal weapon, near the hour of midnight, sought admission to the modest home of a French citizen. He accompanied his demands with loud knocks on the door and cries for "Mademoiselle". Admission being denied, he fired a shot through the door and attempted to break it with the butt of his gun. The householder, Monsieur Bignon, in the defense of his home and his womenfolk, held the door from the inside by pressing against it. The intruder knew, or should have known, that some person was on the opposite side of the door barring his entrance. Notwithstanding these facts, he deliberately fired a second shot through the door which entered Monsieur Bignon's cranium, producing instant death.

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse. * * *.
>
> * * * * *
>
> "Malice aforethought may exist when the act is unpremeditated. It may mean one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused. * * * 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; intent to commit any felony". (Underscoring supplied (MCM, 1928, par. 148a, pp.162-164).

The conviction is sustainable on the basis of two of the principles above announced.

(1) It is manifest that the discharge of the firearm through the house door with knowledge that a human being was standing immediately on the other side of it to prevent it being opened, was an act which intrinsically carried its own proof of malice aforethought.

> "The proven facts disclose an act of homicidal violence which inherently is of such vicious, brutal savagery as to carry within itself proof of malice aforethought and therefore irrefragably stamps the offense murder and not manslaughter." (CM ETO 3585, Pygate).

The principle was discussed and approved in CM ETO 268, Ricks; CM ETO 422, Green; CM ETO 438, Smith; CM ETO 739, Maxwell; CM ETO 1901, Miranda; CM ETO 1922, Forester and Bryant; CM ETO 2007, Harris; CM ETO 3180, Porter; CM ETO 3042, Guy.

(2) The intruder, although convicted of housebreaking only, was in fact guilty of burglary, a felony (MCM, 1928, par.149d, p.168).

> "Burglary is the breaking and entering, in the night, of another's dwelling house, with intent to commit a felony therein. The term 'felony' includes * * * rape * * *. It is immaterial whether the felony be committed or even attempted". (MCM, 1928, par.149d, p.168).

Housebreaking, of which he was convicted, is also a felony (D.C.Code, sec.22-1801(6:55). He was in the act of committing such crime when he killed Bignon.

> "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 the carrying out of that purpose; and in such cases it is not necessary to a conviction that the jury believe beyond a doubt that the accused intended to kill the decedent, or to do him bodily harm". (Underscoring supplied) (1 Wharton's Criminal Law - 12th Ed., sec.420, p.632).

Upon this theory the intruder was guilty of murder (CM ETO 1453, Fowler).

6. (a) The crucial issue in the case revolves about the question of identification of the colored soldier who murdered Bignon while breaking and entering his domicile and who thereafter, in the Bouton home, assaulted Madame Bignon with intent to rape her. The same soldier committed all of the crimes. The French civilians involved, and who appeared as witnesses, were unable to make identification of accused as the culprit (R31,43,88,89), although Madame Bignon testified that accused "looks like him * * * resembles him (referring to the assailant), but I cannot tell for certain" (R23). In order to meet this situation the prosecution introduced the following evidence to support the charge that it was the accused who committed these crimes:

Rene Bouton and Charles Bouton testified that the colored soldier who visited the Bouton home early in the evening received two eggs from their brother, Raymond, which he placed in the right pocket of his raincoat (R40,43,85).

Lieutenant Charles F. Michaels, 3326th Quartermaster Truck Company, was the supply officer of the company. He testified that when accused came to the company an M-1 rifle, bearing serial number 2296283, was issued to him (R44,45). He identified Prosecution Exhibit 6 (R45) as accused's rifle. There were also issued to accused 50 rounds of .30 caliber ammunition for use in his rifle (R46). In connection with the loading of the rifles the following instruction was issued to the company:

> "* * * in the M-1 rifle, the men would carry seven rounds of ammunition in the rifle. A full clip of eight would necessitate one round being in the chamber. As a safety precaution, we instructed the men to carry only 7 rounds in the rifle in order to enable the rifle not to have a round in the chamber. Only 7 rounds were the instructions. * * * The ammunition was to be put in the gun, but the bullet was to remain out of the chamber and the safety was to remain on. If, at any time, that they thought they had need to put a round in the chamber". (R46, 48).

Lieutenant Donald F. Tucker, commanding officer of 3326th Quartermaster Truck Company on and prior to 21 August 1944, testified that about 11:30 p.m. on 21 August 1944, he was in bed. He heard two "well spaced shots and some screams". He arose, secured a detail of eight men and went to investigate. The company on that date was located about a mile north of Plumaudan. As he and his detachment advanced, loud shouts and screams were heard emanating from a side

road, which they entered. A light was seen in a house, the door of which was open (R47-48). A soldier, who spoke French, called into the house, but there was no response. A noise was heard in an adjoining hedge. Lieutenant Tucker challenged twice but received no answer. A man came out of the hedge. Shots were fired and the man took cover in the ditch. One of the corporals recognized the man as the accused. When "picked up" he was ten yards from the house which was the home of a family named "Bougis" ("Bougis" was the maiden name of Madame Bignon (R25)). It was about midnight (R50). When asked by Lieutenant Tucker why he was out of camp accused replied that he was

> "on the water detail, and he had gone to take a leak, and the truck had gone off and left him, and he was trying to find his way back to camp" (R51).

Lieutenant Tucker knew that statement was false and so informed accused (R52). Accused said

> "he was walking on the road with Privates Nichols and Earls, and he was endeavoring to get back to camp when we found him." (R52).

As the detail was about to leave, one of the soldiers looked in the door of the house and saw the body of a man. There was "a hole in the top of the head, and what appeared to be brains on the floor". Lieutenant Tucker inspected accused's rifle. It had been fired recently and there were but five shells in it. Prosecution Exhibit 6 (the rifle) was the gun which accused had that night (R52-53). He further questioned accused as to his knowledge of events. Accused denied any knowledge (R59,67). Accordingly, Lieutenant Tucker directed him, "Go look through the door at the body". Accused did so and then returned and sat on his helmet.

> "After sitting there a few moments, I talked with him again, and I told him if he was involved in any way to let me know; and I also told him that whatever he told me could be used against him in a court martial. Then he began to shiver like he had a chill, and he said, 'I'll tell you what I know about it.' Then he told me about getting lost and finding this house. Then he told me about getting to this house and knocking on the door, and nobody answered, and he fired a round through the door. He knocked again, and nobody answered, and he fired another round through the door.

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"Q. Then what happened?

"A I asked him what happened then, and he said he didn't remember anything until he heard us coming up the road." (R59,60,77).

Lieutenant Tucker had previously warned accused of his rights to remain silent, made no promises of immunity to him, nor did he threaten him (R68,75).

About 2:30 a.m., 22 August, accused was taken to the military police headquarters in Dinan, where Lieutenant Naiser, the military police officer, examined and searched him. A clip of five bullets was removed from accused's gun (R53,61). They were identified and admitted in evidence as Prosecution Exhibit 7 (R55). At the Bignon house Lieutenant Tucker found, during an investigation by French police on 22 August (R33), two empty .30 caliber machine gun shells. One was discovered on the steps in front of the door, and one about two feet to the right of the door. They were of the type used in an M-1 or .30 rifle (R62-64). The shells were introduced in evidence as Prosecution Exhibit 8 (R62).

Accused wore a raincoat when encountered. He removed it and delivered it to Lieutenant Tucker. It was untidy and had what appeared to be blood stains on the left hand side of the collar and lapel (R55). At the military police station that coat was searched and there was an egg (R95-96; Pros.Ex.10) and one round of ammunition in the pocket. "Dog tags" bearing number 33453189 and the name of James E. Hendricks, a billfold and accused's pay book were also removed from his person at the military police station (R57-58). After receiving warning as to his right to remain silent, accused was questioned by Lieutenant Naiser, in Lieutenant Tucker's presence (R61), who reported the interview as follows:

"Lt Naiser was doing the questioning. He asked Hendricks whether or not he fired the rifle, and Hendricks told him that he had gotten lost and had gone to this house to try to get directions back to camp. As he approached the door, he stumbled. When he stumbled, he dropped his rifle and it went off. He reached down to put the safety on his rifle, and it went off again. Then he tells he went over to this house across the road, and in this house an old lady gave him some cider. He drank the cider, and that's all he remembers until we picked him up." (R60,77).

Simone Deniel, a chemist's assistant employed at the Morlaix Hospital and an expert in blood tests and detection, testified that she had tested the stains found on the raincoat taken from accused

(R89-91; Pros.Ex.9) and found that they were blood. She also discovered on accused's rifle (R45; Pros.Ex.6) "very, very feeble traces" of what might be blood (R92). She was unable to determine whether the blood was that of human origin (R93).

(b) The duty of the Board of Review in considering the issue as to the identity of the assailant in the instant case is to examine the record of trial for the purpose of determining whether there is competent, substantial evidence that accused was the perpetrator of the crimes which were proved beyond reasonable doubt (CM ETO 3200, Price, and authorities therein cited).

The inculpatory facts which are summarized above were uncontradicted. They form a matrix of evidence which beyond reasonable doubt inculpates accused. The instant case is illustrative of the strength of so-called circumstantial evidence when properly connected and presented to the court. It possesses inherent trustworthiness and reliability which is even more convincing than personal identification by witnesses (CM ETO 2686, Brinson and Smith). Particularly is this true where the witnesses are not familiar with negro characteristics and faces, as in the instant case.

The Board of Review, therefore, concludes that the record of trial contains evidence of a most substantial character identifying accused as the colored American soldier who broke and entered the Bignon house, killed the master thereof and thereafter assaulted his wife with intent to rape her.

> "With this evidence before the court, it was its province and duty to evaluate it, judge of the credibility of witnesses and reach a determination whether the accused was the man who committed this atrocious crime. The evidence identifying him as the culprit was substantial and its reliability and trustworthiness are unimpeached. Under such circumstances, the finding of the court will be accepted as conclusive and final upon appellate review" (CM ETO 3375, Tarpley).

The Tarpley case is sustained by CM ETO 492, Lewis; CM ETO 503, Richmond; CM ETO 531, McLurkin; CM ETO 559, Monsalve; CM ETO 1621, Leatherberry; CM ETO 2686, Brinson and Smith; CM ETO 3200, Price).

7. The charge sheet shows accused to be 21 years four months of age, and that he was inducted 1 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 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

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sufficient to support the findings of guilty and the sentence.

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

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 11 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private First Class JAMES E. HENDRICKS (33453189), 3326th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, 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 4292. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4292).

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 109, ETO, 19 Nov 1944)

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

BOARD OF REVIEW NO. 2

30 NOV 1944

CM ETO 4293

U N I T E D S T A T E S	HEADQUARTERS, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Chief Warrant Officer WALTER S. HOWARD, (W-2108159), Headquarters Communications Zone, Ordnance Service.	Trial by GCM, convened at Cheltenham, Gloucestershire, England, 4 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and 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 94th Article of War.

Specification 1: In that Chief Warrant Officer Walter S. Howard, Headquarters, Communications Zone, Ordnance Service, European Theater of Operations, did, at Cheltenham, Gloucestershire, England, on or about 1 February 1944, wrongfully and knowingly sell ten wrist watches of the value of about $170.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that * * * did, at Cheltenham, Gloucestershire, England, on or about 1 February 1944, wrongfully and knowingly sell two typewriters of the value of more than $50.00, property of the United States, furnished and intended for the military service thereof.

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Specification 3: In that * * * did, at Cheltenham, Gloucestershire, England, on or about 1 April 1944, wrongfully and knowingly sell twenty wrist watches of the value of about $340.00 property of the United States, furnished and intended for the military service thereof.

Specification 4: In that * * * did, at Cheltenham, Gloucestershire, England, on or about 1 July 1944, wrongfully and knowingly dispose of, by gift to Herbert Leslie Dickenson, a British civilian, two Elgin wrist watches of the value of about $24.00, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for two years. The reviewing authority approved only so much of the findings of guilty of Specifications 1, 2 and 3 as involves the wrongful sale, and, of Specification 4, the wrongful disposition by gift, of government property, furnished and intended for the Military use thereof, described and valued in the respective specifications as follows:

In Specification 1, two wrist watches of a value of about $23.95; in Specification 2, two typewriters of some value not in excess of $20.00; in Specification 3, one wrist watch of a value of about $9.00; and in Specification 4, two Elgin wrist watches of a value of $18.00;

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

3. The evidence for the prosecution shows that: Austin Edward Smith, manager of the Corner Club in Cheltenham, Gloucestershire, England, on or about 1 February 1944, bought first a single watch and then another one or two, from accused (R8). Later he bought ten watches, brought to him by accused in small boxes. Eight watches were sold by Smith to a Mr. Manners and two to a Mr. Snelling. Smith paid accused three pounds each for them (R9) in payments of five or ten pounds at a time. Smith, as a witness, identified in court, Exhibits A-7 and A-8 as watches he got from accused and which he (Smith) "handed them in myself". Smith testified that about 15 March (R10) accused "brought

them" a typewriter to the club which he bought and paid accused for and that about six weeks later he bought another typewriter from accused who "brought it down on a cycle and brought it into the club." Smith did not open the box but sold the typewriter to Bert Manners, a butcher, for 20 pounds (R11) having paid accused 16 pounds for it. The other typewriter was purchased from accused and sold to Manners in a similar way without Smith opening the box. About the first of May, Smith got another 20 watches from accused (R12) who brought them to Smith in installments. Smith did not examine them but they were in boxes similar to Exhibits C-1, C-2 and C-3 which he identified in court as watches he had purchased from accused. These watches had "USA" or "Ord" and numbers on the back (R13). Smith testified to buying these ten watches, two typewriters and 20 watches from accused at a price of "from two pounds up, and the first one was three pounds ten," for each watch (R14). Smith knew accused "fairly well" as they "used to have a drink together" (R18). Smith opened only two or three of the watches, the rest were in sealed boxes but he saw them when the people to whom he sold them opened them (R21). He bought no watches from anyone other than accused (R22).

E. J. Snelling, a transport driver, testified that he bought four watches from Austin E. Smith and positively identified Exhibit C-4 as one he had worn and Exhibits C-1, C-2, and C-3 as similar to the watches he got from Smith (R21-25) and which he recovered and turned over to the police when told by the police they wanted them (R25-26).

Ivan B. J. Manners testified he knew accused "by sight" and identified him (R26). He bought eight watches and two typewriters from Smith and returned them to the police. He identified Exhibit A-1 as like seven watches he had bought wrapped up and Exhibit A-8 as a Hamilton wrist watch of the type of the other seven. He bought the typewriters, a Royal and an Underwood on two occasions and identified Exhibits B-1 and B-2 as the ones in question which he had used in his office and which he had turned over to the police (R26-30).

Herbert D. Dickenson, a Cheltenham butcher, testified that accused was a customer of his shop and about the first part of July accused made him a gift of two wrist watches (Exhibit D) which watches he turned over to the police (R30-36).

A stipulation by accused, defense counsel and the trial judge advocate to the effect that if Technician Fourth Grade Walter O. Ronson, (35798273), Headquarters Detachment, European Theater of Operations, Ordnance Service, were present in court he would testify that as a member of the Administration Section of Ordnance Service, as above, at Cheltenham, England, in 1943, he drew from the post quartermaster for the Ordnance Service two typewriters, an Underwood, serial No. 224099 and a Royal 10", serial No. X555754, and

If Detective Sergeant H. J. Price were present in court he would testify that Exhibits A-1 to A-3 inclusive were handed to the police by Bert Manners, together with Exhibits B-1 and B-2. Exhibits C-1 to C-4 inclusive were delivered to the police by E. J. Snelling and that Exhibit D consisting of two Elgin watches were turned over to the police by H. L. Dickenson, all in the month of July 1944 (R36-37).

Major C. P. MacDonald, Ordnance, was assigned to the office of Chief Ordnance Officer of which section accused was a member (R38). He testified that accused's duty, among other things, consisted in the co-ordinating and requisitioning of materials. Exhibit A-5 was opened and identified by him as a 7 Jewel Elgin Ordnance watch, government property, an "item of T/E equipment" which cannot be bought and is issued only to special people. Exhibits C-1, C-2, C-3, C-4, D, and A-1 to A-8 inclusive were all identified by witness as Ordnance watches and property of the United States Government for use in the military service. A Hamilton 17 jewel watch, witness valued at $14.95 and the 7 jewel Elgin at about $9.00 (R38-40). None of them were obsolete property or subject to general sale (R41). These watches are for requisition from staff sections and higher headquarters and no formal record of them is kept and issues were made without receipt. Exhibit A-1 to A-8; B-1 and B-2; C-1 to C-4 inclusive and Exhibit D were admitted in evidence. The court took judicial notice of AR 30-2720, paragraph 4, limiting the cost in the purchase of typewriters (R44).

4. Accused remained silent after having his rights as a witness explained to him. No evidence was produced in his behalf.

5. To convict accused of the offenses charged it must be shown

"(a) That the accused sold or disposed of certain property in the manner alleged;

(b) that such property belonged to the United States and that it was furnished or intended for the military service thereof;

(c) the facts and circumstances of the case indicating that the act of accused was wrongfully or knowingly done; and

(d) the value of the property as alleged" (MCM,1928, par. 150i, p.185).

The evidence clearly sustains the findings of guilty of so much of each specification as was approved by the reviewing authority.

6. The check sheet shows accused to be 36 years four months of age. He enlisted in March 1932 and has had continuous service; Warrant as Junior Warrant Officer 30 December 42 and as Chief Warrant Officer 7 July 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 of trial is legally sufficient to support the findings of guilty as approved and the sentence.

8. Conviction of a sale of government property of a value of less than $20. may be punished by confinement at hard labor for not to exceed six months. There are four separate offenses herein, one involving property of a value of $23.95 (MCM, 1928, par.104c, p.100). Confinement in the United States Disciplinary Barracks, Greenhaven, New York, is proper (AW 42; Cir 210, WD, 14 Sept. 1943, sec.II, par.2a as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 30 NOV 1944 TO: Commanding General, Headquarters Communications Zone, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Chief Warrant Officer WALTER S. HOWARD, (W-2108159), Headquarters Communications Zone, Ordnance Service, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4293. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4293).

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

29 NOV 1944

CM ETO 4294

U N I T E D S T A T E S	NINTH UNITED STATES ARMY
v.	Trial by GCM, convened at Morlaix, France, 23-24 September 1944. Sentences: As to accused Davis - To be hanged by the neck until dead; as to accused Potts - Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Privates First Class WILLIAM E. DAVIS (33541888) and J. C. POTTS (34759592), both of 3121st Quartermaster Service Company	

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: In that Private First Class William E. Davis and Private First Class J. C. Potts, both of 3121st Quartermaster Service Company, 563rd Quartermaster Battalion, acting jointly, and in pursuance of a common intent, did, at Guiclan, Finstere, France, on or about 22 August 1944, with malice aforethought, willfully, deliberately feloniously, unlawfully, and with premeditation, kill

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one Germaine Pouliquen, a human being, by shooting her with a rifle.

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

Specification: In that * * */did, at Guiclan, acting jointly, and in pursuance of a common intent, Finstere, France, on or about 22 August 1944, with intent to commit a felony, viz, rape, commit an assault upon Germaine Pouliquen, by willfully, forcibly, and feloniously holding her and attempting to have carnal knowledge of her.

Each accused pleaded not guilty to and was found guilty of both charges and their specifications, all of the members of the court present at the time the vote was taken concurring in the case of accused Davis, and at least two-thirds of the members of the court present at the time the vote was taken concurring in the case of accused Potts. No evidence of previous convictions of either accused was introduced. All members of the court present at the time the votes were taken concurring, accused Davis was sentenced to be hanged by the neck until dead, and accused Potts 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, the Commanding General, Ninth United States Army, approved the sentence as to accused Davis and forwarded the record of trial for action under Article of War 48, approved the sentence as to accused Potts, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of this accused, and forwarded the record of trial for action pursuant to Article of War 50½. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as to accused Davis, 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 22 August 1944, Jacques Pouliquen, 28 years of age, lived at Locmenven, Guiclan, Department of Finistere, France, with his wife Germaine (the deceased), age 23, and one daughter who was two and a half years old. The Pouliquens had been happily married for about three years (R7,17,24-25,36). Living near the Pouliquens were Mesdames Jacquette Roue and Jeanne Kergoat (R17,20-21) and Monsieur Ernest Keruzec (R48,67). A map or "placque" of the neighborhood was admitted in evidence, the defense stating there was no objection thereto (R8; Ex. 2).

On 22 August, after the evening meal which occurred about 5 pm four colored soldiers, namely, Private First Class Leroy Bowles of accuseds' company, a soldier named Ira Isabelle, and both accused, left camp and visited a farm where they helped some French people "tote in some hay" and carry some seeds "upstairs of the barn". They were given cider during the time they worked (R8-11). The evidence indicated that the farm they visited was that of one Francois Gestin, and that Pouliquen, Ernest Keruzec, Louis Quiviger, Michel Gestin and other French civilians worked there at the time (R25-26,44-45,48,60). The farm of Francois Gestin was not far from the area shown on Ex.2 (R16-17). (241)

Bowles testified that the four soldiers then left the farm and started up the road. They then came to the Pouliquen house where they stood at point B on Ex. 2 and saw a woman in the yard at point A (R11-12). Potts went into the yard, talked with her and then entered the Pouliquen house, followed by the woman. Davis and witness remained in the yard and Isabelle went up to the door and said "Come on, let's go". Potts left the house and the four soldiers walked toward the Kergoat house on their way back to camp. On the way Bowles observed an old lady (Madame Roue) in her yard. When they reached point C on Ex. 2, they stopped and accused Davis said that he was "going down there and see could he get anything from this lady" (Madame Pouliquen). Bowles and Isabelle returned to camp and accused, Potts and Davis, armed with carbines, returned in the direction from whence they came (R13-15). Witness did not enter the Pouliquen house nor did he know what happened therein (R15). He was paid at camp about 9 pm and saw Davis Potts at camp later during the evening (R16).

On the same evening Madame Roue, 57 years of age, noticed four black soldiers cross the fields near her house and go down the road marked "Path" on Ex. 2. She went to obtain water and upon her return saw one black soldier aim his gun at Madame Pouliquen (the deceased) who stood at a point marked D on Ex. 2 about four feet away from the soldier. Deceased called for help, asked Madame Roue to secure deceased's husband, and said "they are about to kill me". It was about 8 pm. Another soldier who was on "the brim" of the road, "made a sign" for Madame Roue to pass on and she went to the home of Madame Kergoat (Ex. 2). The four colored soldiers were the only ones Madame Roue saw that evening (R17-20).

As a result of her conversation with Madame Roue, Madame Kergoat went immediately to the Gestin farm where Pouliquen, Quiviger, Ernest Keruzec and Michel Gestin were threshing, and the four men immediately hastened to the Pouliquen home (R21,26,44,49,60-61). Madame Kergoat followed the four Frenchmen and when she reached the crucifix on Ex. 2, she saw a black soldier seize Madame Pouliquen by the shoulder and throw her to the ground. Madame Kergoat then went to the home of Ernest Keruzec and en route heard some shots. Less than ten minutes after Madame Kergoat saw Madame Pouliquen thrown to the ground, the latter was brought wounded to the Keruzec home (R22-24).

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As Pouliquen approached his house with the other three men from the direction of the crucifix, he heard his wife scream when he was at point E on Ex. 2 (R26-27). He entered the house and saw his wife lying across the width of the bed, her legs hanging over the edge, and her dress pulled up far enough to expose the upper part of her legs. A black soldier, standing on a stool, was on top of her between her legs. He held her left arm under her back. Madame Pouliquen, who weighed about 60 "kilos", tried to push him away with her right hand. Another soldier held her feet. A third soldier who was in the center of the room held Pouliquen's daughter by the hand, and a fourth soldier stood near the door (R28-30,38). His wife asked Pouliquen to take her out of the house (R30). He pulled the black soldier from his wife and observed at that time that his private parts were exposed. The soldier put his penis back in his trousers and the other soldier released his hold on her feet (R30-31,39). Pouliquen identified accused Davis, the "darkest one", as the soldier who was on top of his wife, and accused Potts as the soldier who held her feet (R31). Davis then "came after" Pouliquen and aimed a gun at him which had been picked up from against a cupboard by either the soldier who held his daughter, or by the soldier who stood near the door. Pouliquen fled from the house followed by his wife and daughter. One or two soldiers were then outside in the yard (R31-32,38-39,40). Pouliquen ran toward the corner of the Roue house and then between the Roue house and his own toward the road. Two shots were fired at him and a bullet hit the wall of the Roue house above his head. He heard his wife scream, returned to the corner between the two houses and saw his wife lying on the ground at point D on Ex. 2. She had not been shot at that time. He then ran back between the two houses, jumped over the hedge into the road shown at the top of Ex. 2 and ran down toward the crucifix. Just before he reached point F on Ex. 2 he heard two more shots, stopped and saw Davis and Potts standing in the road at points E and H on Ex. 2. He saw Davis who faced in the direction of the crucifix. Davis aimed at the deceased who fell into a ditch at point G (R32-34,36-37,39,41-42). Pouliquen lifted his wife from the ground and with Gestin, took her to the home of Ernest Keruzec on Ex. 2. She appeared to be suffering great pain, said that she was wounded in the abdomen and that she was "done for". The incident occurred about 8 pm, French time, and 9 pm American time (R34-35,39). Pouliquen was positive in his identification of both accused (R36,41-42). It was sufficiently light so that he could distinguish the faces of the soldiers in the house, even though there was no artifidial light therein (R39).

Louis Quiviger testified that when he reached the Pouliquen house he saw Pouliquen enter and remove a black soldier from within. Quiviger did not go beyond the threshold and did not see anyone endeavoring to have intercourse with Madame Pouliquen. Another black soldier who was within the house aimed a gun at Quiviger, who fled across the field to Gestin's house. He heard about eight or nine shots but did not see who fired them. At the trial, Quiviger went

over to a line of six colored soldiers and identified Davis as the soldier who threatened witness with a gun, and was positive in his identification. Quiviger testified that Davis was not the soldier who was pushed out of the house by Pouliquen (R44-47).

When Ernest Keruzec ran toward the Pouliquen house he heard Madame Pouliquen scream when he was at point J (R49-50), and then saw her leave the house (R50,53). He saw four colored soldiers at the house and observed Pouliquen pull one soldier out of his home. Keruzec also saw another soldier leave the house (R51). When Keruzec arrived at the door

> "the black took their guns. When we saw that we went away running. We saw them aiming at us" (R50).

After he ran about 40 meters Keruzec observed that Madame Pouliquen followed after him. When Keruzec reached the road intersection shown on Ex. 2 he heard a shot and a bullet whistled. He looked back and saw that a soldier who stood at point K aimed a gun at them. They continued to run. A second shot was fired and Keruzec saw Madame Pouliquen fall in a ditch at point L. At this time Keruzec was at point N and Pouliquen at Point M. Keruzec remained near her for a few seconds and then went for a doctor (R50-51,53-57). He heard seven or eight shots in all, two or three of which were fired in his direction (R52-53). At the trial Keruzec went to a line of six colored soldiers and identified accused Davis as the soldier who witness saw fire at Madame Pouliquen (R51-52). Although Keruzec did not turn around after the second shot was fired (R56), Davis was the only one who stood in the road when witness turned around and saw him about one minute before the woman was shot (R54). Witness also identified, from among the six colored soldiers, accused Potts as one of the soldiers whom he saw that evening at the Pouliquen house before witness ran away (R52-53). Davis was the only soldier Keruzec saw after the latter fled from the house (R53). Keruzec was positive in his identification of both accused. The shooting occurred about 8 pm French time and 9 pm American time (R57). Both accused and two other soldiers observed the threshing in the afternoon (R56-57).

Michel Gestin also, upon his arrival, saw four colored soldiers at the Pouliquen home (R62) and saw Pouliquen enter the house and drag out a black soldier (R61). One of the soldiers

> "threatened us with his gun, then we ran towards the Roue farm and we jumped on the road; then one fired and hit the wall of the house; then we stayed a while on the road and came toward the Gestin farm" (R61).

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When Gestin reached point P on Ex. 2 he heard a shot and saw Madame Pouliquen fall at point G. He saw that the "darkest" of the four soldiers stood on the road at point J and aimed a gun in her direction (R61-64). Madame Pouliquen appeared to suffer great pain, moaned, and said "The blacks have killed me" (R64-65). Witness remained in the road about two minutes, after which he saw no soldiers. He, Pouliquen and two others then took the wounded woman to Ernest Keruzec's house (R61-62,63-64). The following colloquy occurred on direct examination of witness:

"Q. Mr. Gestin, do you think that you would recognize any of the men that you saw at the Pouliquen house at about the time that this shooting occurred if you were to see them again?

A. Yes. Three.

Q. I'll ask you to stand up and face 6 soldiers lined up over there and tell the court whether you see among those 6 men any of the men that you saw at the Pouliquen house at about the time this shooting occurred.

A. Yes.

Q. How many men do you see among the 6 men that you are now looking at that you saw at the Pouliquen house the night of the shooting?

A. Two.

Q. Will you step over to the 6 men and put your hand on the shoulder of each of the two men that you see there that you saw at the Pouliquen house at the time of this shooting?

A. (Witness responded by walking over to the 6 colored soldiers touching two of them on their shoulders).

TJA: I would like to have the record show that the witness has placed his hand on the shoulder of J. C. Potts; likewise, to have the record show that the witness has placed his hand on the shoulder of William E. Davis.

Q. Now, Mr. Gestin, are you absolutely sure that the two men that you have picked out over there were the same two men that you saw immediately before or after the time of this shooting?

A. Yes" (R63-64).

When Francois Keruzec, brother of Ernest Keruzec, arrived at the latter's home on that evening, Madame Pouliquen was on a mattress on the floor. She appeared to be suffering great pain. In the car on the way to a hospital at Morlaix she said to Francois that she "had a very sad death", and that she "had been violated" (R67-69). At the Morlaix hospital an operation was performed upon Madame Pouliquen but as it was determined that she was in a dying condition and beyond medical aid, the incision was closed. She was not examined "for rape". It was stipulated by the prosecution, defense and accused that she died 23 August as the result of a bullet wound, that the bullet entered the lower left-hand quadrant of the abdominal cavity and emerged from the left buttock, and that the wound was inflicted 22 August 1944 (R7-8; Ex.1). She died at the home of her mother in Guiclan in the Department of Finistere (R25).

Captain Robert L. Sloss, 543rd Quartermaster Group, appointed investigating officer, interviewed both accused and warned them as to their rights. Davis then made a statement and Potts listened to it and "concurred in it". The statement was reduced to writing and signed by both accused on 9 September. It was admitted in evidence over the objection of the defense, the prosecution requesting the law member to advise the court

> "that the part of this statement that concerns Davis can be construed and taken against him and that part against Potts, against Potts only" (R71-73; Ex. 3).

Corporal Richard Booker, 511th Military Police Battalion, testified that on 28 August he investigated the incident, went to the scene, secured three witnesses and took them "through three different (quartermaster) companies". Each witness "picked out" Davis, Potts and Bowles. The line-ups consisted of colored troops and

> "At no time during the line up did the one witness see who the other witness was picking out" (R74-75).

Booker further testified that when questioned the men denied "being there". About two days later Isabelle was questioned and

> "We * * * found out that these three other colored soldiers had been at the farm so when these other three were confronted by Isabelle, they more or less gave a story that started to run true to form, and before the evening was over Davis said that he fired the shot at the woman" (R75).

Booker did not recall if he advised Davis and Potts of their rights before they made their oral statements, but he did so before they signed subsequent written statements. Witness informed them of their rights under Article of War 24, told them that they did not have to make or sign any statements, and that if they did so, such statements could be used against them in a court-martial (R75-76). Each accused, without promise of reward, then signed a written statement dated 28 August, which was offered in evidence against him only. When the statements were offered in evidence by the prosecution, defense counsel stated that there were "No questions" (R76-77). Booker, then questioned by the court, testified that during the interrogation of accused by himself, another soldier and two lieutenants, accused were not threatened or manhandled, but that "there was some shouting going on". Asked if anyone addressed rough language to accused he testified:

> "Except for the fact they were called a liar or something like that; there was probably some cuss words going on because the other officer figured he was lying and knew he was lying and called him a liar * * *. When we got the signed statements from them they were allowed to smoke" (R77).

The statements were admitted in evidence over the objection of the defense (R78; Exs. 4,5).

As each accused testified substantially in accordance with the three statements admitted in evidence (Exs.3,4,5), they are not set forth herein.

4. For the defense, each accused appeared as a witness after he was advised as to his rights (R81,96-97). Both testified that they, Bowles and Isabelle helped stack hay and store seeds at a farm earlier during the day and that they were given some cider (R82,94,97,99-100). Both accused confirmed Bowles' testimony that they left Bowles and Isabelle in the road and returned to the Pouliquen house, where they had seen Madame Pouliquen a short time before (R84-85,101-102). Each accused was then armed with a fully loaded carbine. Potts' gun had 15 shells in the magazine (R85) and Davis' weapon had 14 shells in the magazine and one in the chamber (R102-103). Each admitted that his purpose in returning was to try to persuade Madame Pouliquen to engage in sexual relations with him (R85,98,101-102). Upon their return, Potts said "Bon Jour" to her in the yard and she said something in reply which he did not understand. She and Potts then entered the house, followed by Davis. A little child was in the room (R85-86,97, 102-103). The three then sat on the bed. The woman sat between accused. Potts put his hand in her hair, fondled her breast, and asked if she would have intercourse with him in exchange for "K" rations. He had two packages of the rations in his shirt. She laughed and said "Non compris". Potts asked her to "zig-zig" and she again replied

"Non compris". She did not scream or push him away. They had never seen the woman before and did not know she was married. They sat on the bed for about 20 minutes, but the woman did not accept the "K" rations. She simply smiled and shook her head (R82-85,88-89, 97-98,101,103). Davis understood that she was "not agreeable" to the idea (R101). He did not say anything to her during the 20 minutes, as he did not "know how". He did not touch her and just sat next to her. He watched Potts, who talked, ran his hand through her hair and fondled her breasts. He could see that Potts "wasn't making any time, so there wasn't any need for me to try" (R108-110). They did not indulge in intercourse, nor did they attempt to force the woman to submit to sexual relations (R83,89,90,91,98,103,108-110). She did not scream during this interval (R82,89,104).

Potts testified that at the end of 20 minutes two Frenchmen burst into the house, raised their voices, and went toward Davis in a threatening manner, said something to him and pointed "their finger in his face". It appeared that they "were going up on him". Potts became frightened, dashed from the house and ran toward camp. He saw some other Frenchmen outside the house (R82,89-90,94,96). When he was about a half mile from the house he heard some shots. Later, Davis whistled, caught up with him and said

> "Potts, I believe I shot that woman. I didn't intend to do it. I was trying to scare those Frenchmen off me" (R82-83,91).

They then went to their bivouac area (R82).

Davis testified that when two Frenchmen entered the house, Potts ran out of the house. The Frenchmen rushed at Davis, seized him and tried to take his gun. Davis became frightened, flung one aside, tussled with the other, broke loose, and followed by both Frenchmen ran outdoors. Outside there were other Frenchmen (R97-98, 104-105,109-110). In the yard, Davis stopped and faced the house. Two Frenchmen left the house, started to run away from him, and he fired two shots over their heads and toward the wall of the house (R97,105). He then went to the road at point R on Ex.2, and fired three shots. Madame Pouliquen stood in the door of the house when he began to fire. She ran out of the house on his second shot and was at point S when he fired the third. She then "jumped down on the road and ran quite a little way". Davis then saw her seize her side and fall. Davis fired in an easterly direction, never fired in the direction of the grass triangle on Ex.2, and in all did not fire over five shots. When he fired the first two shots, both Frenchmen ran toward the Roue house and when he fired the other three shots, the Frenchmen and the woman ran away from him and no one came toward him (R97,105-107). Davis was the only one who did any shooting and Potts fired no shots (R99,108). Asked why he fired the rifle after

he left the house, Davis testified that the Frenchmen were behind him, he thought they were trying to catch him and do something to him, and he fired to "scare them away from me". He did not intend to hurt anyone (R98-99). Asked why he fired two shots when the two Frenchmen ran toward the Roue house, and three shots when the Frenchmen and Madame Pouliquen ran from him, he testified that he did not know where he was shooting

> "but I was just scared and I fired three more times * * *. I was scared the Frenchmen would try to do something to me * * *. I just kept on pulling the trigger of the gun * * * best I knowed I was trying to defend myself" (R107).

5. Certain procedural questions require consideration:

(a) At the close of the case for the prosecution the defense moved for findings of not guilty of both charges and specifications as to accused Potts on the ground that the prosecution "has failed to make out any case". The motion was denied (R80-81). As to the Specification of Charge II, the prosecution's evidence was of a competent and substantial character which sustained the findings of guilty of each accused, and the Board of Review is of the opinion that the motion as to such specification, was, therefore, properly denied (CM ETO 3147, Gayles, et al, and authorities cited therein). As to the Specification of Charge I, the Board of Review, for reasons hereinafter set forth, is of the opinion that the motion should have been granted.

(b) After accused were arraigned and before their pleas were entered, defense counsel interposed "a motion to sever", stating that accused were jointly charged and that each accused was listed as a witness for the other on each charge sheet. The motion was denied (R6).

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

> "A motion to sever is a motion by one of two or more joint accused to be tried separately from the other or others. It will regularly be made at the arraignment. The motion should be granted if good cause is shown; but in cases where the essence of the offense is combination between the parties - conspiracy for instance - the court may properly be more exacting than in other cases with respect to the question whether the facts shown in support of the motion constitute a good cause. The more common grounds of this motion are that the mover desires to avail himself on

his trial of the testimony of one or more of his coaccused, or of the testimony of the wife of one; or that a defense of the other accused is antagonistic to his own; or that the evidence as to them will in some manner prejudice his defense. (Winthrop)" (MCM, 1928, par. 71b, p.55).

Whether such a motion should be granted or denied is a matter within the sound judicial discretion of the court (CM ETO 895, Davis, et al). The testimony of the accused in their own behalf was not in conflict, but displayed a marked consistency. The testimony of each accused disclosed his presence with the victim at the time and place of the alleged assault with intent to commit rape, but was in denial of the commission of such assault. At the time of the shooting by accused Davis, which caused the victim's death, his testimony, and that of accused Potts, showed that the latter was not then present. However, according to Pouliquen's testimony accused Potts was present. Upon all the evidence, it is clear that the courtdid not abuse its judicial discretion in denying the motion (CM ETO 3147, Gayles, et al).

(c) On several occasions, prosecution witnesses testified on direct examination that the Pouliquens were happily married and that the victim was a good mother, of good character and did not associate or engage in "affairs" with other men (R21-22,36,46,65,66). No attack on the woman's character had been made by the defense nor did the defense object to the testimony. The admission of this evidence was clearly erroneous (CM 240788, Bull. JAG, Mar. 1944, sec.395(8), pp.95-96). However, the Board of Review is of the opinion that in the instant case the guilt of both accused of the offense of assault with intent to commit rape was so convincingly established by the evidence that such erroneous admission of evidence as to the victim's reputation did not injuriously affect their substantial rights within the purview of the 37th Article of War (CM ETO 1069, Bell).

(d) Prosecution's Exhibits 3, 4 and 5, consisting respectively of a statement signed by both accused, and statements severally signed by each of them, were received in evidence over the objections of the defense. It was established that each accused was informed of his rights under Article of War 24, was told he was not under compulsion to make or sign any statement and if he did so such statement could be used against him in a court-martial (R71-72,75-76). Assuming that each statement so given was a confession, there is no evidence that it was given under circumstances that would deny its admissibility. The court's determination will not be disturbed upon appellate review in view of the substantial affirmative evidence of their voluntary nature (CM ETO 559, Monsalve; CM ETO 1606, Savre; CM ETO 2007, W. Harris; CM ETO 3469, Green). The fact that each statement was reduced to writing by one other than accused does not militate against its admissibility (CM ETO 438, H. Smith; CM ETO 2007, W. Harris; CM ETO 3469, Green).

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6. (a) Charge II and Specification:

Each accused was found guilty of assault with intent to commit rape, as alleged.

(1) As to accused Davis, it was established by competent, substantial evidence that at the Pouliquen home, while his victim was lying across the width of a bed, her legs hanging over the edge with her dress pulled up far enough to expose her thighs, he laid on top of her, while she tried to push him away with her right hand. He was pulled from her by her husband, who had come to her rescue in answer to her screams and who then observed the exposed private parts of accused Davis. The evidence supports the findings that at the time of this assault upon his victim, he entertained the specific intent to rape Madame Pouliquen (CM ETO 2500, Bush; CM ETO 3093, Romero; CM ETO 3163, Boyd, Jr; CM ETO 3255, Dove; CM ETO 3897, Dixon).

(2) As to accused Potts, it was also established by competent, substantial evidence that he held Madame Pouliquen by the feet at the same time that accused Davis was on top of her. On his own testimony he had entered her dwelling, armed with a fully loaded carbine, for the purpose of persuading her to have sexual relations with him.

The distinction between principals and aiders and abettors has been abolished by Federal statute and an aider and abettor may be convicted as a principal (sec.332, Federal Criminal Code, 18 USCA, 550; 35 Stat.1152). The distinction is also not recognized in the administration of military justice. All are principals (Winthrop's Military Law & Precedents - Reprint, p.108).

> "Under Sec.332 of the Federal Criminal Code, above quoted, the acts of the principal become the acts of the aider and abettor and the latter may be charged as having done the act himself and be indicted and punished accordingly. By virtue of said statute a principal of the second degree at common law becomes a principal in the first degree (De Preta v. United States, 270 Fed.73; Conelli v. United States, 289 Fed. Fed.791; Kelly v. United States, 258 Fed. 392, certiorari denied, 249 U.S. 616, 63 L.Ed. 803). Premised on the above-stated doctrine is the established and well recognized rule that an accused may be charged with and found guilty of the crime of rape although he did not actually have intercourse with the victim if the evidence establishes that he was present at and aided and abetted the ravisher

in the accomplishment of the act of intercourse (52 CJ, sec.50, p.1036; State v. Flaherty, 128 Maine 141, 146 Atl. 7; People v. Zinn, 6 Cal. App. (2nd) 395, 44 Pac.(2nd) 408; People v. Nieto, 14 Cal.App.(2nd) 707, 58 Pac.(2nd)945; People v. Durand -- Cal.App.(2nd) ---, 134 Pac.(2nd) 305, CM NATO 385,Speed (CM ETO 3740, Sanders, et al)).

The evidence also supports the findings that accused Potts was guilty of assault with intent to rape Madame Pouliquen under the principle of law above set forth and the established precedents of the Board of Review (CM ETO 72, Farley and Jacobs; CM ETO 1453, Fowler; CM ETO 3740, Sanders, et al; CM ETO 3851, Watson and Wimberly; CM ETO 4444, Hudson, et al).

(b) Charge I and Specification:

Each accused was found guilty of murder, as alleged.

(1) As to accused Davis, the evidence shows that, as soon as he and accused Potts were interruped in their joint attempt to rape Madame Pouliquen, as above set forth, he seized his carbine. After he had been evicted from the house he began to fire shots at her husband and others who had come to her rescue. One of these shots struck and caused the death of Madame Pouliquen.

"Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse.

* * *

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

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An 'intention to cause the death of, or grievous bodily harm to any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); 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; intent to commit any felony" (MCM, 1928, par.148a, pp.162,163-164) (Underscoring supplied).

"It is murder, malice being presumed or inferred, where death is caused by the intentional and unlawful use of a deadly weapon in a deadly manner provided in all cases there are no circumstances serving to mitigate, excuse or justify the act. The use of a deadly weapon is not conclusive as to malice, but the inference of malice therefrom may be overcome, and where the facts and circumstances of the killing are in evidence, its (sic) existence of malice must be determined as a fact from the evidence.

* * *

In order that an implication of malice may arise from the use of a deadly weapon it must appear that its use was wilful or intentional, or deliberate. This, like other matters of intent, is to be gathered from the circumstances of the case, such as the fact that accused had the weapon prepared for use, or that it was used in such a manner that the natural, ordinary, and probable result would be to take life" (29 C.J., sec.74, pp.1097-1101) (Underscoring supplied).

The evidence plainly indicated that accused Davis, angered by the fact that the joint enterprise contemplating Madame Pouliquen's rape had been thwarted, deliberately and without the slightest excuse shot his victim in cold blood. The findings of guilty as to accused Davis were supported by substantial, competent evidence of a most convincing character (CM ETO 3932, Kluxdal; CM ETO 3180, Porter; CM ETO 1901, Miranda; CM ETO 1161, Waters; CM ETO 438, Smith).

(2) As to accused Potts, a vital question arises in the court's finding him guilty of this Specification and Charge. The evidence indicates that at the time of the shooting by Davis, accused Potts had either fled from the scene, as shown by his own testimony and that of accused Davis, or was present and took no part in the shooting according to the testimony of Pouliquen, the only witness who testified that he saw him with Davis in the road at the time of the shooting. It was evident beyond question that at that time both accused had abandoned and desisted from their joint attempt to rape Madame Pouliquen and had left the house where such attempt had been perpetrated.

"The weight of authority is that if a number of persons enter upon the commission of a felony, all are criminally responsible for the death of a person that ensues as a natural consequence of the common felonious purpose, although the one accused may not have done the actual killing. This rule has been deemed broad enough to include homicides committed in attempts to escape from the scene of the crime, or 'where the killing is done immediately after the conclusion of the project, for the purpose of preventing detection.' See 13 R. C. L. p. 732. The only exception to this general rule seems to be found in People v. Marwig (1919) 227 N. Y. 382, 125 N. E. 535, 22 A.D.R. 845, infra, and is recognized by implication in People v. Walsh (1933) 262 N.Y. 140, 186 N. E. 422, infra, both these cases seeming to have proceeded upon the theory of technical completion of the felony, influenced in part, if not wholly, by the fact that the homicide occurred after the perpetrators had left the scene of the crime.

In People v. Marwig (1919) 227 N. Y. 382, 125 N.E. 535, 22 A.L.R. 845, the court held that to render one of two who conspired to rob a store guilty of murder for the shooting by his companion of a person who attempted to interfere with their escape after they had left the store (there being no evidence that they carried away anything of value), the conspiracy must not only have extended to the robbery but also have included the attempted escape. The limitations on vicarious liability for murder in the first degree have been expressed in many ways, and the theories which have been evolved are not always as much in conflict as may at first appear. Reference to People v. Marwig (N. Y.) supra, which has been widely quoted and considered, will disclose many of the limitations which seem to have been considered by courts adhering to theories which upon the surface might appear divergent. The implications contained in People v. Marwig (N.Y.) supra, and other decisions which seem to limit the range of operation of particular felonies, as regards the definition of first-degree felony murders, were criticized in People v. Boss (1930) 210 Cal. 245, 290 p. 881, infra, as follows: They 'are generally cases in which the crime is held to be completed upon an entry or breaking into a building, and the conclusions therein are influenced by the

rule of law that a felonious entry or breaking is sufficient to constitute the crime. That rule was adopted to make punishment of this class of crime more certain. It was not intended to relieve the wrongdoer from any probable consequences of his act by placing a limitation upon the res gestae which is unreasonable or unnatural.' Undoubtedly the recent decisions indicate that the view as to what constitutes 'perpetration of' or 'engagement in' felonies, in defining first-degree felony murders, has been somewhat broadened, with due regard, of course, to the ordinary rules of cause and effect. Allowance must also be made for the inherent characteristics of the particular felony involved. In this connection it is to be observed that in People v. Marwig (N.Y.) supra, although a technical robbery was involved, there was no evidence of retention of loot, or asportation, in effecting the escape.

Where several defendants engaged in the robbery of certain premises, and, upon detection by officers, sought to escape therefrom, one of them fatally shooting an officer standing on the outside, from or while standing near a rear door on the premises (his position being a disputed question), the court, in People v. Walsh (1933) 262 N.Y. 140, 186 N.E. 422, in reversing a joint conviction of murder in the first degree, because the trial court had in effect instructed the jury that if they believed the people's evidence they might convict of murder in the first degree, observed that whether the robbery was still in progress when the shot was fired depended largely upon the inference to be drawn from the conduct of the one firing it, and said: 'It should have been left to the jury, under instructions pointing out generally that the killing, to be felony murder, must occur while the actor or one or more of his confederates are engaged in securing the plunder or in doing something immediately connected with the underlying crime: * * * that escape may, under certain unities of time, manner, and place, be a matter so immediately connected with the crime as to be part of its commission; * * * but that, where there is no reasonable doubt of a complete intervening desistance from the crime, as by the abandonment of the loot and running away, the subsequent homicide is not murder in the first degree without proof of deliberation and intent' - citing People v. Marwig (N.Y.)supra. The court also observed that it was possible to have a factual situation in such cases where only one conclusion could be drawn as to whether the homicide took

place during the commission of the felony, but that instances where the trial court might instruct upon the proposition as a matter of law were exceptional" (108 ALR 847, 848).

"Thus, where several persons have combined together for the purpose of committing a felony, and upon an alarm they run in different directions, and one of them, being pursued, kills the pursuer, the others cannot be considered as principals in such act. Rex. v. White, Russ. & R. C. C. 99, and Jones v. State, 14 Ohio C. C. 35 and 47, touch on this point.

The case of People v. Knapp, 26 Mich. 112, at page 115, in my judgment, correctly states the rule: 'It is undoubtedly possible for parties to combine in order to make an escape effectual, but no such agreement can lawfully be inferred from a combination to do the original wrong. There can be no criminal responsibility for anything not fairly within the common enterprise, and which might be expected to happen if occasion should arise for anyone to do it. In other words, the principle is quite analogous to that of agency, where the liability is measured by the express or implied authority. And the authorities are quite clear and reasonable which deny any liability for acts done in escaping, which were not within any joint purpose or combination" (People v. Marwig (1919), 227 N.Y. 382, 125 NE 535, 22 ALR 845,849,850). (Underscoring supplied)

"There is no criminal liability where the homicide was a fresh and independent product of the mind of one of the confederates, outside of, or foreign to, the common design, or where it did not result from something which was fairly within the common enterprise, and which might have been expected to happen if occasion should arise for anyone to use it" (26 Am. Jur., sec.68, p.205). (See also 26 Am. Jur. secs.64-69, pp.202-206; 29 CJ sec. 82, p.1107).

In the instant case, it is apparent that the shooting of Madame Pouliquen took place after completion of the joint felonious assault and abandonment of the common felonious intent to rape her and after both accused had left the scene of such assault. There was no evidence of a joint purpose by the two accused to shoot in order to effect their escape, or for any other purpose following the abandonment of the original venture. Nor does it appear that the reason for the shots fired by accused Davis was to effect an escape. In fact, no reasonable explanation can be discovered in the evidence for the senseless action of accused Davis in firing on French civilians, who were then fleeing

with all possible haste from his presence. No evidence appears in the record that accused Potts participated or acquiesced by words or action in the shooting by Davis, but, on the contrary, all the evidence shows that, their common enterprise of assault with intent to rape Madame Pouliquen having terminated, Potts took immediate flight and offered no further violence to anyone. Davis himself stated Potts had already left when he came from the house and fired at the French civilians (Pros.Ex.4). In short, no agreement by accused to use firearms in such a manner as to endanger life for any purpose following the abandonment of the joint assault may fairly be inferred from the evidence. The shooting by Davis was not "fairly within the common enterprise" and might not reasonably have been "expected to happen" under the circumstances. The combination of accused was for the purpose of raping Madame Pouliquen and of doing such things as would aid in its accomplishment. When the purpose was frustrated and Potts departed from the scene, the combination terminated, and with it Potts' criminal responsibility for Davis' murderous acts. Upon all the evidence and the law as above stated, the Board of Review is of the opinion that the record of trial is legally insufficient as to accused Potts to support the findings of guilty of the Specification of Charge I and Charge I and legally sufficient to support only so much of the sentence, as to accused Potts, as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years.

7. The charge sheet shows that accused Potts is 19 years one month of age and was inducted 21 September 1943 at Fort Benning, Georgia. Accused Davis is 29 years five months of age and was inducted 7 October 1943 at Richmond, Virginia. Each was inducted to serve for the duration of the war plus six months. Neither had any prior service.

8. The court was legally constituted and had jurisdiction of the persons and offenses. Except as noted, 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 accused Davis the record of trial is legally sufficient to support the findings of guilty and the sentence, but that for the reasons stated, as to accused Potts the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the findings of guilty of Charge II and its Specification and only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for 20 years.

9. As to accused Davis, the penalty for murder is death or life imprisonment, as the court-martial may direct (AW 92). As to accused Potts, confinement in a penitentiary is authorized for the crime of assault with intent to commit rape by Article of War 42 and

section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, par.1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private First Class WILLIAM E. DAVIS (33541888), 3121st Quartermaster Service 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 4294. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4294).

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 146, ETO, 21 Dec 1944)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 NOV 1944 TO: Commanding General, 9th United States Army, APO 339, U. S. Army.

1. In the case of Private J. C. POTTS (34759592), 3121st Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification and legally sufficient to support the findings of guilty of Charge II and its Specification and only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years. Such holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence, modified accordingly by supplemental action, which should be forwarded to this office for attachment to the record of trial.

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 4294. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4294).

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

14 DEC 1944

CM ETO 4300

U N I T E D S T A T E S	IX TROOP CARRIER COMMAND
v.	Trial by GCM, convened at AAF Station 484, APO 133, England, 23 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.
Private First Class SAMUEL J. KONDRIK (33316867), Headquarters 313th Troop Carrier 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 soldier named above has been examined by the Board of Review.

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private first class Samuel J. Kondrik, Headquarters 313th Troop Carrier Group, IX Troop Carrier Command, did, at Grantham, Lincolnshire, England, on or about 13 August 1944, in the night-time, feloniously and burglariously break and enter the dwelling house of Mrs. Pem Hartley, Red Cross Building, Market Square, Grantham, Lincolnshire, England, with intent to commit a felony, viz, larceny, therein.

Specification 2: In that * * * did, at Grantham, Lincolnshire, England, on or about 13 August 1944, feloniously take, steal and carry away one (1) wrist watch, value about $60.00 property of Corporal Philip Flohr, Headquarters Squadron, 82nd Service Group, and one (1) pair ladies' hose, value about $1.50, property of Mrs. Pem Hartley, Red Cross Building, Grantham, Lincolnshire, England.

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He pleaded not guilty; and was found guilty of Specification 1 except the words "in the night-time, feloniously and burglariously break and", substituting therefor the word "unlawfully", of the excepted words not guilty, of the substituted word guilty; of Specification 2 guilty, except the figures "$60.00" and "$1.50", substituting therefor respectively, the figures "$50.00" and "$.50, of the excepted figures not guilty, of the substituted figures guilty, and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 12 years. The reviewing authority approved the sentence but reduced the period of confinement to ten years, designated the Federal Reformatory, Chillicothe, Ohio, as theplace of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Evidence for the prosecution shows substantially the following facts:

On 12 August 1944 Corporal Philip Flohr left for safekeeping, with Mrs. Pemberton Hartley, directress of the American Red Cross Club in Grantham, England, a gold case Waltham Premier wrist watch (R6, Pros.Ex.1). Before leaving Grantham for a few hours on the following afternoon, 13 August 1944, Mrs. Hartley locked the watch in the top drawer of her dresser in her bedroom, located on the third floor of the Red Cross building (R10). She also locked her bedroom door. When she next returned to her room at approximately midnight, Mrs. Hartley found her door unlocked. She looked for the watch but could not find it. The dresser drawer was open and a pair of tan rayon ladies' stockings, as well as the watch, was missing therefrom (R11,12). On 14 August 1944, Corporal Flohr reported the loss of his watch to Staff Sergeant Frank Matalick, who was in charge of the instrument shop at Army Air Force Station 484 (R6). A detailed description of the watch made at this time indicated it to be a curved type, white face wrist watch with Roman numerals on it. The watch had a gold band attached and the crystal was cracked at one corner. The watch face at this corner was described as being "kind of dirty" (R6). He left a written description of his watch.

About two days later the accused brought a Waltham Premier watch to Sergeant Matalick which fitted the description he had of Corporal Flohr's watch, asking him to put a crystal on it and to effect other repairs (R23,24). This watch, Corporal Flohr identified as his property (R7,23, Pros. Ex.1). The facts in connection with the reported loss of the watch and the receipt ofasimilar one for repair, were reported by Sergeant Matalick to Lieutenant Gregg of the Military Police. On 18 August 1944, accused came to the instrument shop to pick up the watch and was placed under arrest (R27). Thereafter Lieutenant Gregg examined the personal effects of

the accused and discovered a pair of women's stockings, which Mrs. Hartley identified as her own (R13,27,28, Pros. Ex.2). He also examined Mrs. Hartley's room in the Red Cross Building and found that the locks on the door and dresser drawer had been pried open and broken (R27). The prosecution's evidence further shows that accused was seen by an employee of the Club at some time between 8:30 and ten o'clock on the evening of 13 August 1944 on the top landing on the third floor of the Red Cross Club, outside of Mrs. Hartley's room (R18,27). The third floor is used only for living quarters of the Red Cross Club personnel and no soldier is allowed up there.

Concerning the value of the items in question, Sergeant Matalick testified that he was an "instrument specialist"; that he had been working with instruments for "about two years"; that he did watch repair work on the side and had had "quite a bit" of opportunity to value watches; that in his opinion the watch in question (Pros. Ex.1) was worth "about ten or twelve pounds" --- "right close around fifty dollars" (R23,57). Mrs. Hartley valued the hose (Pros. Ex.2) at "Two shillings and nine pence" - - "roughly fifty cents". They were acquired through the Quartermaster Sales Store in London (R58).

4. The accused, after having been fully informed of his rights as a witness, elected to be sworn and testify. He denied that he was on the third floor of the Red Cross building on the date in question, although he admitted going into the club twice that evening (R31,32,40). He identified Prosecution's Exhibit I as a watch which his brother had given to him as a present about two years before (R33,34), and Prosecution's Exhibit 2 as a pair of silk stockings which he had bought "on the main drag" in Palermo, Sicily "after my organization left me down there" (R34,35,36). Accused's presence in the Angel Hotel and at various "pubs" in Grantham on the evening of 13 August 1944, was corroborated by the testimony of his co-driver. He returned to his station that night shortly after 11 o'clock (R30,32).

5. Housebreaking is a lesser included offense of burglary and is defined as the -

> "Unlawful entering of another's building with intent to commit a criminal offense therein (Par.149e,MCM,1928, p.169).

This offense is broader than burglary in several particulars including the fact that the entry may be "either in the night or in the daytime" (Par. 149e, MCM, supra).

The corpus delicti of the offense was amply proven and accused found in possession of the missing property:

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> "Defendant's explanation of his possession of the fruits of a burglary (housebreaking) is entitled to proper consideration by the jury * * * However, to avail a defendant his explanation should be, not only reasonable and credible, but also such as to raise a reasonable doubt in the minds of the jury * * * and, it has been held that the jury may properly convict on the basis of defendant's possession of the stolen goods, even though the State has not directly disproved the truth of defendant's explanation of his possession. * * * an explanation contradicted by other evidence need not be believed by the jury, or will not, as a matter of law, prevent conviction" (12 CJS, sec.59f, pp.740-741) (Underscoring supplied).

Cross-examination of the accused developed inconsistencies and improbabilities in his story. He claimed that he had broken the watch about a year before and only had an opportunity to have it repaired two days after Corporal Flohr lost his watch. However the watch and the stockings found in possession of accused were identified as the property of Corporal Flohr and Mrs. Hartley respectively. These matters were questions of fact for the court to determine and findings on such facts, where supported by substantial evidence will not be disturbed by the Board of Review (CM ETO 1360, Poe; CM ETO 1953, Lewis).

The limited evidence concerning the value of the stolen articles has been set out above. It is well established that;

> "Other than as to distinctive articles of Government issue (Par.1533; Sup.V, Dig. Ops. JAG, 1912-1940) or other chattels which, because of their character, do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny thereof is the market value" (CM 208002 - Gilbert; CM 208481 - Ragsdale; CM 218143 - Rocco; sec.585, McClain, Criminal Law; all cited in 16 B.R. 300).

Sergeant Matalick's testimony that, in his opinion, the watch was worth "ten or twelve pounds * * * right close around $50.00" is not adequate proof of the market value of the watch. However, he is somewhat qualified as an instrument specialist. As to proof of market value of a watch and other articles of stolen personal property before it, the Board of Review has held that the court could "from its inspection alone, determine that the property had some value" (CM 228742 - Blanco).

There is no competent evidence as to the market value of the rayon stockings. However, in addition to the fact that the court could find that the hose in question had some value, the court could also take judicial notice of Army Regulations 30-3000 (Quartermaster Corps Price List of Clothing and Equipage) (MCM, 1928, par.125, p.135). Therein rayon stockings are listed, and priced at 53¢ per pair.

It may therefore be inferred from the evidence and from the descriptions of the stolen articles that they had some substantial aggregate value in excess of $20.00.

The maximum punishment by confinement authorized by paragraph 104c of the Manual for Courts-Martial for housebreaking is ten years, and for larceny of property of a value of $50.00 or less and more than $20.00 is one year. Inasmuch as the reviewing authority reduced the period of confinement from 12 to 10 years the sentence is within the legal limits authorized.

6. The charge sheet shows accused to be 25 years of age. He was inducted in the Army, without prior service, at Philadelphia, Pennsylvania, 9 June 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. The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is proper (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars.1a(1), 3a).

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 DEC 1944 TO: Commanding General, IX Troop Carrier Command, APO 133, U. S. Army.

1. In the case of Private First Class SAMUEL J. KONDRIK (33316867), Headquarters 313th Troop Carrier Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded in 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 4300. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4300).

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

CM ETO 4303

14 DEC 1944

U N I T E D S T A T E S	NINTH AIR FORCE
v.	Trial by GCM, convened at Laval, France, 6 September 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for eight years and six months. United States Penitentiary, Lewisburg, Pennsylvania.
Private JESSIE C. HOUSTON (38238543), Company "A", 447th Signal Construction Battalion, Aviation, Ninth Air Force	

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

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

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

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

Specification: In that Private Jessie C. Houston, Company "A", 447th Signal Construction Battalion, Ninth Air Force, did, without proper leave, absent himself from his organization at USA Station 427 APO 696, U. S. Army from about 0600 hours 2 July 1944 to about 1030 hours 3 July 1944.

CHARGE II: Violation of the 65th Article of War.

Specification: In that * * * did, at USA Station 427, APO 696, U. S. Army, on or about 3 July 1944, use the following insulting language toward First Sergeant James N. Payton, a non-commissioned officer who was then in the execution of his office, "Get off that old shit" and "You are too Goddamn hard on us men", or words to that effect.

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CHARGE III: Violation of the 63rd Article of War.

Specification: In that * * * did, at USA Station 427, APO 696, U.S. Army, on or about 3 July 1944, behave himself with disrespect toward First Lieutenant THOMAS N.K. CAMERON, his superior officer, by wrongfully and sarcastically saying to him "That is a fine way to talk to an enlisted man", or words to that effect.

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

Specification 1: In that * * * did, in the vicinity of Gatteville, Manche, France on or about 31 July 1944 with intent to commit a felony, viz, murder, commit an assault upon Private Willard E. Flaherty, by willfully and feloniously striking him the said Pvt. Williard E. Flaherty on the shoulders with a hand axe.

Specification 2: In that * * * did, in the vicinity of Gatteville, Manche, France, on or about 31 July 1944, with intent to commit a felony, viz, murder, commit an assault upon Private Raymond H. Mechlin, by willfully and feloniously striking him the said Pvt. Raymond H. Mechlin on the head with a hand axe.

Specification 3: In that * * * did, at or near Gatteville, France, on or about 31 July 1944, with intent to do them bodily harm, commit an assault upon M. Marcell Garcon, M. Louis Garcon, Mme Vve Alexis Garcon, and Mme Marie Garcon by shooting into the house in which they were then present with a dangerous weapon, to wit, a Thompson sub-machine gun, caliber .45.

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

Specification: In that * * * did, without proper leave, absent himself from his organization at or near Barfleur France from about 0100 hours 31 July 1944, to about 0230 hours 31 July 1944.

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

Specification: In that * * * did, at his company bivouac area near Gatteville, Manche, France, on or about 31 July 1944, wrongfully take and use, without proper authority, a certain motor vehicle, to wit, ¼ ton 4 x 4 truck, US 20349035, property of the United States of a value of more than $50.00

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He pleaded guilty to Charge I and its Specification when arraigned but was permitted to change this plea to one of not guilty when the testimony in the case was concluded (R55). He pleaded not guilty to all other charges and specifications. He was found guilty of all charges and specifications with the substitution in Specifications 1 and 2 of Additional Charge I, of the words "do bodily harm with a dangerous weapon", for the words "commit a felony, viz, murder". Evidence was introduced of three previous convictions by summary court, one for wrongful use of a government vehicle in violation of Article of War 96, one for absence without leave for about one day and breach of restriction in violation of Articles of War 61 and 96, and one for absence without leave for about one day and wrongfully leaving camp in improper uniform in violation of Articles of War 61 and 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for eight years and six months. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution showed that accused absented himself without leave from his station from about 0600 hours 2 July 1944 to about 1030 hours 3 July 1944 (R13,14,15, Pros. Ex.1,4). Upon his return to the post, First Sergeant James N. Peyton summoned him to the orderly room for the purpose of having him sign "a slip * * *, a kind of confinement order, to keep him in camp" (R13,15). Accused refused to sign the slip and an altercation ensued as the result of which the first sergeant ordered accused to leave the orderly room. Accused told the first sergeant to "Get up off that old shit" and left the orderly room with the remark "You are too Goddamn hard on us men" (R13,14,16,17, Pros. Ex.4). Later that day, accused obtained the permission of his company commander to speak with the battalion commander with respect to the incident (R17,18). When he went to battalion headquarters he again became loudly argumentative and was ultimately dismissed by First Lieutenant Thomas N. K. Cameron, the battalion adjutant (R18). Accused saluted and turned to leave "and as he went he said sarcastically 'That is a fine way to talk to an enlisted man'" (R19, Pros. Ex.4). Accused's bearing and tone of voice during the conversation was "arrogant and disrespectful" (R20).

It was further shown that on 31 July 1944, between 0100 and 0200 hours, accused approached the gate of his bivouac area in a jeep and was halted by the guard. As he had no trip ticket, the guard at the gate "stepped back" to call the corporal of the guard. At this, accused "drove on out the gate". Accused "didn't seem to be drunk" at this time. A witness who had seen accused at about 12:30 that night testified that accused at that time "had had a couple of drunks" but

was not drunk (R23,24-25). Another witness who had seen accused at roughly the same time testified that accused was "feeling goofy" but that he "knew what he was doing" (R22). "Around midnight" on 30 July 1944 an American soldier came to the home of M. Marcel Garcon near Gatteville, Normandy, France (R27). In the house at this time were M. Marcel Garcon, M. Louis Garcon, Mme. Marie Garcon, Mme Vve. Alexis Garcon, and Mlle. Alexis Garcon (R32). The soldier was drunk and was armed with a Thompson sub-machine gun (R29,33). He knocked at the door for approximately ten minutes and, when M. Marcel Garcon finally came to one of the upstairs windows to learn what was desired, the soldier asked for some cognac. M. Garcon replied "pas cognac" and closed the window. At this, the soldier "shot three bullets into the door and two through the window I had just closed" (R27,32, Pros. Ex.5,7). M. Garcon then opened the door. The soldier again asked for cognac and, upon being told that no cognac was to be had, asked for and received some cider. He then started to search the house and finally found some cognac (R28,32). As he was drinking the cognac, M. Garcon left the house, found two American soldiers, and reported the incident to them. The two soldiers returned to the house with M. Garcon, took the soldier into their custody and drove away (R28,34). The French witnesses were not able to identify accused as the soldier who committed the acts concerning which they had testified.

Private Raymond H. Mechlin testified that early in the morning of 31 July 1944 a Frenchman approached him and Private Flaherty, and asked them to accompany him. They did so and "he took us to his French house and motioned for us to go upstairs". There they found the accused and attempted to get him to leave. After "a little argument" and "a little scuffle", Mechlin and Flaherty got accused in the accused's jeep and started to take him to their battalion headquarters (R35). Mechlin drove because he thought accused was "too drunk to drive" (R41). As they proceeded down the road, accused picked up "an army hand axe from some place in the jeep * * * and hit Private Flaherty with the axe" (R35-36). Flaherty exclaimed, "I have been cut" (R36a), and at this, Mechlin turned toward the accused and the accused struck Mechlin "over the helmet" with the axe (R36). He used the cutting edge of the blade and the blow made a dent in the helmet (R42, Pros. Ex.12). The jeep then left the road and went into a ditch. Accused freed himself and began to run down the road (R36). He staggered slightly as he ran but ran "comparatively fast" (R39). Mechlin and Flaherty did not give chase because the area was mined. Rather, they reported the incident to the security patrol and Mechlin took Flaherty to "the medics" (R36a,43). Flaherty suffered a cut two inches long, one half inch deep on his right shoulder and a wound two and one half inches long, inch wide and one half inch deep in his left shoulder (R44). Accused was slightly drunk at the time of the incident but not too drunk to know what he was doing (R39).

Accused abandoned his gun when he fled. Mechlin identified the gun in question as a Thompson sub-machine gun, caliber .45, number 729545. The records of accused's organization showed that a Thompson sub-machine gun number 729545 was issued to the accused on 26 June 1944 (R12).

The jeep which accused was driving on the night in question was numbered 20349035 (R11,40,45). This vehicle was assigned to accused's organization (R12). Accused was not authorized to use the vehicle on the night of 30 July or early morning of 31 July 1944 (R12,25,26,46). It was stipulated that this vehicle was the property of the United States and had a value in excess of $50 (R26).

Accused had no permission to be absent on the morning of 31 July 1944 (Pros. Ex.2).

4. Accused, after having been advised of his rights as a witness, took the stand but limited his testimony to Charges I, II and III only. He admitted that he absented himself without leave for the period set forth in the Specification of Charge I. He further admitted that he made the statements set forth in the specifications of Charges II and III but inferentially denied that such statements were intended to be disrespectful (R47,48,49). He also stated that the "paper" he was given to sign was a "confinement order", that he had understood he was restricted to his area as punishment for his absence without leave and that he had complied with the restriction.

Certain witnesses were called by the prosecution whose testimony tended to show that the restriction in question was an administrative restriction pending trial and was not imposed as company punishment (R51,53-55).

5. The evidence adduced by the prosecution, together with accused's admissions, is amply sufficient to support the court's finding of guilty under Charge I and its Specification. The only question in connection with this finding is whether accused had already been punished for the offense under Article of War 104 so that subsequent punishment therefor was barred (MCM, 1928 par.69c, p.54). On this question, there was evidence in the record from which the court could find that any restriction imposed upon accused after his absence without leave was an administrative restriction pending investigation and trial and was not imposed as punishment under Article of War 104. The court was thus justified in rejecting the contention of the defense that trial for the absence without leave charged in the Specification of Charge I was barred because of former punishment under Article of War 104.

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There was also ample evidence to support the findings under Charges II and III and the specifications thereunder. The prosecution showed, and accused admitted, the making of the statements set forth in the specifications. There was testimony to the effect that these statements were made in a disrespectful manner. Any issue raised by accused's attempt to show that no disrespect was intended was a question of fact for the court.

Nor is there any substantial question as to the propriety of the court's finding under Specifications 1 and 2 of Additional Charge I. Competent uncontradicted evidence showed that the accused struck Private Flaherty on the shoulders and Private Mechlin on the helmet with a hand axe. The cutting edge of the blade was employed. There can be little doubt that a hand axe, so used, is a dangerous weapon. Flaherty received rather severe wounds as the result of the blows and the blow directed at Mechlin dented his helmet. The type of weapon used, the resulting injuries and damage, and the circumstances under which the assault was made support an inference that the assault was accompanied by an intent to do bodily harm (CM 193085, Dig OP, JAG, 1912-40, sec.451 (10), p.313).

With respect to the offense alleged in Specification 3 of Additional Charge I, here too there can be little doubt that an assault was committed and that such assault was made with a dangerous weapon (Wharton's Criminal Law, 12th Ed., Vol.I, sec.804, p.1101). Some question may exist, however, whether the assault was accompanied by the requisite specific intent. The Manual for Courts-Martial contains the following discussion with reference to the offense of assault with intent to do bodily harm (MCM, 1928, par.149n, p.180):

> "This is an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed. It is not necessary that any battery actually ensue, or, if bodily harm is actually inflicted, that it be of the kind intended. Where the accused acts in reckless disregard of the safety of others it is not a defense that he did not have in mind the particular person injured" (Underscoring supplied).

While this discussion indicates that an assault with intent to do bodily harm is an assault aggravated by the specific present intent to do bodily harm to the person assaulted, it also indicates inferentially that such intent, or its legal equivalent, may be inferred from conduct which is in reckless disregard of the safety of others. In this same connection, see CM ETO 2899, Reeves, in which case the accused was charged with the rather similar offense of assault with intent to commit murder. The evidence in that

case showed that accused recklessly pointed and fired a rifle into a group of men who were riding on a truck. The Board held the record legally sufficient on the ground that accused's conduct showed such a reckless disregard of human life as to supply the requisite specific intent to commit murder or the legal equivalent of such intent. The principle of the cited case is applicable by analogy here. The conduct of accused in the instant case, in firing five rounds from a Thompson sub-machine gun into a dwelling which he knew to be occupied, certainly constitutes conduct in reckless disregard of the safety of others and, in view of the considerations set forth above, may properly be characterized as an assault with intent to do bodily harm with a dangerous weapon. And since this conduct was not only in reckless disregard of the safety of M. Garcon, whom accused specifically knew to be in the house, but also in reckless disregard of the safety of any of its occupants, it follows that accused committed an assault with intent to do bodily harm on the respective occupants, as alleged (Cf: Kincaid, 24 B.R. 247 at 254). Some effort was made by the defense to show that accused was too drunk to be capable of entertaining the specific intent necessary to establish the commission of the offense alleged. While there was testimony that accused was drunk, there was also testimony that accused "knew what he was doing". Accused was sufficiently in possession of his faculties to demand liquor, to search the house and to effect his escape shortly after he had been apprehended. Whether accused was too drunk to entertain the requisite intent for this offense was an issue of fact for the court and, on the evidence in this case, it does not appear that the court abused its discretion in reaching its decision upon this question, (Bull JAG, Vol II, No. 11, Nov. 1943, sec.451(10), p.427).

No substantial question is presented in connection with the findings of guilty of Additional Charges II and III and the specifications thereunder.

6. The charge sheet shows that accused is 23 years and nine months of age. He was inducted into the army, at Houston, Texas, on 5 September 1942. No prior service is shown.

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

8. The United States Penitentiary, Lewisburg, Pennsylvania, was designated as the place of confinement. Confinement in a penitentiary is authorized for the crime of assault with intent to do bodily harm with a dangerous weapon (AW 42; sec.276 Federal Criminal Code (18 USCA 455)). However, as accused is under 31 years of age

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and the sentence is for not more than ten years, the designation of a Federal Reformatory as the place of confinement is required (Cir. 229, WD, 8 June 1944, sec.II, pars.1a(1), 3a). The place of confinement should be changed to the Federal Reformatory, Chillicothe, Ohio (Idem).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 DEC 1944 TO: Commanding General, Ninth Air Force, APO 696, U. S. Army.

1. In the case of Private JESSIE C. HOUSTON (38238543), Company "A", 447th Signal Construction Battalion, Aviation, Ninth Air Force, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty 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. As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is improper and should be changed to the Federal Reformatory, Chillicothe, Ohio. This may be done in the published general court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4303. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4303).

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

7 NOV 1944

CM ETO 4309

U N I T E D S T A T E S	FIRST UNITED STATES ARMY.
v.	Trial by GCM, convened at Headquarters First United States Army, near Fougerolles du Plessis, France, 28 August 1944. Sentence: To be hanged by the neck until dead.
Private THERON W. McGANN (39332102), Company A, 32nd Signal Construction Battalion.	

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 92nd Article of War.
Specification: In that Private Theron W. McGann, Company A, 32nd Signal Construction Battalion, did, at Quibou, Manche, France, on or about 5 August 1944, forcibly and feloniously, against her will have carnal knowledge of Madame Yvonne Emilienne Eugenia Vaudevire.

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. Evidence was introduced of two previous convictions by summary court, one for absence without leave for three days in violation of Article of War 61, and one for loitering on his post as a sentinel in violation of Article of War 96. 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, First United States Army, approved the sentence and

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

3. The evidence for the prosecution showed that on 5 August 1944, accused's company was stationed about a mile north of Quibou, near Canisy, France (R7,20). On that date Madame Yvonne Vaudevire, of Paris, was living in Quibou with Madame Paulette Martin, a refugee from Cherbourg (R8,14-15). About 9:30 p.m. the two women were in Madame Martin's kitchen (R8,16) and two female children were sleeping upstairs (R10,14). Madame Vaudevire could not speak or understand English but Madame Martin studied the language for two years and understood it a little (R9,16).

Both women testified that someone knocked "hard" on the door and, when Madame Vaudevire opened it, accused asked "How about pulling a piece?" Madame Vaudevire replied "No, impossible", whereupon he repeated his question and she made a similar reply. He then, uninvited, forced his way into the house and went over to Madame Martin. He placed his hand on his revolver, which was in a holster, seized her about the waist and asked "Will you pull a piece?" She answered in English "No, impossible; tomorrow". He replied "No, tonight" (R8-9, 16-17). Madame Martin said to Madame Vaudevire, who was standing near the door, "Get out of the door so I can go out and call for help". Madame Vaudevire replied "No", and accused then went to the door, locked it and put the key in his pocket. Holding a black (R11) revolver he lined up the two women in front of him, one behind the other. Madame Vaudevire, being afraid, raised her arms and said "Yes, I consent" (R9,17). Accused came after her (R9), and Madame Martin saw them go over to a davenport (R17) which was in the kitchen (R10,17).

Madame Vaudevire further testified as follows:

When accused pointed the gun at the women she told him she preferred "to give in, not to shoot" (R12). She also told him the children were in a room upstairs but "may be he did not understand" (R10). He removed her clothing in a rough manner, leaving her entirely naked, and placed her garments on the davenport. He did not tear the clothing (R10,12). She was "kind of dizzy" and "very afraid" (R12). He sat down on the davenport and, because she was "mostly dead than living", put her on his lap, naked, facing him (R10, 12). His penis then entered her private parts and he indulged in sexual intercourse with her. The "act was complete" and consumed about 20-30 minutes (R9-11). He used a rubber (R12). During the act Madame Martin remained in the kitchen on the other side of the room and covered her eyes with her hands (R10-11). Accused looked steadily at Madame Martin all the time, continually pointed his revolver at her and never put down the weapon for a moment (R10-11,13). The following questions and answers occurred during direct and cross-examination of Madame Vaudevire:

"Q. Why did you have intercourse with this accused?
A. Because he was going to kill us both (R11).

* * * * * * * *

Q. Did you consent to this act with the accused?
A. No; by force, because he wanted to kill us; if I consented it was to stop him from killing us.

* * * * * * * *

Q. Do you mean you were frightened?
A. Yes; very afraid.

Q. That is what you mean by being more dead than living?
A. Yes; if I wouldn't have been afraid, I wouldn't have let him do it" (R12).

Madame Vaudevire further testified that accused had removed his jacket, and after the act was completed several bullets fell out of his pocket. He "roughly" made witness pick them up while he kept his revolver pointed at Madame Martin (R11,13). After the bullets were recovered he pushed witness with his hand

> "but he wanted to kill Mrs. Martin; I tried to make him understand not to commit an act like that; he was afraid that Mrs. Martin would not consent" (R11).

Madame Martin testified that Madame Vaudevire "seeing the danger raised her arms and said, 'Yes, I consent'". When Madame Vaudevire and accused went toward the davenport, witness hurried over to the table in the kitchen and stood about three or four meters away from the davenport with her hands over her eyes (R17,18,19). She did not observe the removal of the victim's clothing nor did she see where the clothes were placed (R19-20). Although she remained in the kitchen, witness did not observe the sexual act for she kept her eyes covered during the entire incident for a reason she could not explain (R17-18). She heard bullets fall on the floor (R18), and thereafter saw Madame Vaudevire, clad in her underclothes, standing before accused trying to prevent him from shooting witness. "* * * he wanted to kill me. I had refused. He wanted to kill me". Witness did not know how long she held her hands over her eyes (R17).

Both women further testified in substance that accused then took Madame Martin's French-English dictionary, found the word "complaint" and indicated that no complaint was to be made concerning the incident, that he was leaving the next day. He was assured by the women that no complaint would be made (R11,17,19). Madame Vaudevire testified that they "had to consent to whatever he said to try to get rid of him" (R11). Accused offered a cigarette to his victim,

took one himself, put his revolver back into its holster, opened the door with the key which he had in his pocket and departed (R11,17). Madame Vaudevire finished dressing before he left (R11). Madame Martin testified that accused pointed the pistol at her twice, once after he entered the house and once when he ordered her not to complain about the affair (R18,19). The following afternoon (Sunday) Madame Vaudevire reported the incident to the police. She did not make a complaint on the evening of the incident because it was dark, two two small children were upstairs, and the women did not want to go out. The following night (Monday) she identified accused at an identification parade of soldiers (R14,20). Both witnesses identified accused at the trial (R8,16,19).

On cross-examination Captain Herman P. Siebken, commanding officer of accused's company (R6-7), testified that he had known accused for about 14 months. He could not testify that accused was

> "mentally unbalanced or anything like that. He could be where he was a good soldier, at times, and then again he wasn't" (R22).

He was known to be a prevaricator (R22).

On 8 August agent John W. Landon, 16th Military Police CIS, Criminal Investigation Department, interviewed accused and, after advising him of his rights, took his statement which Landon reduced to writing. The statement, which was signed by accused, was obtained without threats or promises and it was admitted in evidence, the defense stating there was no objection thereto (R22-24; Pros.Ex.1). It was, in pertinent part, as follows:

> "On Saturday Aug 5, 1944 at about 1930 hrs I left our bivouac area and went souviner hunting in some fields near Canisy, France near Quibou also. I had started back about 2300 hrs, I did not have a watch and just guessed at the time, about 2345 I arrived at a farm house and knocked on the door, a woman opened the door and I walked in. there was another woman in the room, I asked them both for a piece of ass in French, as best I could, my expression was, 'Sil vous plait Madame, Voulez-Vous tirer un coup?' they both talked to each other in French a few minutes I took my gun out and the brunett I now know as Madame Vaudevire came over to me and in a coy manner. I then motioned for her to go to the davenport and with my gun I motioned for the short woman I now know as Madame Martin to go in a corner and stay there. I went to the davenport with Madame Vaudevire and started loveing her up, I pulled her dress up and

I sat on the davenport and made her sit on my lap faceing me, this is the position I used to have intercourse with. I used a rubber during this intercourse I then got up and put my fatigue jacket back on, I had removed it when I started the intercourse, when I put it on some live ammunition fell out of a pocket and she picked it up. the other woman Madam Martin sat in the corner and was faceing away from us during the intercourse. After we finished Madame Vaudevire took out a French dictionary and looked up something and said something about "comrade" and I looked up the word "complaint" and made her understand she was not to do this, I also told her that we were leaving there the next day and she should not say anything until I had left, also even after I had gone. I lit a cigarette and offered her one, we stood around a minuit or so and I then gave her back the key to the door and she unlocked it and I left, I had taken the key and locked the door when I first came in. I was definitely not drunk, I did have two or three drinks out of a jug of cider that a French civilian man gave me earlier in the evening."

4. The defense offered no evidence and, upon being advised of his rights, accused elected to remain silent (R24).

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

* * * * * * * * * * *

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent" (MCM, 1928, par.148b, p.165).

"The force. The force implied in the term 'rape' may be of any sort, if sufficient to overcome resistance. * * * It is not essential that the force employed consist in physical violence; it may be exerted in part or entirely by other forms of duress, or by threats of killing or of grievous bodily harm or other injury * * *.

Non-consent. Absence of free will, or non-

consent, on the part of the female, may consist and appear * * * in her yielding through reasonable fear of death or extreme injury impending or threatened; * * * in the fact that her will has been constrained, or her passive acquiescence obtained, by * * * other controlling means of 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) (Bull. JAG, Vol.II, No.8, Aug 1943, sec.450, p.310).

"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).

No elaborate discussion of the evidence is required in this case. The identity of accused as the assailant and the fact of intercourse with his victim were freely admitted by accused in his voluntary written statement. The testimony of Madame Vaudevire to the effect that she submitted to the act of intercourse solely because of accused's menacing use of his revolver, and her resultant utter terrorization and fear of impending death if she did not submit, was substantially corroborated by the testimony of Madame Martin. Further, accused in his written statement substantially admitted his commission of the offense alleged. He stated that he knocked on the door and when it was opened he entered, locked the door and kept the key. He then asked the two women for intercourse, used his revolver in order to effect his purpose, made Madame Vaudevire sit on

his lap facing him, and ordered Madame Martin "to go in a corner and stay there". After the act was completed he warned the women that they were not to make any "complaint" concerning the incident, and surrendered the key to the door when he departed. The court's findings of guilty were supported by a wealth of substantial competent evidence and will not be disturbed by the Board of Review upon appellate review (CM ETO 3141, Whitfield; CM ETO 3709, Martin; CM ETO 4194, Scott; CM ETO 3740, Sanders, et al).

6. The charge sheet shows that accused is 23 years one month of age and was inducted at Portland, Oregon, 13 May 1943, to serve for the duration of the war plus six months. He had prior service in the Oregon National Guard, 162nd Infantry, from 4 September 1940 to 22 August 1941 and was discharged as a private because of a conviction by a civil court - character poor.

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

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

B. Franklin Pete Judge Advocate

Edward H. Sargent 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. 7 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private THERON W. McGANN (39332102), Company A, 32nd Signal Construction 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, 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 4309. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4309).

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 104, ETO, 15 Nov 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

9 DEC 1944

CM ETO 4332

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Technician Fifth Grade JOSEPH L. SUTTON, (32917458), 4010 Quartermaster Truck Company, (TC)	Trial by GCM, convened at Neauphle-Le-Chateau, France, 26 September 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for fifteen years and six months. 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 93rd Article of War.

Specification 1: In that Technician Fifth Grade Joseph L. Sutton, 4010 Quartermaster Truck Company (TC) did, at or near St. Pierre-Du-Monte, France, on or about 25 August 1944, with intent to do him bodily harm, commit an assault upon Sergeant Armstead L. Steward, by shooting at him with a dangerous weapon to wit, a carbine.

Specification 2: In that * * * did, at or near St. Pierre-Du-Monte, France, on or about 25 August 1944, with intent to do him bodily harm, commit an assault upon Private First Class Junior Magee, by shooting at him with a dangerous weapon to wit, a carbine.

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Specification 3: In that * * * did, at or near St. Pierre-Du-Monte, France, on or about 25 August 1944, with intent to do him bodily harm, commit an assault upon Private James P. Lonon, by shooting at him with a dangerous weapon to wit, a carbine.

CHARGE II: Violation of the 63rd Article of War.

Specification: In that * * * did, at or near St. Pierre-Du-Monte, France, on or about 25 August 1944, behave himself with disrespect toward First Lieutenant Henry B. Zuidema, his superior officer, by saying to him while pointing at him a loaded carbine "Don't touch me or I'll kill you" or words to that effect.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence of two previous convictions was introduced, one by summary court for disrespect towards a superior officer and one by special court-martial for assault upon a fellow soldier, in violation of Articles of War 63 and 93 respectively. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years and six months. 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. A summary of the evidence, as related by witnesses for the prosecution is substantially as follows:

Specification 1:

Sergeant Armstead L. Steward, 4010th Quartermaster Truck Company, identified accused as a member of his organization and testified that on 25 August 1944:

"When I first notided him he was not far from Adams and I walked up to him and told him to put the gun down, and he said, 'What the hell have you got to do with it' and said 'Get in front of me', and I took him at his word and got in front of him. I stopped and he said, 'Make a move and I'll shoot you'. I hit the gun and it went off. He told me to go ahead and walk in front of him, which I did. * * * We walked on up to my tent and I said 'Sutton, I've got a can of pudding in here,

> can I get it?' He said, 'Yes, but don't make any funny movement or I'll shoot'. I got the pineapple pudding, but we didn't have a can opener. * * * I ran behind the truck. * * * When I got behind the truck I saw Lieutenant Zuidema running down, and I heard an '03 shot. The next time I saw him, Lieutenant Zuidema had brought him to the orderly room" (R20,21).

Sergeant Steward further testified that he had played with accused in the past but never with firearms; and that: "I just told him to put the gun down * * * I wasn't playing then". Whereupon accused said:

> "'What the hell you got to do with it, get in front of me and if you make any quick movements I'll shoot'. I took a couple of steps, and he had the gun pointed down, and I took my left arm and hit the gun -- that is when gun went off. He had it pointed like that (indicating)".

He was asked "Facing you?" To which he answered, "That is right, sir" (R21). The sergeant said that accused had a "carbine", that "he wasn't smiling" and "I was thinking if I didn't march I would get shot, so I marched" (R22,23).

On cross-examination Sergeant Steward testified that he did not see accused fire the carbine; that he did not have it pointed at him but "to the left of me" and at port arms; that the gun went off when he /Steward/ hit it (R23).

Specification 2:

Private First Class Junior Magee, 4010th Quartermaster Truck Company, testified as follows:

> "I was playing that evening, drinking a little bit, and he /accused/ got high and started playing a little rough, and he cut me on the finger with a knife. He gave me the knife to cut him, and I threw it into the weeds. He wanted the knife--he wanted to make me get it, so I went and tried to find it and I couldn't, so he went and got his rifle and came back and was going to make me find it" (R5).

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He further testified that we were

> "just playing. We always did play, but Sutton made me mad * * * He went and got his rifle and told me I had better find it, * * * to show him where I threw the knife * * * I pointed in the weeds * * * /and/ Sutton fired the rifle * * * /He was/ Right beside me * * * he fired right at my finger * * * I felt the shot".

Asked if he felt the shot Magee replied "Yes, Sir, go by the end of my finger" (R56,9,11). Magee testified on cross-examination that accused did not point the carbine at him but that he pointed it over in the bushes; that he and the accused were good friends when the incident happened and were good friends now; that they had been drinking together during the afternoon in question (R7,9,10).

Specification 3:

Private James P. Lonon, 4010th Quartermaster Truck Company, testified that on 25 August 1944:

> "I was working on a truck. I am an assistant driver, and we were taking the top off to make it stationary. We saw Sutton and Magee playing and they were looking in the bushes, I don't know what they were looking for, and I heard a shot go off. I looked over and saw Sutton with a gun, and I didn't pay much mind, so we went on working, and about 15 minutes later I heard another shot and looked around and Sutton was with Sergeant Steward, and they walked up to where I was working. I said, 'Sutton, may I speak to you a minute', * * * we had also been playing together, and he said, 'You come along too'. He told us to get in front of him. Sergeant Steward had promised me a can of pineapple, and he asked Sutton if I could go in and get it. I did, but we didn't have anything to open it with so I asked Sutton if I could go over to my tent and get a knife, and he said 'No'. He didn't answer me right away and I started on and he said, 'Don't take another step or I'll shoot you'. I thought he was kidding, I took another step, and I heard a shot fired. I went over to my tent where I had my '03, and I took it out. Sutton and I were pretty good friends, so I tried to talk to him because the shooting now was close to the officers, and it would bring them down on him, and he would get into a lot of trouble. I shot in the ground and it didn't have any effect, so I ran back to the fence were the rest of the troops were. Lieutenant Zuidema came

down and went over and said something to Sutton. He was about 50 yards from me, and he came over and asked me for my gun and went back over and got Sutton and myself, and took us up to the orderly room" (R11-12).

Lonon amplified his statement.

"He [Sutton] had a carbine * * * I obeyed him * * * We went to Sergeant Steward's tent which is about 20 feet from my tent * * * when I started to make a motion to start the gun went off, and as I was not looking in the general direction of the gun I couldn't tell whether he was shooting at me or not * * * I went * * * about 18 feet * * * and hid behind the trailer * * * Sergeant Steward left the same time I did, when Sutton shot at me he ran" (R12,13).

Asked if he was playing when accused fired, Lonon replied "No, Sir". However, accused was "laughing" when Private Lonon and Sergeant Steward were marching in front of him (R16).

On cross-examination, Lonon testified that he and Sutton were good friends and had "done lots of playing together", including "rough play" when "some shots were fired by me and the accused"; that on the day in question he did not see Sutton shoot the gun as "he had the gun across his knee * * * I told him to be careful as it was loaded. I started to walk, when I heard the shot". Lonon was about "6 feet" away at the time.

Specification of Charge II:

Lieutenant Harry B. Zuidema, 4010th Quartermaster Truck Company, (R26) testified as follows:

"On this particular night I had been up to the commanding officer's quarters; * * * I heard a shot when I was sitting there but paid no attention to it because there was shooting in the different companies or had been shooting in different companies every now and then. I left the company commander's quarters and started down toward the first platoon, * * * I heard another carbine shot. * * * it sounded to me like it was in the vicinity of the second platoon. * * * I got half way down the field and I heard another shot and I recognized that shot

> as being in our company area, so I doubled timed down to where I heard the shot. On my way down I saw the men evacuating the area of the second platoon and going in the opposite direction of the shot. When I got down near the trucks I saw Sutton ducking behind a truck and he had his carbine, but I didn't see who he was firing at. I asked him what he was doing and he pointed the gun at me and said, 'Don't touch me or I will have to kill you. James Lonon and myself are having it out'. I tried to explain to him that shooting rifles at each other would lead to someone getting killed, and he told me it was either going to be him or Lonon. I told him to point the gun in another direction and he did. He wouldn't let me have the gun. I asked him for it three or four times, and each time I would ask him for it he would say 'Don't touch me or I'll kill you'. I reasoned with him, and told him if I got Lonon's gun would he give me his gun and he said, 'Yes'. He wouldn't give me his gun until I got Lonon's. I went and asked Lonon for his gun and he immediately gave me his gun, and I went back to Sutton and then he gave me his gun. I then took the two men up to the orderly room. Before Sutton gave me his carbine he took the clip out of it, and I looked in both of the chambers of the guns and one bullet was in them" (R27).

Asked in what position accused held the gun at the time he was told to surrender it, Lieutenant Zuidema replied:

> "He had it pointed at me, clip in the carbine, and finger on the trigger, ready to shoot * * * in a ready position" (R28).

He further testified that accused "raised his voice" and to that extent he was disrespectful; that his manner of speech was convincing (R28,29). The men of the company, except those up at the front, or when attacked, or unless on guard, were not allowed to have ammunition in their rifles or carbines. There had been two or three meetings in which they had been warned against the promiscuous firing of guns (R29).

Captain Jose L. Robert, Medical Corps, testified that shortly after the incidents occurred he examined accused and found that he had a "strong alcoholic breath" but that "he was not drunk physically or mentally"; that Sutton was "sober" and in "full possession of his faculties" (R30).

4. The evidence on behalf of accused consists of the testimony of the first sergeant of accused's organization who had known accused as a soldier for a year and testified as follows:

> "I have found Private Sutton very cooperative since he has been in this company. I have never had any trouble with him in carrying out orders. None of my other non-commissioned officers have had trouble with him. I have never called him down for being insubordinate. I do not consider him a dangerous man in any way. He has taken orders from me any number of times that I know any number of other soldiers would have balked at. Sir, since he has been awaiting trial I have not had him under guard. I trusted him as a soldier and as a man, and he didn't leave the bivouac area. Basically I don't consider him a dangerous man. At that particular time, I imagine you would call it war strain. He, perhaps got hold of too much cognac, and I don't think he was responsible for what he did" (R33).

Accused, after being fully informed, by the court, of his rights as a witness, elected to remain silent.

5. Concerning Specification 1 of Charge I, the proof shows that the sergeant of accused's unit walked up to Sutton who was carrying a loaded weapon and told him to "put the gun down". Whereupon accused made certain insubordinate remarks and ordered the sergeant "to get in front" of him, at the same time threatening the sergeant by saying, "make a move and I'll shoot you". The sergeant then "hit the gun and it went off". He testified that he "wasn't playing then"; and that "I was thinking if I didn't march I would get shot, so I marched". Although the sergeant testified that accused did not point the gun directly at him but rather "down", "to the left" and at "port arms", his testimony establishes an assault with a deadly weapon by showing that accused, armed with a loaded carbine, threatened to shoot and thereby forced him to "march", supporting, as well, the inference of intent. The allegation of the specification that the assault was committed "by shooting at him" was mere surplusage (CM ETO 764, Copeland and Ruggles). Questions concerning the credibility of witnesses and the resolving of disputes of fact are issues for the sole determination of the court and unless palpably in error, such findings will not be disturbed by the Board of Review on appellate review (CM ETO 1899, Hicks; CM ETO 1953, Lewis).

As to Specifications 2 and 3 of Charge I, the evidence shows that accused shot in the direction of Private First Class Magee and Private Lonon when the former was pointing into the bushes where he had thrown accused's knife, and in the direction of the latter when Lonon started to leave the tent. Magee felt the bullet graze his finger and Lonon was only about six feet from the tent when accused fired the carbine. The handling of the firearm in these instances was such as would likely produce death or great bodily harm. The facts and circumstances clearly indicate that accused was careless and reckless in the use of a loaded weapon; that he had been drinking; that he made repeated threats to and demands upon Magee and Lonon and that in the execution of these threats he fired the weapon at or near them. He was therefore properly found guilty, under Specifications 2 and 3, of assault with intent to do bodily harm with a dangerous weapon, as alleged (CM ETO 3475, Blackwell; CM ETO 764, Copeland; CM ETO 2899, Reeves).

The record contains much evidence to the effect that accused and the victims assaulted and allegedly assaulted were engaged in rough play with firearms - a sort of war game in which each gave commands and accepted orders; that accused and the victims were good friends; that there could not have been, under the circumstances, malice, ill will, or the required intent to do bodily harm. However, the record contains evidence to the contrary. The findings of the court, where supported by substantial evidence will not be disturbed upon appellate review (CM ETO 1953, Lewis; supra and authorities cited therein).

Concerning the Specification of Charge II the evidence is substantial and uncontradicted that accused behaved himself in an insubordinate and disrespectful manner towards Lieutenant Zuidema, his superior officer, on the date and under the circumstances, as alleged.

6. The charge sheet shows that accused is 24 years of age. He was inducted, without prior service, at Newark, New Jersey, 24 April 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 of trial is legally sufficient to support the findings of guilty and the sentence. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.229, WD, 8 June 1944, sec.II, par.1b4, 3b).

8. Confinement in a penitentiary is authorized for assault with a dangerous weapon (AW 42, sec.276, Federal Criminal Code, 18 USCA 455).

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, Advance Section, Communications Zone, European Theater of Operations, APO 113, U. S. Army.

1. In the case of Technician Fifth Grade JOSEPH L. SUTTON, (32917458), 4010 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. 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 4332. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4332).

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

(295)

BOARD OF REVIEW NO. 2

CM ETO 4337

8 NOV 1944

U N I T E D S T A T E S v. Second Lieutenant RANDOLPH WINSLOW (O-1111449), Headquarters and Service Company, 660th Engineer Topographic Battalion, Corps of Engineers.	CENTRAL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened in London, England, 17 August 1944. Sentence: 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 officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General with the European Theater of Operations.

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

CHARGE: Violation of the 61st Article of War.

Specification: In that 2d Lt Randolph Winslow, Headquarters and Service Company 660th Engineer Topographic Battalion, ETOUSA, did, without proper leave, absent himself from his station at District I, Kew, Surrey, England, from about 1 July 1944, to about 3 July 1944.

ADDITIONAL CHARGES

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

Specification: In that 2nd Lieutenant Randolph Winslow, Headquarters and Service Company, 660th

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Engineer Topographic Battalion, European Theater of Operations, U. S. Army, did, at Kew, Surrey, England, on or about 15 July 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 31 July 1944.

CHARGE II: Violation of the 69th Article of War.
(Finding of Not Guilty.)
Specification: (Finding of Not Guilty.)

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

He pleaded not guilty to all the charges and specifications. He was found guilty of the original Charge and Specification; guilty of the Specification of Additional Charge I, except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words, not guilty, of the substituted words, guilty; of the Additional Charge I, not guilty, but guilty of a violation of the 61st Article of War; and not guilty of Additional Charges II and III and their respective specifications. Evidence was introduced of one previous conviction by general court-martial for absences without leave for eight days and for three days, in violation of Article of War 61. He was sentenced to be dismissed the service. The approving authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, stating it was "wholly inadequate", and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 1 July 1944 accused was a Second Lieutenant of the 660th Engineer Topographic Battalion, Kew Gardens, Surrey. On 1 July the battalion adjutant received from Captain Moore of Company "A", said battalion, with which company accused was at that time on duty, a report as to the status of accused as the result of which by search it was found that accused was absent (R7-10). On 3 July accused returned to the battalion and was ordered by his battalion commander to arrest in quarters. Thereafter he slept in a room assigned to the officer of the day. The area occupied by the unit at that time was entirely enclosed by barbed wire and a wooden fence and all entrances and exists were guarded (R11). On 13 July it was reported to the battalion adjutant that accused had attempted to leave the premises and he advised accused that he (accused) was in arrest in quarters and if he attempted again to

leave the premises, his confinement in the guardhouse would be requested. On the evening of 14 July the battalion adjutant informed accused that the Staff Judge Advocate of Central Base Section in London, wished to speak to him and that a vehicle would be furnished him next morning to make the trip and on completion of the interview, he was to immediately return. Later the adjutant saw the driver and, as a result of his report, searched the building and found accused absent. Inquiries at accused's former billet and elsewhere, failed to locate him and he was not found in the area again until 3 August, although repeated search was made (R13). The morning report of accused's unit for 3 July was admitted in evidence as Prosecution Exhibit 1. It shows accused from duty to "AWOL eff 1 July" and "AWOL to ar in qrs 0800". The morning report of accused's unit for 17 July was admitted in evidence as Prosecution Exhibit 2 (R31). It shows accused "Fr ar in qrs to AWOL eff 1700 15 July".

The porter at the Jules American Red Cross Club in London, testified that on 31 July 1944 he came in contact with accused, finding him asleep on a floor unoccupied and not let to officers, at about 7:30 o'clock in the morning. He attempted to arouse accused and then called the head porter (R23). Some ten minutes later he saw accused coming down from the roof with a "C.I.D. officer". Accused seemed to be in a drunken stupor and he found a half bottle of whiskey in a locker at the side of the bed accused had occupied (R24). Accused was brought into the Provost Marshal's office in London about midmorning of 31 July by a "C.I.D. Agent" and was sent to the dispensary for examination and then confined. He appeared drunk (R26).

Agent John H. Bryant, 8th Military Police, Criminal Investigation Section, in response to a phone call about 0930 hours 31 July, went to the Jules American Red Cross Club where he found accused in the office of the Club Director from where he was taken to the guardhouse. He was intoxicated (R27). Later, on the following day (R30), Bryant was present when accused, after due warning as to his rights, made a written statement which was admitted in evidence as Prosecution Exhibit No. 4 (R28). (In this statement accused admits all the essential elements of the offenses of which he was found guilty.)

4. The evidence for the defense shows that accused for at "least a month" prior to 5 July 1944 had slept in the "O.D." room outside the door of which is a bell at least 12 inches in diameter rung as a warning whenever buzz bombs were coming over. It rung

on one occasion 17 times in a 24-hour period. Otherwise, also, accused's sleeping place was noisy (R32-33).

Accused as a witness testified that he had approximately four years and eight months service in the regular army prior to his current enlistment, was commissioned on 1 March 1943, after graduating from Officers' Candidate School, came to the European Theater of Operations in February 1944, and to his present unit late in May 1944. During the six weeks prior to 27 June he had been restricted to the post, sleeping in the officer of the day's room, a busy place in addition to having the buzz bomb alarm in the adjoining corridor. During this time he acted as Assistant Operations Officer. On 27 June he was released from "restriction to limits". He left the post on the evening of 30 June, a Friday, and returned the following Monday. It was not necessary to secure permission to leave. He reported to Captain Moore at the regular time for duty on the Monday morning and was told that he was "restricted to the post" until such time as Moore could talk to the adjutant (R37-38). This restriction was never changed to arrest in quarters. On 13 July Captain Minor told him, "You understand you are restricted to the post, and if you should make any attempt to leave I should be forced to have you sent down to the CBS guardhouse and confined" (R39). On the evening of Friday, 14 July, he was told to report to the "TJA" in London on the 15th of July, and he did so. He did not return in the same vehicle as the driver had some other errands and accused told him that he (accused) would return by tube. He did not return to his unit but stayed in London, at the Normandie Hotel, the "Jules Club" and with various civilians, registering in his correct name and at all times wearing his complete uniform (R39). His intention was to return to his unit. On cross-examination, he admitted that on his release from restrictions he went back to his billet for one night only and then returned to sleep on the post as it was more convenient. The two days he was absent, 1 and 2 July, he performed no military duties nor any on the night of 30 June (R40). He knew on 1 July that his unit was alerted and that he was to get his equipment together and stay with his company (R41). He had made no arrangement to take off Saturday, 1 July, and on 30 June had been told to "Get your stuff ready and then report to the Operations Officer". He did not consider he was absent without leave on 1 July (R42). He admitted that when he reported to Captain Moore on the morning of 3 July, he was asked for some explanation of where he had been and had answered, "I don't want to offer any explanation, but I do ask you to forgive me for making a mistake" and that he had been kept in so long he "had to get out and let off some steam". At that time he was told he could not be excused and charges would be preferred against him and that he "was restricted to the post" by which he understood he was not to leave the area until released by proper authority (R43). He

knew that charges were pending against him during the period 3 July to 15 July (R46) and there was nothing to prevent him from returning to his unit when his interview was completed on 15 July or during the following two weeks until 31 July (R47). The neuropsychiatric officer of the 7th General Dispensary testified that he observed accused for about one hour on 3 August; that accused was sane and had always been sane, was responsible for his actions and knew the difference between right and wrong (R48-49); that in his opinion accused had difficulty in making the change-over from an enlisted man to an officer (R50).

5. The 61st Article of War

> "is designed to cover every case not elsewhere provided for where any person subject to military law is through his own fault not at the place where he is required to be at a time when he should be there" (MCM, 1928, par.132, pp.145-146).

The record of trial clearly indicates, and accused admits his unauthorized absences, aggravated by the further fact that the second absence occurred at a time when he knew he was restricted to the post under pending court-martial charges for his first absence.

6. The charge sheet shows accused to be 37 years seven months of age. He was appointed a Second Lieutenant, "AUS, C.E.", 1 March 1943. He stated that he had four years and eight months 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 under Article of War 61.

[signature] Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

[signature] Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 13 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant RANDOLPH WINSLOW (0-1111449), Headquarters and Service Company, 660th Engineer Topographic Battalion, Corps of Engineers, 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. 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 4337. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4337).

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

(Sentence ordered executed. GCMO 129, ETO, 12 Dec 1944)

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

BOARD OF REVIEW NO. 1 10 NOV 1944

CM ETO 4338

U N I T E D S T A T E S	)	3D BOMBARDMENT DIVISION
	)	
v.	)	Trial by GCM, convened at AAF Station 153, APO 559, U.S. Army, 7 October 1944. Sentence: Dismissal, total forfeitures, and confinement at hard labor for one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York
Second Lieutenant ROBERT R. EDWARDS (O-819008), Air Corps, 571st Bombardment Squadron (H), 390th 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 61st Article of War.
Specification: In that Second Lieutenant Robert R. Edwards, 571st Bombardment Squadron, 390th Bombardment Group (H), did, without proper leave, absent himself from his station at AAF Station 153, APO 559, U.S. Army, from about 20 August 1944, to about 19 September 1944.

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 one year. The reviewing authority, the

Commanding General, 3d Bombardment 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, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

On 14 August 1944, accused was a member of the 571st Bombardment Squadron, 390th Bombardment Group, stationed at AAF Station 153. His duty assignment was that of co-pilot. On the evening of that date he left the station on pass covering 15 and 16 August and was due to return on 17 August (R5). On 18 and 19 August he was not seen at the station and, consequently, on 20 August a search was made of his barracks and of the area in which it was situated, but he could not be found. An announcement over the Tannoy system throughout the entire base, and calls to the officer's club, the combat library, and combat mess brought no response from accused (R10,11). From 20 August to 19 September repeated searches were made for him in his barracks and in the area. He was not found (R10,11,12,13). He was not present for duty from 19 August to 21 September (R6), and was not seen at the station during that period (R10,11,12,13,14). Pertinent entries on the morning reports of accused's organization show that he was absent without leave from 20 August to 19 September 1944 (R7,8; Pros. Exs.1,2,3). He was not authorized to be absent from duty during that period (R6). He returned to his station on 19 September 1944 and stated to the clerk in the orderly room of his organization that he was placing himself in arrest in quarters (R13).

4. After having been advised of his rights, accused elected to make the following unsworn statement through his counsel in extenuation of the offense charged against him:

> "The defendant came to this field as a co-pilot of a B-17 crew, and after two uneventful missions he sustained a burn in his right eye. After that he was sent to various hospitals because whenever he went in a plane he found that his right eye blurred his vision; and his complaint was that while he felt he could fly as an individual, he certainly could not fly in formation flight. There was considerable discourse, examinations, and trouble for him as to whether or not he should fly with the eye as it was; and he finally attempted to fly a mission but was forced to abort: an hour and a half after take off his right eye teared and his vision became blurred. The defendant had one duty assignment

here and that is as co-pilot. If he wasn't flying as a co-pilot he would have absolutely nothing to do unless given another assignment; and at the time of the alleged absence the defendant's crew had gone down in action and he was waiting on the ground, trying to find some way of correcting either an astigmatism or something else radically wrong with his right eye. So that if he were away from duty during that period his feelings were not such as to make him feel he was doing something as a person who intentionally walked off, since he felt, as stated in the medical report, that while he would like to fly anywhere as an individual he felt he would be jeopardizing the lives of nine other individuals and the plane, if he were flying."(R16).

The defense offered no evidence to contradict the evidence introduced by the prosecution.

5. The findings of guilty of absence without leave as alleged are fully supported by the evidence.

6. The charge sheet shows accused is 24 years and 9 months of age. He enlisted in the Regular Army 5 November 1941, at Fresno, California, and was discharged to accept a commission in the Army Air Corps 4 December 1943. He was commissioned a second lieutenant, Air Corps, 5 December 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 holds that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized by AW 42 and Cir. 210, WD, 14 Sept 1943, sec. VI, as amended.

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 10 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant ROBERT R. EDWARDS (O-819008), Air Corps, 571st Bombardment Squadron (H), 390th Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 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 4338. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4338).

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

(Sentence ordered executed. GCMO 108, ETO, 18 Nov 1944)

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

BOARD OF REVIEW NO. 1 — 11 NOV 1944

CM ETO 4339

U N I T E D S T A T E S	2D ARMORED DIVISION
v.	Trial by GCM, convened at Headquarters 2d Armored Division, APO 252, U.S.Army, 26 September 1944. Sentence: Dismissal, total forfeitures, and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Captain ALEXANDER B. KIZINSKI (O-374009), Medical Corps, Medical Detachment, 41st Armored Infantry Regiment.	

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 85th Article of War.

Specification: In that Captain Alexander B. Kizinski, Assistant Surgeon, 2nd Battalion Medical Detachment, 41st Armored Infantry Regiment, was at or near St Pierre des Fleurs, France, on or about 25 August 1944, found drunk while on duty as the Assistant Surgeon in charge of the Medical Detachment, rear element, 2nd Battalion, 41st Armored Infantry Regiment, and while his unit was engaged in combat against the enemy.

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 five years. The reviewing authority, the Commanding General, 2d Armored Division, 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 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 evidence for the prosecution was substantially as follows:

On 25 August 1944, accused was assistant surgeon, 2d Battalion, 41st Armored Infantry Regiment, and in charge of an aid station located near the town of St. Pierre des Fleurs, France. It was his duty to give medical aid to casualties brought back from the front and to those who became casualties in the rear area, to evacuate them, and to direct the work of the enlisted men who were assisting him. His unit was in contact with the enemy and casualties had been brought in early that morning (R4,6,14,16). The area around the station itself was subjected to intermittent shelling and some of the shells fell in the front yard of the house occupied by the station (R6,16). Two ambulances from another unit were attached to the station and remained near it. Calls for them were received at the radio half-track which was part of the station equipment (R5). Everyone at the station, except accused, seemed aware of the danger from the shells. He was seen taking two drinks of "Calvados" at about 10:30 that morning and seemed befuddled (R5,7,8). The officer in charge of the ambulances moved them to a comparatively safer position about a mile away. Accused did not move his station to the new ambulance point. A radio message was sent to Captain Huskins, battalion surgeon and superior officer of accused, which apprised him of the situation. He radioed back an order to accused directing him to move the station to the new ambulance point. When informed of the order by the radio operator, accused said, "To hell with it, we're going to stay here" (R5,14).

At about 2 p.m. Captain Huskins went to the aid station at the request of the radio operator. There he found accused lying on the floor as if asleep. The station had not been moved. When roused, accused was slow to respond, was "glary-eyed", and waved his hand and smiled as if nothing had happened. He did not rise from the floor except on one elbow. He denied having received any instructions to move. He did not appear fit to perform his duties and Captain Huskins himself went out to attend to four casualties who had been reported while he was at the station (R15,16).

At about 3 p.m. Captain Segenreich, a medical officer, examined accused on orders from Major Haukenberry, commanding officer of the

medical detachment of the 41st Armored Infantry Regiment, and regimental surgeon. He found accused slumped on the half-track, with alcohol on his breath, and uninterested in the activity around him. His speech was slow, slurred, but coherent. Normally he spoke distinctly and with ordinary rapidity. In Captain Segenreich's opinion accused had been drinking and his condition was such that he would have been unable to perform his duties properly (R12,13,14).

Major Haukenberry himself, who saw accused at the request of Captain Huskins, found him lying on the ground by the half-track. He did not stand until requested to do so and after some urging. He was unstead on his feet. His speech, though coherent, was retarded and slurred. The odor of alcohol was on his person. In the opinion of this witness accused was under the influence of alcohol to a degree which prevented him from carrying out his duties in an efficient manner (R17,18). Two witnesses, both of them enlisted men on duty at the station, testified that accused was drunk (R7,12).

4. At his own request, accused was sworn and testified substantially as follows:

On 25 August 1944 he was on duty as assistant surgeon, 2d Battalion, 41st Armored Infantry Regiment. The area in the immediate vicinity of the station was then being shelled (R19). He had not been able to sleep on the nights of 23 August and 24 August because of the shelling and because he had to rise early to treat casualties. His nerves were "pretty well shot up" and he was afraid of breaking down. He thought a few drinks would help him. He took two or three drinks of "French whiskey" in the morning of 25 August (R20). He had known for two years that a few drinks would, in his own words, "put him under". One or two small drinks would affect him. His physical condition was impaired on 25 August but he did not know whether by mental fatigue or alcohol (R21).

In extenuation of the offense and not to prove insanity, the existence of which the defense expressly disclaimed, accused testified to a history of epilepsy and alcoholism in his family. As far as he knew, he had none of the symptoms of epilepsy, but the thought that the disease was supposed to be hereditary depressed him. For the past 12 or 13 years he had been drinking from one-half to one pint of liquor a day when he had nothing to do and was not on duty (R21).

Major Miller, division psychiatrist of the 48th Armored Division, testified that accused had become a mild depressive type as a result of the situation existing within his family, and that he possessed a reactive depression with alcoholism as a symptom. Such a type might turn to alcohol as an outlet (R23).

It was stipulated that the qualification card of accused contained seven ratings in the column of his record of service marked manner of performance. Six were "excellent", and one was "very satisfactory" (R19).

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5. The evidence before the court, including the admissions of accused on the stand, fully established that on 25 August 1944 he was engaged in the performance of his military duties at an aid station as assistant surgeon of the battalion named in the Specification and while thus engaged, he became intoxicated to such a degree as to impair the rational and full exercise of his mental and physical faculties. There is, therefore, adequate proof of the two elements of the offense, namely, that accused was on a certain duty, and that he was found drunk while on such duty (MCM, 1928, par.145,pp.159-160; CM ETO 3301, Stohlmann, 1944). The court could take judicial notice that the offense was committed in time of war. The allegation and proof that the offense was committed while his unit was engaged in combat with the enemy, though not essential to show a violation of Article of War 85, constitute an element of aggravation.

6. The charge sheet shows that accused is 33 years of age and that his commissioned service began 17 December 1940. 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 a violation of Article of War 85 by an officer in time of war is dismissal from the service and such other punishment as the court-martial may direct (AW 85). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized by A.W. 42 and Cir.210, WD, 14 Sep 1943, sec. VI, as amended.

_____ Judge Advocate

Ellwood W. Sargent 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. 11 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Captain ALEXANDER B. KIZINSKI (O-374009), Medical Corps, Medical Detachment, 41st Armored Infantry Regiment, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 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 4339. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4339).

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

(Sentence ordered executed. GCMO 117, ETO, 8 Dec 1944)

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

BOARD OF REVIEW NO. 2

CM ETO 4349

1 DEC 1944

U N I T E D S T A T E S	IX AIR FORCE SERVICE COMMAND.
v.	Trial by GCM, convened at AAF Station 519, Grove, Berkshire, England, 22 August 1944.
Private FRANCIS R. MORNEAU, (39688851), Replacement Pool, Squadron "A", 13th Replacement Control Depot (Aviation)	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for two years. Place of confinement not designated in action.

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 61st Article of War.

Specification: In that Private Francis R. Morneau, Squadron A, 13th Replacement Control Depot (Aviation), did, without proper leave absent himself from his organization, at AAF Station 433, from about 2 June 1944 to about 16 July 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by special court-martial for absences without leave for nine days and ten days respectively, both in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority approved the sentence, without designating the place of confinement, and forwarded the record for trial for action pursuant to the provisions of Article of War 50½.

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3. The prosecution, without objection by the defense, introduced a copy of Special Order 133, Headquarters, 1st General Hospital, ETOUSA, dated 30 May 1944, paragraph 7 of which provided that accused, then assigned to the Detachment of Patients, 1st General Hospital, was transferred in grade to the 13th Replacement Control Depot, and would proceed to that station on or about 31 May 1944 reporting on arrival to the Commanding Officer thereof for duty (R6, Pros Ex.G-2). Corporal Max Andrews, Squadron A, 13th Replacement Depot, Station 433, testified that his assignment in the squadron was that of Area Chief, that accused was "turned over" to his area for billeting on 18 July 1944, and that accused had not been present in the witness' organization for duty prior to that date (R6). On cross-examination, witness stated that subsequent to 18 July 1944 accused was a "good soldier", that he came to the witness and "volunteered to do anything he could" and that, as a result, he was detailed as night charge of quarters in the orderly room (R7). It was stipulated by and between the prosecution, defense and the accused that accused "turned himself in" to the British police in Waltham Abbey, Essex, on 16 July 1944, and was in turn released to the custody of the United States Military Police on the same date (R7).

4. Accused, after having been advised of his rights as a witness, testified that he was 47 years of age, that he had been married and divorced, and that he had children one of whom was an Aviation Cadet (R8). He stated that he had been troubled by family matters because his wife had remarried and he had received letters from his children which led him to believe that they were not "being treated as they should be" (R9). He enlisted during the "last World War" and served 18 months (R10). With the advent of the present war, he thought perhaps he "could do some good in the Service" so he again enlisted (R8). Subsequent to this enlistment, accused was offered a discharge "two or three times" but rejected the offers (R10). While still in the United States, he was treated for rheumatism and arthritis and a medical officer recommended that he not be sent overseas but accused "talked him out of that" (R9). He was again hospitalized in England and it was recommended that he be returned to the United States. However, accused did not wish to be transferred out of his "old outfit" and requested that he be permitted to remain with his unit. His request was granted (R9). He also testified that he had been hospitalized and on sick call at other times during his current term of enlistment (R8,9). Another of his commanding officers had recommended that he be sent home because of illness but accused was "always able to talk him out of it". He did not believe his condition was "as bad as it actually is and that is the reason I have tried to stay in the service" (R10).

On cross-examination, accused testified that he left "the Hospital" on 2 June 1944 and had "turned himself in" on 16 July 1944. During at least a portion of his absence he stayed with friends at Waltham Abbey (R9).

It was stipulated that if Captain Marcus P. Goumas, Assistant Surgeon, 13th Replacement Control Depot, Army Air Force Station 433 were present in court he would testify that the accused was seen by him on Sick Call on 25 July 1944, at which time a diagnosis of chronic bronchial asthma, moderate, cause undetermined, plus chronic bronchial bronchitis, mild, cause undetermined, was made. Accordingly, accused was admitted to Sick Quarters and treated until 8 August 1944, when he was discharged. At the time of his discharge, his condition remained unimproved. The climate in the European Theater of Operations was deemed to be "not favorable" for the accused (R10,11). It was the opinion and recommendation of Captain Goumas that accused "be returned to the Zone of the Interior as he has passed his stage of usefulness to the Army in this theater" (R11).

5. The evidence adduced by the prosecution, together with the testimony of accused on cross-examination, constitutes evidence amply sufficient to show that accused absented himself without leave as charged from 2 June 1944 to 16 July 1944.

6. The charge sheet shows that accused is 46 years and 7 months of age, that he was inducted at Fresno, California, on 24 November 1942, and that he previously served from 20 April 1918 to 20 September 1919 with the 7th Cavalry.

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 Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, may properly bedesignated as the place of confinement (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. 1 DEC 1944 TO: Commanding General, IX Air Force Service Command, APO 149, U. S. Army.

1. In the case of Private FRANCIS R. MORNEAU, (39688851), Replacement Pool, Squadron "A", 13th Replacement Control Depot (Aviation), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. In your action approving the sentence you should have designated the place of confinement. However, this may now be done by supplemental action which should be forwarded to this office for attachment to the record of trial. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is the authorized place of confinement for this prisoner, if the dishonorable discharge is to be executed.

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 4349. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4349).

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 15 DEC 1944

CM ETO 4352

U N I T E D S T A T E S	THIRD ARMORED DIVISION
v.	Trial by GCM, convened at Raeren, Belgium, 11 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private WILLIAM H. SCHROEPPEL (36327137), Company B, 23rd Armored Engineer Battalion	

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 on the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private William H. Schroeppel, Company B, Twenty-third Armored Engineer Battalion, did, at Coordinates VK955404, Map Sheet R1, Koln, two miles southeast of Stolberg, Germany, on or about 15 September 1944, while before the enemy, by his misconduct endanger the safety of Task Force 1, which it was his duty to defend, in that he became drunk while a member of an anti-tank gun crew on outpost duty.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for 15 years.

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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. On 15 September 1944, accused was a member of Company B, 23rd Armored Engineer Battalion (R11). His platoon was commanded by Lieutenant George E. Conley and his squad by Sergeant Ralph H. Wiley (R6,11). Lieutenant Conley testified that at approximately 1030 or 1100 hours, 15 September 1944, his platoon was ordered to report to a bridge "about a mile this side of Stolberg and take over the maintenance on the bridge and road, also to protect the bridge". He arrived at the designated area between 1200 and 1300 hours and immediately set up his local defenses (R7-8). He instructed Sergeant Wiley "to set out a 37mm gun crew" at a road block "about half a mile to a mile outside of Stolberg" (R8,10). The lieutenant had been informed that there were enemy troops "up in front of me" and the gun crew was "set up with the idea that there were enemy in front of them" (R8,10). During this time the platoon was under artillery fire and occasional small-arms fire. Also, within three-quarters of an hour after the outpost was set up

> "a dough boy came down the road and artillery backed him up on the corner down to our out post which lasted about half an hour" (R8).

Some three or four hours later, at approximately 1600 or 1630 hours, an infantry company (apparently friendly) came "down the road and pulled out in front" and Lieutenant Conley "pulled on back closer to the bridge" (R8). Accused was at this time in Lieutenant Conley's vehicle and the lieutenant noticed that accused was drunk, so drunk, in fact, that "he could hardly walk" (R8-9). Lieutenant Conley caused accused to be removed from the vehicle and "from there on I didn't have anything to do with him" (R9). Accused had been a member of the lieutenant's command for approximately two years and had had interior guard duty "innumerable" times (R7).

Sergeant Wiley testified that accused was a member of his squad on 15 September and that between 1100 and 1200 hours on that day he "took the men out on the 37 and set it up". Accused was detailed as an ammunition carrier and was instructed as to his duties. The sergeant had the

> "37 gun zeroed in on a road block and I had a .30 caliber machine gun on the right flank--five men on the 37, two men on the .30 caliber. We were supposed to protect that road up through there" (R11-12).

At the time "there was some /friendly/ infantry out ahead of us but we did not know it" (R14). Accused was sober at the time the outpost was set up. At about 1215 hours,

> "there was a shell landed pretty close to the house. I walked around to see if the man was alright; he was sober then" (R13,14).

Between 1200 and 1300 hours the sergeant made an inspection of the outpost and discovered that accused was missing. After search, accused was found "sitting in the cellar talking to himself, drunk" (R12,14). He had a quart bottle with "something yellow in it" which the sergeant took from him and destroyed (R12). Sergeant Wiley then tried to sober accused but "he was drunk and I couldn't do nothing with him" (R13). In his drunken condition accused was of no value to the gun squad (R14).

4. Accused elected to remain silent, and the defense introduced no evidence.

5. The evidence adduced, while lacking in detail, showed that accused was assigned to perform the duties of an ammunition carrier with a five-man gun crew set up as an outpost to protect a road and bridge at a time when his platoon was under enemy fire. It was also shown that accused became grossly drunk while assigned to this duty. By such action he unfitted himself for the performance of his duty at a time when his services were highly necessary thus increasing the hazards to which his unit was already subjected. This offense, while here charged under Article of War 96, is similar to the conduct denounced by Article of War 75, and the evidence here presented might well have been sufficient to support a finding of guilty under the latter article had the offense been so charged (CM ETO 1109, Armstrong; Winthrop's Military Law and Precedents - Reprint, 1920, pp.621-628). In any event, the offense, as alleged in the instant case, constitutes a closely related military offense under Article of War 96 and the evidence present is sufficient to sustain a finding of guilty of the offense charged (Cf: CM ETO 1109, Armstrong, supra).

6. The charge sheet shows that accused is 33 years ten months of age, and was inducted at Camp Grant, Illinois, on 26 March 1942.

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

8. 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).

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 15 DEC 1944 TO: Commanding General, Third Armored Division, APO 253, U. S. Army.

1. In the case of Private WILLIAM H. SCHROEPPEL (36327137), Company B, 23rd Armored Engineer Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty 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 4352. For convenience of reference please place the number in brackets at the end of the order: (CM ETO 4352).

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 4376

U N I T E D S T A T E S v. Private JOHN C. JARVIS (38311129), 3398th Quartermaster Truck Company	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Rambouillet, France, 12 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that Private John C. Jarvis, 3398th Quartermaster Truck Company, having been duly placed in arrest to quarters on or about 21 June 1944, did, at Negreville Bivouac Area Normandy France on or about 9 July 1944, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that * * * did, at Negreville Bivouac Area, Normandy France on or about 9 July 1944, through carelessness, discharge a

US Carbine, Caliber .30 M-1 in his bivouac area.

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

Specification: In that * * * did, after having received a lawful command from Lt. Andrew J. Hart, his superior officer, to surrender a carbine, did at Negreville Bivouac Area, Normandy France on or about 9 July 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of five previous convictions by summary court: the first for refusing to obey the lawful order of a noncommissioned officer to drill and the second for refusing to obey the lawful order of a commissioned officer to report for extra duty, both in violation of Article of War 96, the third for absence without leave (no pass), in violation of Article of War 61, the fourth and fifth each for disobedience of the lawful order of a noncommissioned officer, in violation of Article of War 64 (sic). He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action purusant to the provisions of Article of War 50½.

3. With reference to the Specification, Charge I, the evidence shows that, on or about 20 June 1944, while his organization was stationed in England, accused was placed in arrest in quarters and informed that being in arrest in quarters meant that he was restricted to his company's bivouac area. His organization arrived in France on 6 July. At the marshalling area, before leaving England, his company commander told him that he was still in arrest in quarters and that he would continue to be in arrest in quarters after his arrival in France. On 9 July 1944, while his status remained unchanged, accused, without permission, left his company's bivouac area in Negreville, France.

Concerning the Specification, Charge II, the prosecution showed by strong circumstantial evidence that on 9 July 1944, accused, standing at a point approximately 50 yards distant from his company's bivouac area, deliberately fired several shots from a government carbine into an earthen bank.

With reference to the Specification, Charge III, the evidence for the prosecution shows that after the firing ceased, accused and two other soldiers emerged from the driveway onto the road directly opposite the entrance to the bivouac area (R10). They had between them one

carbine only, which had been issued to Private Warner, one of the other two, but which accused was swinging on his shoulder as they approached the area (R11,14,16,19). Simultaneously, the duty officer, First Lieutenant Andrew J. Hart, of accused's organization, arrived at the entrance, running to ascertain the direction of the firing (R14). The guard testified that, as accused left the lane and entered the road, he offered the gun to one of his companions who had already reached to take it when Hart arrived (R10). According to Hart, he requested accused "to give me the gun. /Accused/ said he couldn't" (R14), explaining in a courteous and respectful tone that "it wasn't his gun" (R17-18). Hart thereupon repeated his request. Hart definitely characterized his first two demands as requests and not orders (R16-19). When accused continued to refrain from complying with these requests, Hart said, "Jarvis * * * I'm giving you a direct order to give me that carbine" (R17). Accused

> "still said he couldn't give it to me. He stated, 'Just a minute', and handed the gun to Private Warner. I asked Private Warner to give me the gun and he did" (R14).

"About three or four minutes" elapsed from the time of Hart's first request until the carbine was actually delivered to him (R17). He received it, however, in "a matter of seconds" after he changed the form of his demand from a request to an order (R18). As soon as Warner received the carbine from accused, he handed it to Hart (R17-18). Accused was courteous to Hart when in response to the officer's direct order, he requested him to wait "a minute" while he, accused, handed the carbine to Warner (R17, 18). The uncontradicted evidence shows that at no time was he actually disrespectful to Hart "other than the fact", according to the latter's testimony, that "he wouldn't give me the gun" (R18).

4. After his rights were explained to him, accused elected to take the stand under oath as a witness in his own behalf (R27). He testified as follows:

> "Sir, two pals and I were coming out walking down the lane with -- when some shots were fired. It was in the direction from which we were coming. We were coming back into the area, sir, our area, when Lt. Hart came out and asked who fired the shots, sir. We didn't know who fired the shots, sir. * * * In fact, no one around knew because all the guards were around but the guards didn't know. So, he asked for my carbine and I told him -- he reached out his hand and said, 'Give me the carbine.' I said, 'Sir, this not my carbine'. He asked for it again. I said, 'Sir, please let me give it to Warner?' So, I said, 'Let

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> me give it to Warner so he can give it to you. It's his carbine.' So, at that I gave it to Warner and Warner handed it over to the Lieutenant" (R28).

Repeating, in further detail, his version of what occurred immediately after the shooting, accused testified:

> "When the Lieutenant came out he asked who fired the shots and he came directly to me. I said, 'Sir, we don't know who fired the shots.' He said, 'It came from your direction.' He said, 'Give me the carbine.' I said, 'Sir, that's not my carbine. This is Warner's carbine.' He said -- I said, 'Sir, if you will permit me to give it to Warner so he can give it to you I will appreciate it.' After that the carbine was given to him * * * By Warner. At that time I had handed it to Warner when I asked him if he will permit me to give it to Warner. But when he said it was a direct order -- * * * It was between hands, between my hand and Warner's hand".

After that it "couldn't have been a second" until Warner gave it to him (R29). If not complying with the Lieutenant's request to give him the carbine was a mistake, it was

> "not a mistake by wanting to willfully disobey an order. It's a mistake in ignorance on the part of my basic training which I had, sir. * * * I was taught not to give up my weapon by request, only give it up by order. That's the reason why I did as I did at the time".

As to the situation when Hart changed the form of his demand from a request to a direct order, accused explained:

> "Actually when he was giving the direct order it was between hands, between mine and Warner's. * * * We were standing side by side and the Lieutenant was facing us. * * * In other words, before he was able to give the direct order, sir, when he asked for it the second time, I was giving it to Warner. He in turn gave it to the Lieutenant. When he said it was a direct order, Warner had it and was giving it to him" (R33-34).

5. The evidence clearly sustains the findings of guilty of the Specification and Charge I.

The Specification, Charge II, alleges that accused carelessly discharged a carbine in the bivouac area. The record shows that the carbine was deliberately fired from a point 50 yards outside the bivouac area into a bank which was also outside. These are entirely different offenses, the gravamen of one being carelessness, the other violation of orders. The offense proved was not the offense charged. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge II and its Specification.

Concerning the Specification, Charge III, the evidence shows that Lieutenant Hart twice requested accused to give him the carbine. In explanation of his failure to comply with these two requests, accused explained that "it wasn't his gun". Hart then gave accused a direct order to give him the carbine, whereupon accused requested Hart to wait "just a minute", at the same time handing the carbine to Warner, of whom Hart immediately demanded and from whom he immediately received it -- within "a matter of seconds" from the time he issued his first and only direct order to accused. The carbine had, as a matter of fact, been issued to Warner with whose permission accused was carrying it at the time he was ordered to deliver it to Hart. According to the guard, who testified for the prosecution, and according to accused, the latter was in the act of handing the carbine to Warner at the time he was ordered to give it to Hart, and, instead of desisting, merely completed the delivery which he had already begun. While Hart's testimony does not affirmatively corroborate the others' as to this particular phase of the transaction, it does not controvert and is not inconsistent with it. Although accused's delivery of the gun to Warner instead of Hart was in contravention of Hart's order and thus constituted a disobedience of it, no such intentional defiance of authority is involved as is necessary to constitute accused's action a violation of Article of War 64 (Bull. JAG, Vol.II, No.8, Aug 1943, par.422(5), p.308). In other words, the offense, under all the circumstances, was not "such a direct and flagrant act of disobedience as is contemplated by A. W. 64, the punishment for which may be death" (Dig.Ops.JAG, 1912-1940, sec.422(5), pp.285-286). Accused's conduct, however, in avoiding compliance in the express manner directed, involved the lesser included offense of failure to obey the lawful order of a commissioned officer to the prejudice of good order and military discipline, in violation of Article of War 96.

6. The charge sheet shows that accused is 29 years seven months of age and that, with no prior service, he was inducted at New Orleans, Louisiana, 21 September 1942.

7. The court was legally constituted and had jurisdiction of the person and offenses. Other than those 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 insufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the findings of guilty of Charge I and its Specification and only so much of the findings of guilty of the Specification, Charge III, as involves finding accused guilty of failing to obey the lawful order of his superior officer in violation of Article of War 96; and only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for nine months.

8. Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sep 43, sec.VI, as amended).

_____ 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, Advance Section, Communications Zone, European Theater of Operations, APO 113, U. S. Army.

1. In the case of Private JOHN C. JARVIS (38311129), 3398th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the findings of guilty of Charge I and its Specification and only so much of the findings of guilty of the Specification, Charge III, as involves finding accused guilty of failing to obey the lawful order of his superior officer in violation of Article of War 96; and only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for nine months, 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 authorized for the offenses of which accused was legally convicted is nine months. In view of this, suspension of the execution of the dishonorable discharge will conform to present policies of this theater for the conservation of manpower. Accordingly, by additional action, which should be forwarded to this office for attachment to the record, you should reduce the period of confinement to nine months, and it is suggested that you suspend the dishonorable discharge until the soldier's release from confinement and designate Loire Disciplinary Training Center, Le Mans, France, as the place of confinement.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4376. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4376).

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 4382

U N I T E D S T A T E S v. Private THERON C. LONG (14007767), Company B, 13th Infantry	8TH INFANTRY DIVISION Trial by GCM, convened at APO 8, U.S. Army (France), 21 October 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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Theron C. Long, (then Corporal), Company B, 13th Infantry, did, in the vicinity of Brest, France, on or about 8 September 1944, desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit: participation in combat against the enemy, and did remain absent in desertion until on or about 9 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 Specification, except the words and figures 8 September 1944, 4382

substituting therefor respectively the words and figures 0900 8 September 1944, and further except for the words 9 September 1944, substituting therefor respectively the words and figures 1100 8 September 1944; of the excepted words not guilty, of the substituted words guilty; of the Charge, guilty. 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 in this case shows that accused on 7 September 1944 was a corporal and assistant squad leader of a platoon in Company B, 13th Infantry (R7). On that date accused's company was in reserve 300 yards in the rear of Company C, 13th Infantry (R4,7). The attack on Brest, France, was in progress (R5,6,9,10). Company C was in close contact with the enemy - so close in fact that hand grenades were thrown (R8). On the evening of said date a warning was issued to the members of Company B that it would replace Company C on the front lines on the next day (8 September) and that an attack on the enemy would also be made by Company B on that date. The warning was given through the chain of command from the company commander to the squad leaders who imparted the information to the squad members (R5,11,15,17). The members of accused's squad were given instructions to this effect by the squad leader on the evening of 7 September (R17) and it was common and general knowledge in the company (R6,12). Commencing in the early morning of 8 September, Company B was under small arms and artillery fire (R8). Between 0800 and 0900 hours it moved forward to replace Company C. The enemy was within 700 or 800 yards of Company B and as the company advanced it received enemy artillery and mortar fire (R5,8).

Early in the morning of 8 September (0300 hours), accused asserted that his left leg pained and bothered him. At 0700 hours his platoon commander permitted him to go to the battalion aid station for treatment. An hour after breakfast accused left the company for the aid station (R9,16). The medical officer at the station testified that he did not treat accused on that date but that he saw him in the courtyard of the station. Accused informed him that his platoon commander had directed him to remain with the Headquarters Company because he was unable to participate with his company (R21). At about 0900 hours while Company B was moving forward to replace Company C, accused reappeared at the company. He informed his squad leader that he was under orders to report back to the aid station (R16).

Accused did not report to the aid station nor did he remain with his company. He appeared at the company kitchen (then located 10 to 15 miles in the rear of Company B) between 1100 and 1200 hours on 8 September and there he remained until the attack on Brest was completed the next day (R23).

In a statement voluntarily made to the investigating officer (Pros.Ex.A), accused admitted he knew his company was preparing for an attack when he left it and that he had no authority to go to the rear. As a witness in his own behalf, accused admitted he went to the kitchen after he went to the aid station (R28,30).

The evidence is convincing that accused by means of artifice and falsehood, at the crucial moment when his company was going into an attack upon the enemy, succeeded in freeing himself from control of his superior officers, He was thereby afforded the opportunity of seeking safety in the rear and he availed himself of it. He went to the company kitchen ten to 15 miles in the rear of the attack and there remained in comparative safety until the battle hazards were concluded. There was substantial evidence from which the court was justified in inferring that he knew of the battle plans and the perils to which he would be exposed. His actions bespoke clearly his intent to avoid these battle hazards. The subtlety of the means he employed taints his cowardice with fraud and deceit. The offense with which he was charged was clearly proved (CM ETO 4570, Hawkins, and authorities therein cited).

4. The charge sheet shows that accused is 22 years two months of age. He enlisted 23 September 1940 at Fort Jackson, South Carolina, to serve for three years. His service period is governed by the Service Extension Act of 1941. No prior service is shown.

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

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

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

Franklin Ater Judge Advocate

Malcolm C. Sherman 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. 16 FEB 1945 TO: Commanding General, 8th Infantry Division, APO 8, U.S. Army.

1. In the case of Private THERON C. LONG (14007767), Company B, 13th 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 4382. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4382).

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

29 DEC 1944

CM ETO 4386

U N I T E D S T A T E S	)	2D ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Headquarters 2d Armored Division, (Holland) 16-17 October 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. United States Penitentiary, Lewisburg, Pennsylvania.
	)	
Privates CECIL W. GREEN (38451694), and WILLARD PHILLIPS (14000193), both of Company B, Supply Battalion, 2nd Armored Division.	)	

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

GREEN

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

Specification 1: In that Private Cecil W. Green, Company "B", Supply Battalion, 2d Armored Division, APO 252, was at or near Heerlerheide, Holland, on or about 5 October 1944 drunk and disorderly in uniform in the home of Frau Vandenhoff, #20 Netelstraat, Heerlerheide, Holland, under circumstances as to bring discredit upon the military service.

Specification 2: In that * * * did at or near Heerlerheide, Holland on or about 5 October 1944, violate a standing order of the First US Army dated 15 September 1944, in that he did, without proper authority, leave his bivouac area at or near Heerlerheide, Holland

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and visit the town of Heerlerheide, Holland.

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

Specification: In that * * * did, at or near Heerlerheide, Holland, on or about 5 October 1944, with intent to commit a felony, viz, rape, commit an assault upon Mien Wynen, by willfully and feloniously attempting to force the said Mien Wynen to the ground and placing his hands over her mouth.

PHILLIPS

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

Specification 1: In that Private Willard (NMI) Phillips, Company "B", Supply Battalion, 2d Armored Division, APO 252, was at or near Heerlerhiede, Holland, on or about 5 October 1944 drunk and disorderly in uniform in the home of Frau Vandenhoff #20 Netelstraat, Heerlerhiede, Holland, under such circumstances as to bring discredit upon the military service.

Specification 2: In that * * * did at or near Heerlerhiede , Holland on or about 5 October 1944, violate a standing order of the First US Army dated 15 September 1944, in that he did, without proper authority, leave his bivouac area at or near Heerlerhiede, Holland and visit the town of Heerlerhiede, Holland.

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

Specification: In that * * * did, at or near Heerlerhiede, Holland, on or about 5 October 1944, with intent to commit a felony, viz, rape, commit an assault upon Nelly Wynen, by willfully and feloniously placing his hand over her mouth and forcing the said Nelly Wynen to lie on her back.

Each accused pleaded guilty to Charge I and Specification 2 thereunder, and not guilty to Specification 1, Charge I, and to Charge II and its Specification. Each was found guilty of all charges and specifications. No evidence of previous convictions of Green was introduced. Evidence was introduced of one previous conviction of Phillips by summary court for absence without leave for one day, in

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violation of Article of War 61. Three-fourths of the members present at the time the vote was taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority approved each sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for each accused, and forwarded the record of trial for action under the provisions of Article of War 50½.

3. The evidence for the prosecution shows that in Heerlerheide, Holland, lived Henry Joseph Vandenhoff, mine worker, with his wife and eight children, of whom two -- Mien and Nelly Wynen, aged 18 and 16 years, respectively -- were Frau Vandenhoff's daughters by a former marriage (R7-8,13-14,17,26). At 1:30 on the morning of 5 October 1944, Frau Vandenhoff was awakened by a ringing of her doorbell and a knocking on the door (R8,14). When her husband opened the door, the two accused were outside and asked to come in and warm themselves (R8-9,14). Accused spoke no Dutch and the Vandenhoffs no English, but accused Phillips knew a little German and so did the Vandenhoffs (R11,13,15,18). Although both accused were strangers to the Vandenhoffs and had obviously been drinking, the Dutch couple received them cordially (R9,13,14,16).

Upon entering, accused deposited their guns in a corner of a front bedroom through which they passed on the way to the kitchen where their hosts lighted a fire and brewed coffee for them (R9,11,14,15,28). When the baby awoke, accused asked to see the children and were ushered into a bedroom where all eight of the children slept (R9,14). There Phillips handed Nelly her dress and told her that she and Mien were to join them in the kitchen (R9,15, 18,27). The girls dressed and went to the kitchen where Nelly drank a cup of coffee with the accused (R10,18-19,27).

Frau Vandenhoff served accused bread and cabbage as well as coffee (R10,14). Accused asked for meat and butter. When told that the family had none, they offered to fetch some from their nearby bivouac area stipulating, at the same time, that the girls should accompany them (R10,14,27). Frau Vandenhoff expressed her unwillingness to this arrangement. When accused insisted, she suggested to her husband that he go along. He started to put on his shoes but desisted when accused signified their disapproval by pointing to his shoes and repeatedly saying "No" (R11,12,15,20,27-28). Frau Vandenhoff testified that when she said that the girls should not go along, accused went into the front room and took their guns from the corner (R11). According to Mien, "when they were speaking to my father they were in the kitchen and the guns were in the sleeping room". She testified that "before they went they put on their overcoats and took up their guns" (R28). Vandenhoff remarked that the accused were good soldiers and would bring the girls back (R11,13).

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He testified that he was afraid they would use their guns, they were "swinging them around" and "working the bolt" but also that he gave his permission for the girls to go with the accused because one of the soldiers had a rosary and he thought they were "pretty good guys after all they were religious" (R15). He remained in the kitchen while the girls and soldiers went through the hall on the way to the front door (R28). In the hall Green banged on the door with his elbow and said, "'Boom, boom, boom'" (R11,13,20). They left with their guns on their shoulders and their arms around the reluctant girls (R20,28). Mien was weeping when she left and so was her mother (R11,12). Nelly testified that they only went with the soldiers because they had to. "The soldiers forced us with their guns" (R20).

Green and Mien stopped in a meadow before they reached the bivouac area (R21,29). With his arms around her, Green kissed Mien three times (R30); then, indicating "by motions" that he was cold, he spread his overcoat on the ground, pointed to it and said, "'Do, do, do'", which Mien interpreted to mean that he wanted her to lie down upon it (R29,30,31). She indicated her unwillingness, whereupon he seized her "at the back" and undertook to push her to the ground. However only one of Mien's hands and one of her knees ever actually touched the ground. When she began to cry, accused placed his two hands over her mouth (R29,31). She then attempted to flee, "and the soldier took me at my left foot, and I nearly fell on the ground, and then I got free and ran away". She ran all the way home, crying for her mother and for Nelly (R29,30). When she arrived, having been absent approximately a quarter of an hour, "she was crying and she was nervous" (R12,16).

Phillips and Nelly proceeded to his tent in the bivouac area, about 10 to 15 meters from the meadow (R20-21). He forced her into his tent with his knee, after seizing her at the back. She sat down on some blankets and he went to the kitchen. When he returned, after about two minutes, he brought some cans with him (R21). Then, placing one hand on her neck and the other on her back, he pushed her down so that she lay on her elbows (R21-22). She was never at any time forced completely down on her back but remained, until she finally arose, lying on her forearms with her legs outside the tent (R22-23). When she attempted to cry, he held his two hands on her mouth. She "tried to come into sitting position again but I couldn't ". Accused unbuttoned his trousers, exposing his privates to her observation. She beat him in the face and kicked him. He loosened one button on her coat, held one hand over her mouth and tried to get his hand under her dress (R22). She freed herself then and sat up (R25). Accused at that time "heard someone climbing over the fence so he went outside of the tent to look who was there". This terminated the assault, during which, Nelly testified, she kicked him twice, hit him once in the face and cried out only once and no more because "he got his hand over my mouth and I couldn't (R23).

Outside, Phillips found Green climbing over the fence. The two, after talking together, approached the tent and Phillips instructed Nelly to come out. Green took her to the kitchen truck, about 20 meters distant, once forcing her against the truck and when she cried; he threatened to shoot her if she didn't keep still. Phillips remained in the tent (R23).. In the kitchen, Green procured some cans and "told me to take some of them but I didn't". Green had her in his arms but freed her when Phillips joined them and the three returned to the tent. Phillips "had two cans with him and said if I would do for five minutes what he asked I could have those two cans of meat" (R24). Then,

> "the two soldiers began to talk together and I fled away. * * * I fled to the wire and the soldier with the black hair /Phillips/ came behind me and I was just over the wire when he reached the same place. I was on the other side of the wire, and he was inside, and he asked me again if I would do five minutes what he asked then I could have those two cans of meat" (R24).

Nelly ran directly home. "In the meadow I ran", she testified, "and on the street I walked" (R24). When she arrived, bearing canned food which she had taken from the camp, she was excited; she had mud on her shoes and her dress and stockings were torn as the result of her hurried climbing of the fence (R12,16,24,26). She had been absent from home for about half an hour (R12).

Major James D. Webster, investigating officer, testified that after being warned, accused Phillips made a sworn and accused Green an unsworn statement (R33,35). According to Phillips, members of the Vanderhoff family told accused that there was no food in the house and no milk for the baby whereupon they offered to procure some. "The man said that the girls could go with them, and at first he started to go with them but changed his mind" (R34), Phillips did not know why. Phillips proceeded, with "the girl", to his company area, leaving her just outside his tent while he

> "went off then to the kitchen to get some milk and when he came back to the tent where the girl had been she was standing under a tree, and then he heard some shots that rather frightened him, so he took the girl to the fence where they had come in, and let her go. When he had first come into the area he had his arm around her, and when he stopped at the tent he had kissed her, and she didn't fight him, but pushed him away. He did not touch her other than that, and did not attempt to molest her clothing, and did not touch his clothing * * *" (R34).

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Green's statement was to the effect that the Dutch family where he was given some coffee gave him also

> "a hard luck story about having no milk for the baby. The man in the house got the coats for the two girls and told them to go with him. He went with one of the girls. The step-father of the two girls made no attempt to go himself. He walked with the girl to the company area of Company B and he had his arm around the girl and when he got to the fence gate he left the girl and walked on up to the area. He did not attempt to love up the girl and did not take off his coat, he wasn't with her long enough after they stopped to even take his coat off. * * * He then went into the area and found the other girl standing under a tree and he kissed her and she did not struggle, but pushed him away. He stated the other girl did act a little bit frightened and he didn't know whether his kissing her frightened her or whether she was already frightened. He did not attempt to love her up or anything else. He walked to the kitchen and when he came back she was gone" (R36).

4. After their rights were explained to both accused, Phillips elected to remain silent, Green to take the stand in his own behalf and also "as a defense witness for Private Phillips" (R38-39). He was sworn and testified substantially as follows:

On 4-5 October 1944 he shared with Phillips a pup tent in his company bivouac (R39). When he entered the area, in the early morning of the 5th, Phillips and "the girl" were standing "right beside each other" under a tree 25 or 30 feet from the tent. Accused joined them and kissed the girl, who did not appear to be angry (R40). Phillips accompanied her to the fence. After she left, Green went to the kitchen (R40,41).

5. There is substantial evidence that each accused at the time and place alleged committed an assault upon the girl named in the applicable specification. The sole question requiring consideration in each instance is whether there is any substantial evidence that the assault was made with intent to commit rape.

> "The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice" (MCM, 1928, par.149l, p.179).

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"The intent to commit rape must appear from the evidence to have been such as that the accompanying battery, if effectuated, would have amounted to the legal crime of rape. It must be inferable from all the circumstances that the design of the assailant, in the battery, was to gratify his passions at all events and notwithstanding the opposition offered--to overpower resistance by all the force necessary to the successful accomplishment of his purpose" (Winthrop's Military Law and Precedents, Reprint, p.688).

"The question whether there is any substantial evidence to sustain the finding of the court that at the time of the assault accused had the intent to rape the girl, is a question of law which must necessarily be considered by the Board of Review and does not involve determining the weight of the evidence or passing upon the credibility of witnesses. Where an assault is committed on a woman or girl, and the facts do not afford a reasonable basis for the inference of an intent to commit rape, the Board of Review will not approve a finding of guilty of assault with such intent (CM 199369, Davis; CM 220805, Peavy; CM 230541, Daniel)" (CM 239839, Harrison (1943), 25 BR.273).

"Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted" (MCM, 1928, par.149l, p.179).

In Green's case the details of the actual assault committed in the meadow present a highly questionable basis for the inference that accused intended then and there to employ ultimate force if necessary to achieve his purpose. In Phillips' case, Kelly's evidence presents a stronger foundation for such an inference, in that the assault she described was definitely aggravated by elements of indecency. In neither case was the violence more than negligible and neither girl suffered any physical injury. Accused moreover manifested dispositions to persuade and bargain, which, though not wholly inconsistent with an intent to use ultimate force if other measures failed, certainly casts some doubt as to their immediate intention of doing so. But when considered in connection with accused's conduct in exploiting their status as liberators to coerce the unwilling girls to leave their home at one o'clock in the morning, under circumstances disclosed by the testimony of four members of the family, the slight violence employed in the assaults might reasonably be construed as motivated and accompanied by a more sinister purpose than mere unconscionable inducement to reluctant consent. With such additional and highly significant evidence to support the inference of concomitant intent, the court's findings of guilty

of assault with intent to commit rape may not legally be disturbed on appellate review (CM ETO 1953, Lewis).

6. On the second (and concluding) day of the trial, the two prosecutrices, Frau Vanderhoff and her husband, addressed a joint petition, signed by all four, to the court urging leniency, representing that when accused were in their house, they were under the influence of alcoholic drinks and, as a result thereof, not wholly responsible; furthermore, that their acts on the occasion in question produced no harmful consequences.

7. The charge sheet shows that Green is 21 years of age and that, with no prior service, he was inducted at Little Rock, Arkansas, 22 February 1943; that Phillips is 22 years of age and that, with no prior service, he enlisted at Jacksonville, Florida, on 23 July 1940, to serve for 3 years, his service period having been subsequently extended by the Service Extension Act of 1941.

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

9. Penitentiary confinement is authorized under Article of War 42 upon conviction of assault with intent to commit rape in violation of the Article of War 93 (18 USC 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.229, WD, 8 June 1944, sec.II, par.1(b) 4(3b).

Judge Advocate

Judge Advocate

Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 DEC 1944 TO: Commanding General, 2d Armored Division, APO 252, U. S. Army.

1. In the case of Privates CECIL W. GREEN (38451694), and WILLARD PHILLIPS (14000193), both of Company B, Supply Battalion, 2d Armored Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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. I have approved the holding of legal sufficiency after much consideration and with reluctance. As an office of appellate review, the Board of Review and myself are bound by certain rules which have been stated, as follows:

> "Convictions by court-martial may rest on inferences but may not be based on conjecture. A scintilla of evidence - the 'slightest particle or trace', is not enough. There must be sufficient proof of every element of an offense to satisfy a reasonable man when guided by normal human experience and common sense springing from such experience" (CM 223336 (1942), Bull.JAG, Aug. 1942, Vol.I, No.3, sec.422, pp.159,162).

> "In the exercise of its judicial power of appellate review, under A.W. 50½, the Board of Review treats the findings below as presumptively correct, and attentively examines the record of trial to determine whether they are supported in all essentials by substantial evidence. To constitute itself a trier of fact on appellate review and to determine the probative sufficiency of the testimony in a record of trial by the trial court standard of proof beyond a reasonable doubt would be a plain usurpation of power and frustration of justice" (CM 192609, Hulme, 2 B.R. 19,30).

> "The weighing of the evidence and the determining of its sufficiency, the judging of credibility of witnesses, the resolving of conflicts in the evidence and the determination of the ultimate facts were functions committed to the court as a fact-finding tribunal. Its conclusions are final and conclusively binding on the Board of Review where the same are supported by substantial competent evidence" (CM ETO 895, Fred Davis et al).

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The reviewing authority, however, has a broader power. He is permitted to weigh the evidence and it is his duty to do so and to consider all other aspects of the case, in order that justice may be done.

These two soldiers are convicted of assault with intent to rape. As to the intent required in this crime, there seems to be a misunderstanding - a belief that all that is necessary to make out the crime is a desire for sexual intercourse accompanied by an assault. This view fails to distinguish other cases which are sometimes described as forceable fondling or indecent assault, which are preliminary to and with the hope of securing voluntary intercourse. The requisite intent is stated on page 179, MCM, as follows:

> "The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice". (Underscoring supplied).

The conduct of these two soldiers in invading the Dutch home after midnight was disgraceful to American arms. They could well have been charged with kidnapping the two girls. But the assaults were not brutal, were not persisted in and do not convince me that they intended to overcome any resistance by the force necessary. The girls were not physically injured. They were manhandled but neither was forced to a complete prone position. Both escaped and were not pursued. Both they and their parents have requested leniency. It is evident that, after one girl fled, they could have accomplished rape of the other, had that been their intention.

It is my suggestion, therefore, that by supplementary action you approve only so much of the findings of guilty under Charge II and its Specification, as to each accused, as involves an aggravated assault in the manner alleged. Such offense will support confinement for five years. The other two offenses will support confinement for one year. Green is 21 years of age and has served almost two years; Phillip is 22 years of age and has served more than four years. Both soldiers were drunk and so far as shown, their prior records were good. It is believed that the dishonorable discharge as to each should be suspended so that the government may preserve its right to use them again as soldiers, and the Loire Disciplinary Training Center should be designated as the place of confinement.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4386. For conven-

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ience of reference, please place that number in brackets at the end of the order: (CM ETO 4386).

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

CM ETO 4428

22 NOV 1944

UNITED STATES v. Private OTIS ROSS (35797838), Detachment of Patients, United States Army Hospital Plant 4167	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Whittington Barracks, Lichfield, Staffordshire, England, 27 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 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 93rd Article of War.

Specification: In that Private Otis (NMI) Ross, Detachment of Patients, United States Army Hospital Plant 4167, did, at Warwick, Warwickshire, England, on or about 21 August 1944, with intent to commit a felony, viz; commit rape, commit an assault upon Mrs. Frances Mary West, by willfully and feloniously throwing the said Mrs. Frances Mary West on the ground and placing his body upon her.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 119 days in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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3. The evidence indisputably established that, at the time and place alleged, Mrs. Frances Mary West, of 42 Friars Street, Warwick, was taking her small dog for a walk. As she was returning home she was suddenly attacked by the accused who

> "threw me to the ground. He proceeded to put his hands up my clothes. Then I struggled. I got partially to my knees and he threw me down again and turned me over on one side and tried to pull my knickers down. I screamed and shouted 'help' in desperation."

He got on top of her while she was on the ground. She sustained a scratched and bleeding nose and bruises on one side of her face (R6-8). Robert W. Henshall, a sheet metal worker, of Friars Street, Common Gates, Warwick, saw accused follow and then run after Mrs. West (R10). At the time of the attack, she was seen on the ground with accused on top of her and Henshall and two other men "shouted to them". Accused jumped up and ran, but was quickly "captured and brought back and turned over to the police" (R11). He was quiet, made no effort to run away, talked sanely and sensibly and was not drunk (R12). At the trial he was identified as her assailant by Mrs. West (R10) and by Henshall (R11). Lance Corporal Horace Fisher, Budbrooke Barracks, near Warwick, saw accused as he was pursued by three men. He was present when accused was overtaken and heard him say "If I've done anything wrong, I'll pay for it" (R13). On 24 August 1944, accused was interviewed by First Lieutenant Victor D. Reynolds, 307th Station Hospital, who warned him of his rights under the 24th Article of War (R14). Accused indicated that he understood his rights and voluntarily signed a statement, which described his following Mrs. West, knocking her down and running when people approached (R15-16; Pros. Ex.1).

4. After his rights were explained to him, accused elected to remain silent and no evidence was introduced in his behalf (R16-17).

5. The evidence supports the findings that accused at the time of the assault upon his victim entertained the specific intent to commit rape. The findings of guilty were fully warranted (CM ETO 2500, Bush; CM ETO 3093, Romero; CM ETO 3163, Boyd, Jr.; CM ETO 3255, Dove; CM ETO 3644, Nelson).

6. The charge sheet shows that accused is 24 years seven months of age and was inducted 2 April 1943 at Cincinnati, Ohio. 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. Confinement in a penitentiary is authorized for the crime of assault with intent to commit rape by AW 42 and sec.276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

_____ Judge Advocate

Elwood W. Sargent Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 22 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U.S.Army.

1. In the case of Private OTIS ROSS (35797838), Detachment of Patients, United States Army Hospital Plant 4167, 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 4428. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4428).

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

19 DEC 1944

CM ETO 4443

U N I T E D S T A T E S	8TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO #8, U.S. Army, (France), 27 October 1944.
Private GEORGE H. DICK (6849121), Company B, 28th 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 specifications:

CHARGE: Violation of the 86th Article of War.

Specification 1: In that Private George H. Dick, Company B, 28th Infantry, being on guard and posted as a sentinel, at or near two (2) miles northeast Holzthum, Luxembourg on or about 0330, October 13, 1944, did leave his post before he was regularly relieved.

Specification 2: In that * * * being on guard and posted as a sentinel, at or near two (2) miles northeast Holzthum, Luzembourg on or about 0330, October 13, 1944, was found sleeping under a haystack, about thirty (30) feet from his post.

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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 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 undisputed evidence established that on the morning of 13 October 1944, at 0200, accused, a member of Company B, 28th Infantry (R4), assumed his assigned guard post in the Siegfried Line, near Holzthum, Luxembourg (R9,10,14,23-25). The post, which was a one man post (R16) and stationary (R6,15), consisted of a hole in the ground about ten or 15 yards from a haystack (R7) and commanded a field of fire to the front (R9) where enemy patrols had been operating (R14,16). The nearest known enemy activity at the time was about 800 yards fron the post (R25). The sentinel was to remain in the hole (R9-10), and accused was present when orders concerning the posts in the area were given to the men (R25). When his successor on guard came to relieve him at 0300 hours, accused was not to be found (R5). His squad leader, notified of his absence, made a search for him in the immediate area without success (R6). Private Keith E. Roth, a member of accused's squad, joined in the search and crawled into a hole in the haystack where he found a soldier whom he heard "breath loud." He shook the soldier's leg and returned to report the circumstance to his platoon leader. The latter returned to investigate, but the unidentified occupant of the haystack had vanished. A short time later Roth overheard "some other fellows talking" to accused, who said to them that "he was asleep around the haystack" (R8,11,12,13). On the same day at 0700 (R19), accused's commanding officer talked with him, warned him of his rights under the 24th Article of War, advised him "that he didn't have to say anything", and that what he said might be used against him. He asked accused "whether or not he slept on post". Accused answered "Yes" (R18).

4. After his rights were explained to him, accused elected to remain silent (R19-20).

5. Charges were served on accused three days before the trial date. In this instance, accused answered "No" when asked if he objected to "being brought to trial at this time" (R3-4) and it was evident that none of his substantial rights were

thereby prejudiced (CM ETO 5004 Scheck and authorities therein cited).

6. The record of trial makes no reference to the presence at or absence from the trial of either First Lieutenant Peter Pellegrini, an Assistant Trial Judge Advocate, or First Lieutenant James A. Sears, an Assistant Defense Counsel. Their absence, however, "in no wise affected the validity of the proceedings or rights of the accused" (CM 130217 (1919), Dig. Ops. JAG. 1912-1940, sec.395 (54), p.235; CM ETO 4235, Bartholomew et al).

7. As to Specification 1, the elements of proof of the offense alleged are:

> "(a) That the accused was posted as a sentinel, as alleged; and (b) that he left such post without being regularly relieved" (MCM, 1928, par. 146c, p.161).

The fact that the sentinel was not posted in the regular way is not a defense (MCM, 1928, par.146a, p.160). The evidence without contradiction shows that at 0200 13 October 1944 accused assumed sentry duty at his designated post and that at some time before 0300 he left his post before he was regularly relieved. His guilt, as alleged, was clearly shown by the evidence (CM ETO 2131, Maguire, and cases therein cited).

8. Referring to Specification 2, there are three ways by which a sentinel may commit an offense in violation of Article of War 86: by being found drunk on post, sleeping on post, or by leaving it before he is regularly relieved. Once a sentinel leaves his post before he is regularly relieved, the offense is complete and it is immaterial whether he then sleeps in his tent or barracks, or even under a haystack, as in this instance. Unless accused was on his post, it was improper to charge him with

> "sleeping under a haystack, about thirty (30) feet from his post".

under Article of War 86, since such conduct is not prohibited by any language in the article. Neither could accused properly be charged with or found guilty of such conduct in violation of Article of War 96.

> "One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person. Thus a soldier should not be charged with dis-

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> orderly conduct and for an assault when the disorderly conduct consisted in making the assault, or for a failure to report for a routine schedule duty, such as reveille, and for absence without leave, when such failure to report occurred during the period for which he is charged with such absence without leave. * * *(MCM, 1928, sec.27, p.17).

So, in this instance, accused could not properly be charged as set forth in the language of Specification 2 for an offense in violation of Article of War 96, as a neglect to the prejudice of good order and military discipline, when the conduct alleged was not wrongful in itself, but merely followed the offense of leaving his post before he was regularly relieved, already charged under Specification 1.

In adding Specification 2 the draftsman of the charges was undoubtedly influenced by the thought expressed in the following language:

> "However, there are times when sufficient doubt as to the facts or law exists to warrant making one transaction the basis for charging two or more offenses" (MCM, 1928, par.27, p.17).

The pleader was evidently in doubt as to whether accused, on the facts, should be charged with leaving his post or with being found sleeping on his post and thus in effect, pleaded the offenses in the alternative, anticipating that one of the Specifications could be supported by the evidence.

> "Where, however, the case falls quite clearly within the definition of a certain specific article, to resort to plural charges is neither good pleading nor just to the accused * * * An unnecessary multiplication of forms of charge for the same offence is always to be avoided" (Winthrop's Military Law and Precedents, Reprint, p.143).

For the foregoing reasons, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings under Specification 2 of the Charge.

9. The charge sheet shows that accused is 27 years of age and was inducted 23 October 1943, to serve for the duration of the war plus six months. He had prior service with Infantry

Unassigned from 11 December 1933 to 17 March 1936, inclusive.

10. The court was legally constituted and had jurisdiction of the person and offense. Except as noted no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specification 1 and the Charge, legally insufficient to support the findings of guilty of Specification 2 and legally sufficient to support the sentence.

11. The penalty for leaving post by a sentinel before he is regularly relieved, in time of war, is death or such other punishment as the court-martial may direct (AW 86). 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. 19 DEC 1944 TO: Commanding General, 8th Infantry Division, APO 8, U.S. Army.

1. In the case of Private GEORGE H. DICK (6849121), Company B, 28th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specification 1 of the Charge and the Charge, legally insufficient to support the findings of guilty of Specification 2 of the Charge and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4443. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4443).

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

CM ETO 4444

18 NOV 1944

UNITED STATES	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Sergeant JOHNNIE E. HUDSON (34741799), and Technician Fifth Grade LEO VALENTINE, SR., (32954278), both of 396th Quartermaster Truck Company, and Technician Fifth Grade OSCAR N. NEWMAN (35226382), Headquarters and Headquarters Company, 712th Railway Operating Battalion.	Trial by GCM, convened at Reims, France, 3 October 1944. Sentence: As to accused Hudson: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. As to accused Valentine and Newman: Each 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 charged separately and tried together by direction of the appointing authority.

Accused Hudson was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.
Specification: In that Sergeant Johnnie E. Hudson, 396th Quartermaster Truck Company, did, at or near Beaunay, France, on or about 18 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Raymonde Dehu.

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Accused Valentine was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.
Specification: In that Technician Fifth Grade Leo Valentine, Sr., 396th Quartermaster Company, did, at or near Beaunay, France, on or about 18 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Raymonde Dehu.

Accused Newman was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.
Specification: In that Technician Fifth Grade Oscar N. Newman, Headquarters and Headquarters Company, 712th Railway Operating Battalion, did, at or near Beaunay, France, on or about 18 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Raymonde Dehu.

Each accused pleaded not guilty. Four-fifths of the members of the court present at the time the vote was taken concurring, accused Hudson was found guilty of the Charge and Specification directed against him. All of the members of the court present at the times the votes were taken concurring, accused Valentine and Newman were each found guilty of the Charge and Specification directed against each of them. Evidence was introduced of one previous conviction of accused Newman by summary court for absence without leave of unstated duration, in violation of Article of War 61. All of the members of the court present at the times the votes were taken concurring, accused Valentine and Newman were each sentenced to be hanged by the neck until dead and accused Hudson 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, the Commanding General, Advance Section, Communications Zone, European Theater of Operations, with respect to accused Hudson approved his 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. With respect to accused Valentine and Newman he approved their respective sentences and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed each of the sentences imposed upon accused Valentine and Newman, and withheld the order directing execution of each of the sentences pursuant to Article of War 50½.

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

About 6 pm (French time) on 18 September 1944 the accused Newman (white) and Valentine (colored) entered the cafe of Madame Madeleine Pionnier in Fromontiers, Marne, France, and there encountered Mademoiselle Renee Pionnier, the daughter of the proprietress (R7,8,10). They solicited sexual intercourse from the young woman and also alcoholic liquor. Upon being refused they departed (R7,8). They proceeded in a "jeep" to the shop of Madame Germaine Dehu in the same town. Newman entered the shop and requested of Madame Dehu and her daughter, Mademoiselle Raymonde Dehu, age 17 years, butter and cheese (R11,12,13). Upon being informed by Raymonde that none was available, Newman pointed to the "jeep" and repeated the word "butter". Madame Dehu, believing Newman had butter and cheese in the motor vehicle, accompanied him to it. She was followed by Raymonde (R10,12,14). When they reached the "jeep" accused Valentine was in the driver's seat behind the steering wheel and accused Hudson (colored) was in the rear seat lying down (R12,14). Without warning, Newman picked up Raymonde, threw her into the car, placed her next to Valentine in the front seat, entered the car and sat next to her (R10,12,14). Madame Dehu grabbed her daughter, who attempted to hold to her, but Newman broke the hold. Valentine started the motor and drove the "jeep" away. The girl struggled to free herself and cried for help as the "jeep" was driven rapidly through the village (R12,14). Finally Newman pushed the girl into the back seat of the car where Hudson held her fast (R9,14). While in the car Newman removed Raymonde's drawers and hygenic bandage. The girl was in a menstrual period (R14).

Valentine drove the vehicle in the direction of Champaubert and then Etoges and near the latter community turned aside to the small village of Beaunay where the "jeep" was stopped. Newman and Valentine dragged the girl from the car and threw her on to the ground (R15). At that time her outer apparel had not been removed (R19). Valentine was armed with a rifle which he twice placed at Raymonde's head while she fought her assailants (R16,20). Without undressing Raymonde Newman forced his penis into her private parts and engaged in sexual intercourse (R15,16,16½). When Newman had completed the sexual act, Valentine took his place on the girl's body and likewise had complete sexual connection with her (R15).

At the conclusion of the act of intercourse by Valentine the victim escaped and within a short distance encountered a French cyclist to whom she appealed for protection. She mounted the bicycle with him. The three accused in the "jeep" followed the girl and the cyclist. When they overtook them, Valentine threatened the man with his rifle. She testified that the Frenchman put her off of the bicycle and said, "it would be better if I (Raymonde) went" (R15,19). The accused placed Ray-

monde in the vehicle and themselves entered it. It was driven into a side road and halted (R16). The young woman was then entirely disrobed by the accused (R16,19,20). She was thrown to the ground and Newman had sexual intercourse with her for the second time. Valentine, following Newman, sexually engaged the girl (R16). It was now that Hudson for the first time attempted to secure intercourse with her. He laid on top of her but effected no penetration (R16,17). Raymonde succeeded at this stage of the orgy in breaking away from Hudson and he ceased his efforts to overcome her (R17). She was returned to the car, but her clothing, except the blouse, was not recovered. However, Hudson placed his field jacket about her. In this state of undress she was taken into the village where Hudson reclaimed his jacket. The girl then wore only her blouse which reached to her waist. Shaken, cold and bruised, she was at about 10:30 p.m. allowed to depart (R17).

With respect to Hudson, Raymonde asserted that upon arrival at the scene of the first acts of intercourse he gave her a small Catholic medal. The girl put it around her neck to "protect" herself. He informed her he was a Catholic. "He was less brutal than the other two" (R18,20), although he made a determined effort to penetrate her upon the occasion of the second attack and she freed herself only as a result of her struggle and resistance. Prior to the time Newman and Valentine first had intercourse with her, Hudson held her by the wrist (R32,33). Raymonde, recalled as a witness for the court, amplified her testimony thus:

> "Until the moment that the white man and the driver raped me Hudson held me prisoner, but when the other two men started on me he drew away. The colored man (Valentine) held me down and stood over me while the white man (Newman) raped me. * * * At first it was my impression that this man (Hudson) wanted to protect me, but afterwards I saw that he was with the others. That is when he layed (sic) down on me" (R33).

Raymonde was examined by Dr. Henri Provendier, Montmort, Marne, France, at midnight (French time) on 18 September 1944 (R20-21). His report of her condition was as follows:

> "Her mental state --- she was very, very excited. She reminded me of a person I have already seen that had been questioned by the Gestapo. She was very, very excited and seemed to have reached the limit of her strength. Physically, she bore traces of numerous bruises on her legs. Her legs were scratched. She bore scratches on her forearms, and she had been beaten behind her right ear. I could distinctly see the traces of teeth of the high and lower jaws. I found no traces on her breast or on her dress or on her stomach. * * * I made a temporary examination without medical instruments and I saw inside the girl's privates. I saw that she

had been torn, but I am not sure of having seen a man's sperm because of the blood. I continued my examination locally with an electric lamp, a torch, and I found that the lips were swollen and torn. I can also say that the hymen was torn also. * * * I saw that this girl's private party had been torn on the superior party above and below the whole length. Her parties were torn at least four or five millimeters" (R21).

At 4 p.m. on 19 September 1944, First Lieutenant N. M. Hornstein, Medical Corps, 28th Field Hospital, also made a physical examination of the girl (R21-22). He testified as follows concerning his findings:

"Q. Will you tell the court what you found upon examination of this girl?
A. First I found her lips were badly bruised. She had a bad bruise behind the ear which looked as if caused by teeth. On her back she had a bad superficial abrasions and bruises. She also had some cuts on her thighs. Her hymen had been broken recently in three places also a tear of the fourchette.
Q. What is the fourchette?
A. It is the outermost portion of the vagina.
Q. Was the tear on the top side or the bottom?
A. Both.
Q. That would be extending backward to the rectum?
A. Yes sir.
Q. How long tears did you find?
A. The tears were three-quarters to an inch long. Tears in the hymen were about a half inch long.
Q. Could you tell whether they were new or old tears?
A. They were definitely new tears.
Q. Was the girl menstruating at that time?
A. She was" (R22).

Statesments of the accused each bearing date 19 September 1944 were introduced in evidence (Newman: R24; Pros.Exs.7 and 8; Hudson: R26, 27; Pros.Exs.9 and 10; Valentine: R27,28; Pros.Exs.11 and 12). In each instance the court was instructed that:

"only so much of the statements as pertains to the accused making it will be considered and any statement involving any other persons is not considered" (R26).

Inasmuch as the above extra-judicial statements are similar in substance and effect to the unsworn statements of each accused made in open court it is unnecessary to reproduce them.

4. For the defense, Captain Donald H. Martin, 396th Quartermaster Truck Company, commanding officer of accused Hudson and Valentine, testified that the characters of each of them had been excellent and that

> "Sergeant Hudson had been one of my outstanding non-commissioned officers in this theater of operation. He has handled machines and ammunition in my company. I have trusted him with more trucks than ordinarily given to a Buck Sergeant because he had been efficient. I have not, until this incident, found anything detrimental to his character. Corporal Valentine back in the states was assistant to my supply sergeant and his work was of the highest caliber, and I found he was thoroughly to be trusted. In this theater he has performed as a truck driver, and nothing but the incident here has been reported to me to lead me to believe he was not operating efficiently" (R29).

Each accused elected to make an unsworn statement to the court. The same are as follows:

Hudson

> "I borrowed the Lieutenant's peep. I asked him could I borrow it to go down town, but did not tell him why I wanted it. I get T/5 Valentine to go with me. I goes to Chalons. We goes in a place and has several drinks there. After having several drinks there is a white soldier man by the name of Neil. We offered him a drink and asked where we could get a bottle to take back to one of our officers. After we had several drinks we goes to another cafe. On our way he wanted to stop at the APO. He told us he would take us to another cafe and probably get a bottle. We goes up and we has several drinks. I am pretty drunk myself. I told them I was ready to go back to camp. They said no let's go someplace. We drove to some other town. We stopped and had something else to drink, I can't remember exactly what. I think it was wine. They picks up a girl in the peep. At that time I was lying in the back because I was drunk. They drove down further. I raised up and the lady was sitting in be-

tween Valentine and Newman. She was struggling and I didn't pay any attention because I was drunk. They moves in a little field. I vomited and I was feeling bad. I feel better and asked why they didn't leave her alone. They wouldn't say anything. One said your turn now. The kid was lying on the ground. She was trying to tell me something. After I realize what was going on I layed on her. I gave her my rosary because we bad (sic). I did that to show her I wanted to help her and didn't want to harm her" (R30-31).

Valentine

"Hudson had the peep. He didn't tell me what he had it for. We went to Chalons. He told me to get a bottle at Chalons. We were looking for a truck lost a few nights before. We looked at Chalons and didn't find any line on it. We went to a cafe, went in and had a few drinks. We left there and went to another cafe. From there we picked up Neil Newman. We had a few drinks there and left and went to another cafe to have a few drinks. Then we started looking for the truck. Hudson was driving at that time and I took over the wheel. We drove to a little town. Newman pulled over to the curb. I thought he was asking for information. At that time he grabbed this girl. I asked him what he was doing, and he said drive on. We drove off about a mile or two. We pulled off on a little road; took her out of peep lying her on the ground and Newman intercoursed her, then Hudson intercourse her, and then I intercoursed her. I wanted to get her home but I didn't know where she lived. We put her back in the peep. Hudson put her in the car and gave her his jacket. We took off and started down the other highway for Chalons and the MPs stopped us and put us in arrest" (R31).

Newman

"On the afternoon of 18 September I went across to the railroad station at Chalons. I went in to get a beer. I got beer and met two fellows. They inquired about Chalons. I told them I knew a fellow who might sell a bottle. I asked him and he couldn't do it. We started to APO. They said they would let me off. We went out and drank ten quarters of champagne with our-

selves and two MPs and I don't know how much cognac. The place was closing and something was said about Paris. We started to go. I was driving. Valentine said he was going to drive. I told him he could We went to another town. I don't remember seeing the girl. I thought Hudson was the man who got her in the peep. I don't remember having stopped, but once Valentine had his carbine in front of me and said I was going to be first. He got out first and he had the gun. He told me to get out. He put a shell in the chamber of the carbine. She was praying and he told me to take her pants off. By that time he tore them off. She was still praying. He slapped her two or three times. I told him not to hit her. By that time she was on the ground. I got on top of her. I supposed I penetrated her but I don't think I came. I went back. Hudson got on her. Valentine pulled him off and screwed her again. We got into the jeep and Johnnie gave her his jacket. We proceeded up the road and the MPs stopped us. The Sergeant out there went over and got a command car and they took statements from me. I have been under arrest since" (R31-32).

5. The trial of the three accused together, pursuant to direction by the appointing authority, although they were charged separately, was proper under the circumstances herein disclosed (CM ETO 3475, Blackwell, et al, and authorities therein cited).

6. The legal principles governing this case with respect to Newman and Valentine are well established and free from doubt. They may be summarized as follows:

"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 of all resistance" (1 Wharton's Criminal Law, 12th Ed., sec.701, pp.942-943) (Underscoring supplied).

The testimony of the victim, Raymonde Dehu, corroborated and supported by the testimony of Dr. Provendier and Lieutenant Hornstein, proves beyond all doubt or contradiction that Newman and Valentine each had carnal knowledge of the girl, on two separate occasions. Four distinct acts of copulation were shown. Penetration of the young woman's private parts during each of these acts of intercourse was proved and admitted by Newman and Valentine. The first element of the offense with which these men were charged was therefore established and no further comment is necessary.

These acts of intercourse were compelled by force and violence visited upon the person of the victim by her assailants. The evidence cries aloud with proof of her non-consent and resistance to the attacks upon her virtue. The young woman struggled against the advances of the

accused when she was kidnapped and placed in the "jeep" by Newman and during the course of the drive to the scene of the first assaults (R14). During the first acts of intercourse by Newman and Valentine she resisted but was held in captivity by the brute strength of her captors (R16). In spite of the ferocity of the attacks and the overpowering strength of the three accused she succeeded in escaping, and was recaptured when a fellow countryman refused her succor (R15). After she had been taken prisoner the second time and entirely disrobed she continued her resistance, only to be subdued by Newman and Valentine, who again violated her. When Hudson attempted to force intercourse upon her she succeeded in escaping from his embraces (R17). Raymonde described her physical mistreatment (aside from the sexual acts):

> "The colored soldier (Valentine) struck me, pinched and kicked me, and the white man (Newman) twisted my wrist. The third man (Hudson) did not strike me" (R19).

Her external injuries she detailed as follows:

> "I bore a bruise behind my head, my upper lip was swollen, my left cheek was scratched, and I had bruises on my back all over my body except the breast. And I also had a swollen finger" (R19).

The foregoing is a substantial body of evidence which supports the court's finding that Raymonde did not consent to any of the acts of intercourse with Newman and Valentine but conversely that she resisted all of their advances and that intercourse was obtained by the two men only as a result of overcoming her strength and power of resistance. Her conduct from beginning to end of the ghastly affair makes "non-consent and actual resistance reasonably manifest".

In addition, there is uncontroverted evidence that Valentine menaced and threatened her with the rifle he carried. Twice he placed the muzzle of the gun to her head while she was fighting to shield and protect herself. Fear of her life thus became a factor which the court was authorized to consider in measuring the young girl's conduct in the light of the rules of law.

The Board of Review is of the opinion that the findings of guilty as to accused Newman and Valentine are fully supported by competent and substantial evidence of convincing and irrefragable character. They must be accepted by the Board of Review upon appellate review as conclusive and final (CM ETO 1899, Hicks; CM ETO 2472, Blevins; CM ETO 3141, Whitfield; CM ETO 3197, Colson & Brown; CM ETO 3709, Martin; CM ETO 3718, Steele; CM ETO 3740, Sanders, et al; CM ETO 3859, Watson & Wimberly; CM ETO 4017, Pennyfeather).

7. The legal sufficiency of the finding of Hudson's guilt is determinable upon a basis separate and different from that of Newman and Valentine. Hudson had no actual sexual connection with Raymonde. Although he placed himself upon her body and attempted the sexual act with her, the evidence is clear that the girl either prevented the penetration of her person by Hudson or that he was physically unable to enter her person with his penis.

The proof, however, establishes the fact that Hudson was an aider and abettor of both Newman and Valentine in their acts of raping the girl on both the first and second occasions. Evidence of Hudson's culpability commences with his holding of Raymonde in the back seat of the "jeep" after she was kidnapped and while she was being transported to the site of the first attack upon her. He continued to act as the girl's jailer after the "jeep" had been stopped and Newman and Valentine prepared to commit the rapes. Raymonde described Hudson's conduct graphically:

> "Until the moment that the white man (Newman) and the driver (Valentine) raped me, Hudson held me prisoner * * *" (R33).

That Hudson did not withdraw from the attack upon Raymonde is evidenced by the fact that when Newman and Valentine had each obtained satisfaction on the girl's body for the second time, Hudson made an effort to secure intercourse with her.

The white man and two negroes acted in unison with a common intent and a common purpose of accomplishing the rape of Raymonde. They were each active, violent participants in the outrage committed on the young girl. Hudson, although he failed in the consummation of the sexual act, obviously gave direct and efficient assistance to Newman and Valentine in their raping of the innocent, helpless victim. The distinction between principals and aiders and abettors has been abolished by Federal statute and an aider and abettor may be convicted as a principal (sec.332, Federal Criminal Code, 18 USCA 550; 35 Stat. 1152). The distinction is also not recognized in the administration of military justice. All are principals (Winthrop's Military Law & Precedents - Reprint, p.108).

"Under Sec. 332 of the Federal Criminal Code, above quoted, the acts of the principal become the acts of the aider and abettor and the latter may be charged as having done the act himself and be indicted and punished accordingly. By virtue of said statute a principal of the second degree at common law becomes a principal in the first degree (De Preta v. United States, 270 Fed.73; Conelli v. United States, 289 Fed.791; Kelly v. United States, 258 Fed. 392, certiorari denied, 249 U.S. 616, 63 L.Ed.803). Premised on the above stated doctrine is the established and well recognized rule that an accused may be charged with and found guilty of the crime of rape although he did not actually have intercourse with the victim if the evidence establishes that he was present at and aided and abetted the ravisher in the accomplishment of the act of intercourse (52 CJ, Sec.50, p.1036; State v. Flaherty, 128 Maine 141, 146 Atl.7; People v. Zinn, 6 Cal. App. (2nd) 395, 44 Pac.(2nd) 408; People v. Nieto, 14 Cal. App. (2nd) 707, 58 Pac. (2nd) 945; People v. Durand -- Cal.App. (2nd) ---, 134 Pac. (2nd) 305; CM NATO 385, Speed)" (CM ETO 3740, Sanders, et al).

The record of trial is therefore legally sufficient to sustain the finding of the court that Hudson was guilty of the rape of Raymond under the principle of law above set forth and the established precedents of the Board of Review (CM ETO 72, Farley & Jacobs; CM ETO 1453, Fowler; CM ETO 3740, Sanders, et al; CM ETO 3851, Watson & Wimberly).

8. The charge sheets show:

Hudson is 21 years of age, and that he was inducted at Fort Benning, Georgia, 3 March 1943.

Valentine is 24 years of age, and that he was inducted at Fort Dix, New Jersey, 16 July 1943.

Newman is 26 years two months of age, and that he was inducted at Columbus, Ohio, 13 August 1943.

None of accused had any prior service.

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

10. The penalty for rape is death or life imprisonment as a 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 of accused Hudson is authorized (Cir. 229, WD, 8 June 1944, sec.II, pars.1b(4) and 3b).

_____ Judge Advocate

(SICK IN HOSPITAL) 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 NOV 1944 TO: Commanding General, Advance Section, Communications Zone, European Theater of Operations, APO 113, U. S. Army.

1. In the case of Sergeant JOHNNIE E. HUDSON (34741799), 396th Quartermaster Truck Company, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient, as to the soldier above named, to support the findings of guilty and the sentence, which holding is hereby approved.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4444. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4444).

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

CONFIDENTIAL

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Technician Fifth Grade LEO VALENTINE, SR. (32954278), 396th Quartermaster Truck Company, and Technician Fifth Grade OSCAR N. NEWMAN (35226382), Headquarters and Headquarters Company, 712th Railway Operating 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.

2. When copies of the published orders 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 4444. For convenience of reference please place that number in brackets at the end of the orders: (CM ETO 4444).

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.

Incl:
Record of Trial.

(Sentences ordered executed. GCMO 114, 115, ETO, 25 Nov 1944)

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

BOARD OF REVIEW NO. 1

CM ETO 4452

18 NOV 1944

UNITED STATES	IX BOMBER COMMAND, now designated 9TH BOMBARDMENT DIVISION (M)
v.	
First Lieutenant PHILIP L. TREVISO (O-1796550), 1288th Military Police Company (Aviation), (formerly of Detachment A, 1175th Military Police Company (Aviation)), Corps of Military Police.	Trial by GCM, convened at AAF Station 358, APO 595, U.S. Army, 30 August, 2 September 1944. Sentence: Dismissal, total forfeitures, and confinement at hard labor for one year. Place of confinement not designated.

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: Violation of the 61st Article of War.
Specification: In that 1st Lt Philip L. Treviso, Det A, 1175th Military Police Company, Aviation, IX Bomber Command, did, without proper leave, absent himself from his organization at Station 168, from about 0600 4 July 1944 to 1600 hours 4 July 1944.

ADDITIONAL CHARGE: Violation of the 93rd Article of War.
Specification: In that 1st Lieutenant Philip L. Treviso, CMP, 1288th Military Police Company (Aviation), IX Bomber Command, did, at Braintree, Essex, England, on or about 14 July 1944, feloniously take, steal,

and carry away one Officer's Battle Jacket, value about $32.00, the property of 1st Lt Vincent N. Sottile, 450th Bombardment Squadron, 322nd Bombardment Group (M).

He pleaded guilty to the original Charge and Specification and not guilty to the Additional Charge and Specification and was found guilty of both charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, 9th Bombardment Division (M), 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, did not designate any place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution was substantially as follows:

(a) Original Charge and Specification: In support of accused's pleas of guilty, the meaning and effect of which the court explained to him, the prosecution introduced in evidence, without objection by the defense, an extract copy of the morning report of accused's then organization, Detachment A, 1175th Military Police Company (Aviation), showing his absence without leave therefrom from 0600 hours to 1600 hours, 4 July 1944 (R6; Pros.Ex.1).

(b) Additional Charge and Specification: About 1 May 1944 First Lieutenant Vincent N. Sottile, 450th Bombardment Squadron (322nd Bombardment Group (Medium)), took his Army officer's "blouse", which cost him $32.50, to the Collins tailor shop, Coggeshall Road, Braintree, Essex, England, in order to have it converted into a battle jacket (R7-8,18). The "blouse" was stamped with his name. He was told that the cost of alteration would be at least two pounds (R8) and left the "blouse" in the care of the man in the shop who attended him (R7). At the trial Lieutenant Sottile identified an officer's battle jacket as his altered blouse by its make and by his name stamped inside the pocket and in the sleeve. He estimated its present value at about eight pounds. He at no time gave any person permission to secure this jacket from the tailor shop nor did he ever converse with accused concerning it. The battle jacket was admitted in evidence without objection by the defense (R7-8; Pros.Ex.2).

About 2 pm 14 July 1944 accused, then a member of the 1288th Military Police Company (Aviation), drove Private Francis D. Trudell of the same company in a jeep to Braintree, where they stopped at the tailor shop, which accused entered at about 2:30 pm (R9,34-36,40). He asked Mrs. Phyllis Humphryes, of 29 Victoria Street, Braintree, who was working with Sidney Brown, of 17 Tabor Avenue, Braintree, in the shop that day, for

his shirt and trousers which he had left for cleaning (R9-10,18,19). She informed accused they would be ready at 4 pm, whereupon he stated that he would return at that time and left the shop. Mrs. Humphryes testified that during this conversation with accused the battle jacket in question was hanging on a hanger on a mirror just inside the shop (R10-11). On the sleeve of the jacket was pinned a piece of paper with the name of Sottile, the owner, thereon (R13). Both Mrs. Humphryes (R10) and Brown (R19) identified Prosecution's Exhibit 2 as the jacket in question. Accused and Trudell thereupon proceeded in the jeep to Halstead, where they stopped, and then returned to the tailor shop at Braintree (R35-36,40), which accused entered about 3 pm. He stated to Mrs. Humphryes upon entering that "he came back quicker than he thought" (R11). As his clothes were not yet ready, he asked her if she minded if he waited for them, and she replied that she did not. She resumed work on his clothes in the back room (R12). The last time she saw the jacket hanging in the shop was about 3:15 pm (R16). Trudell testified that accused brought the officer's battle jacket to the jeep, laid it on the driver's seat, removed the tag and returned toward the tailor shop (R37-38). About this time (3:15 pm) Brown, who was also working in the back room, heard the outer door to the front part of the shop close, entered that part of the shop and asked accused if anyone came into the shop. Accused replied "no", that he had just been out and "popped in" (R12,20,23). This was the only outer door to the front part of the shop and when it was closed the drop latch always made a "terrible noise" (R9,13,20,29). About 3:30 pm, a telegraph messenger entered the shop, asked for a garment which was not ready and left (R12,20,22). Mrs. Humphryes who meanwhile had finished the work on accused's shirt and trousers, delivered them to him. He paid her five shillings, left the shop (R12), proceeded to the jeep and handed the clothes to Trudell, who at that time also had the jacket in his custody (R38-39). About 3:30 - 3:40 pm, Mrs. Humphryes returned to the back room and a "little while" later entered the shop and saw on the mirror the empty hanger on which the battle jacket had been hanging. The jacket was missing. She reported the loss to Brown who sent her to the Red Cross across the street to report it (R12-13,20-21). No one other than the telegraph messenger entered the shop during the time in question (R13).

Meanwhile, en route from the tailor shop to an air field in the jeep, Trudell asked accused

> "if he was turning Air Corps, because I noticed the battle jacket and most of the Air Corps fellows wear them".

Accused replied that he bought the jacket from another officer who was obliged to have it cut down or buy another. Accused made some statement about it costing ten shillings to have it cleaned (R39). Trudell testified that he could see the front of the cleaning shop from his position in the vehicle and did not see another officer or hear any conversations (R38), but "noticed some GIs going in" (R43). He testified that the vehicle was directly in front of the shop (R41).

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As a result of the report of the theft of the jacket, Fred Moles, a detective constable of Braintree, Captain Donald Young, Assistant Provost Marshal in the Braintree District, and Brown on 15 July 1944 went to accused's station (No. 162) at Chipping (R21,25,28-29), where Captain Young told him he was suspected of having the jacket. Accused stated that he had a newly acquired battle jacket and on request produced it (R29). He showed it to Brown who identified it as the one he had converted from an officer's "blouse" (R21,27,29). Accused stated he had bought it from an officer on the street the previous day, but did not give the officer's name (R30). Captain Young warned accused of his rights and without force, duress or promises, accused made a written statement, which was admitted in evidence without objection by the defense as Prosecution's Exhibit 3, and reads in part as follows:

> "Approximately 14.30 yesterday the 14th July 1944, I went to COLLINS, cleaners, Braintree to pick up my cleaning and the woman informed me it was not ready. I left for Halstead on some other business and returned approximately 30 to 40 minutes afterwards.
>
> As I entered the shop I was called over to a couple of doors away near a Novelty shop by an American Officer. I believe he was a first Lieutenant and he asked me if I wanted a jacket. We bargained. I tried the jacket on and I gave him £3. 10. Od. for it. I then went into COLLINS Cleaners and must have waited about 5 minutes, got my clothes and then left.
>
> The Officer was approximately my size, may be a couple of inches shorter, blonde or light brown hair; he was an Air Corps Officer. He said the reason he wanted to sell the jacket was because it didn't fit right and didn't want to go to any further expense to correct it" (R26-27).

On 17 July, after being warned as to his rights by First Lieutenant Bart Sullivan of the Criminal Investigation Department, U. S. Army, accused made another written statement, admitted in evidence without objection by the defense as Prosecution's Exhibit 4 and reading in part as follows:

> "On Friday, July 14, I left Station 162 around 2:30 p.m. to go to Braintree to pick up some dry cleaning. I also intended to go to Halstead to pick up some watch straps. I took a driver with me by the name of Truedell although I drove.
>
> We went to Collins Cleaning establishment located near the center of the town of Braintree. I arrived there around 3 or 3:30 p.m. I was told my shirt was not

ready at the cleaning place and so I decided to go to Halstead and pick my clothes up on the way back. I had a shirt and a pair of pants at the cleaning place.

I went to Halstead and returned to the Collins Cleaning place about a half hour later.

I parked the jeep about five yards ahead of the cleaning establishment on the same side of the street. I got out from the left side of the jeep. Truedell the soldier with me remained sitting on the right hand front seat of the jeep. I started to go into the cleaners establishment when I was called by an officer who was standing in front of the store next to the cleaning place, to the rear of where the jeep was parked.

The officer said, "Say Lieutenant or Hey, Lieutenant." I walked over to him. He said, "Do you want to buy a battle jacket?" I noticed he had a battle jacket over his arm. I asked him something about whether or not it fit. The officer said to try it on. I had a field jacket on which I took off and tried on the battle jacket. The battle jacket fitted me fairly good. I don't know whether I asked the price of it before or after I tried it on but he told me it was three pounds ten. He told me it was a good jacket but that it didn't fit him and that he didn't want to spend any more money on it.

I said it is a good deal or words to that effect and took the money out of my wallet and paid him. I gave him three pound notes and one ten shilling note. I walked over to the jeep and put the jacket on the drivers seat. I don't believe I said anything to Truedell as to where I got the jacket.

I then went into the cleaners place. When I went in a woman came out from the rear of the store. She stated that my shirt wasn't ready yet. I asked her if I could wait for it. She said yes that she would do it right away.

I waited in the front of the store for about four or five minutes. The only one that came into the store while I was waiting there was telegraph byo. When this telegraph boy came in a man came out from the rear of the store and talked to him for a little while, then the telegraph boy went out. He did not take any clothes out with him.

At the end of about five minutes the woman came out with my pants. I paid her six shillings and left.

I brought them out to the jeep and started for Rivenhall. When we were leaving the cleaning establishment I mentioned to Truedell about the high price of cleaning.

I remember Truedell saying, "Are you going Air Corps?" I told him that I had bought the battle jacket and that everyone seemed to be wearing them.

We arrived back to our station around 5 p.m. I brought the jacket in and hung it up with my other things on the rack. I did not look the jacket over to see if there were any identifying marks on it. When I did bring it out to the jeep in the first instance I did take off a tag that was pinned on it. I figured the tag was a cleaning tag and that the officer had just got the jacket out of the cleaners.

I wore the jacket that night to an eating place over by Blackmoor.

On Saturday afternoon Captain Young and a member of the civilian police came to see me and told me that a jacket was taken from a cleaning place about the time that I was there. I showed them the jacket and they said that that was the one.

I believe the officer from whom I purchased the jacket was a 1st Lieutenant in the Air Corps. I don't remember ever seeing him before. I believe he wore wings. He had on a blouse, He was about 5 feet 7 or 8 inches tall and weighed around 145 to 150 pounds. I did not ask the officer his name." (R30-32).

Brown testified that he had been a tailor for 35 years, was familiar with the value of similar jackets and estimated the value of Prosecution's Exhibit 2 as "anything from six pounds" (R24).

4. (a) For the defense, Mrs. Humphryes, recalled, testified substantially in accord with her testimony on behalf of the prosecution (R47-51), adding that the jacket had been hanging on the mirror in the shop for several weeks prior to the day in question (R50).

(b) After he was warned of his rights, accused elected to testify in his own behalf (R52). He testified as follows:

(1) Original Charge and Specification:

"I left the station at approximately six o'clock that morning, I believe it was July 3rd, and went on pass, and after the normal pass privileges, whatever it is, I tried to get back. At the time that I tried to get back the trains were very crowded. I went back to the officer I was with and tried to call my station and couldn't get through. We both went to eat and during that time I tried to call once more and couldn't get through. We then decided to join the line and wait until we could get back, which we did, and by the time we arrived it was about four o'clock that afternoon" (R52).

He further testified that he was due back at 6 am, 4 July (R52) and admitted his absence without leave as alleged (R53).

(2) Additional Charge and Specification: Accused testified in substantial accord with his statement to Lieutenant Sullivan (Pros. Ex.4), with the following pertinent additions:

Contrary to Trudell's testimony that the jeep was parked near the door of the cleaning shop, it was actually 15 - 20 feet past the shop (R53). After Mrs. Humphryes said she would get accused's cleaning about 3:30 - 3:40 pm, he "stood around and smoked". He saw a mirror in the room, but saw nothing on it.

"I was smoking a cigarette and I didn't want to put it out on the floor so I walked to the door and opened it and threw it out on the street and closed the door. The next thing Mr. Brown came in and asked did someone come in and I said no, I just popped out a cigarette" (R56).

He didn't tell Lieutenant Sullivan about leaving the store for a minute to throw out a cigarette butt because "it didn't seem important to me at the time". He did not know the name of the Lieutenant who sold him the jacket or from where he came. He did not obtain a receipt from its purchase (R58). It was 4 - 5 minutes from the time he met this officer, whom he had never seen before, until he completed the sale, out in the streets (R61). The officer held accused's jacket for him and he tried the combat jacket on "right there" in a little doorway in front of the novelty shop next to the cleaning shop. It was a "trifle" small (R54,59). He did not examine it until he returned to the jeep (R54). He thought he needed to have it altered to fit him properly but made no mention of this in the tailor shop (R60). He did not look at the slip of paper on the jacket, but merely removed it (R54). He thought there was writing on the slip but did not recall the name. Lieutenant Sottile was not the man from whom he obtained the jacket. He did not try to locate the vendor be-

cause he "was restricted from that Saturday (15 July) on". Asked if he requested permission to try to locate the vendor, he stated:

> "After this all happened I realized just what it was, I realized it was futile to try and find him. I knew if anyone found him I would have to be the one to do it, because I was the only who had seen him. My C.O. restricted me to my base and I was not confused, but sort of stunned by everything that happened and was not thinking much about anything except about how bad everything was" (R59).

Although his duties were as police and prison officer and provost marshal, he never asked anybody to help him find this officer. Although he was restricted, he knew he could call for the help of "C.I.D." men in Braintree in finding him, but he "didn't think they could find him".

> "I was the only one who knew him. The only description I could give would have fitted a lot of officers".

"Not feeling very good about anything", accused did not ask if he could go and look for him (R60).

5. (a) The pleas of guilty to the original Charge and Specification are supported by clear evidence of accused's absence without leave as alleged.

(b) That Lieutenant Sottile's battle jacket was wrongfully taken from his bailee was established by undisputed evidence. It is clear that theft of property from the bailee or custodian thereof constitutes larceny (MCM, 1928, par. 149g, p. 173; CM ETO 2098, Taylor et al). The evidence of the cost of the "blouse" from which this jacket was made and the tailor's testimony as to its value establish that it was of substantial value, if not $32.00 (MCM, 1928, par. 149g, p. 173; CM ETO 2840, Benson, and authorities therein cited). The only question for determination is whether the record contains competent substantial evidence (1) that accused took the jacket and (2) if so, that such taking was with the intent to deprive the owner permanently of his property therein. There was a direct conflict in the circumstantial evidence adduced by the prosecution and the testimony and extrajudicial statements of accused upon the issue of the manner of his acquisition of the jacket. The prosecution's evidence showed that on the day in question accused was present where the jacket was hanging in the tailor shop; that no person other than the employees in the shop and a telegraph messenger, who according to accused's testimony left empty-handed, was present there prior to the time the jacket was missing; that immediately prior to such time an employee in the shop heard the door of the shop close; that accused brought the jacket to his jeep and told Trudell something to the effect that it cost ten shillings to have it cleaned; and that he cast

away the slip of paper on the jacket bearing the owner's name without looking at it. Accused's explanation of his possession of the jacket, in summary, was that as he was about to enter the tailor shop, an officer, unknown to him, hailed him from near the shop and offered to sell him the jacket; that accused tried it on in the street; that they bargained and accused bought the jacket for three pounds ten shillings without obtaining either a receipt or the officer's name or address. The factual questions were peculiarly for the court's determination. The court, evidently disbelieving accused's explanation, found him guilty as charged. Its findings that accused took the jacket with the specific intent to deprive its owner of it permanently are supported by strong circumstantial evidence and will not be disturbed upon appellate review (CM ETO 2840, Benson). The circumstances shown by the evidence form a chain strongly linking accused with the larceny of the jacket. They meet the standards of proof enounced in CM ETO 2686, Brinson & Smith, CM ETO 3200, Price, and CM ETO 4292, Hendricks, and authorities cited in those cases, in that they exclude every fair and rational hypothesis except that of accused's guilt. His possession of the stolen property was not satisfactorily explained. He would have had the court believe that the strange officer who, he said, sold him the jacket, himself stole it from the tailor shop and did not remove the slip of paper from it. Accused's story bears all the earmarks of a pure fabrication and strongly suggests an attempt on his part to trifle with justice. The findings of guilty are amply supported by the record (CM ETO 2840, Benson, and authorities therein cited).

6. The charge sheets show that accused is 26 years 11 months of age had enlisted service from 10 March 1941 to 20 November 1942, and was commissioned a second lieutenant, Corps of Military Police, 20 November 1942, to serve for the duration of the war plus six months.

7. The court was legally constituted and had jurisdiction of the person and 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 finding of guilty and the sentence.

8. Dismissal is authorized upon conviction of a violation of either Article of War 61 or 93. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, would be authorized (AW 42; Cir.210, WD, 14 Sep 1944, sec.VI, as amended).

B. Franklin Kite Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

CONFIDENTIAL

(380)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of First Lieutenant PHILIP L. TREVISO (O-1796550), Corps of Military Police, 1288th Military Police Company (Aviation), (formerly of Detachment A, 1175th Military Police Company (Aviation)), 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. In your action confirming the sentence you did not designate the place of confinement. However, this may be done by supplemental action which should be forwarded to this office for attachment to the record of trial. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is the authorized place of confinement for this accused.

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 4452. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4452).

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

(Sentence ordered executed. GCMO 113, ETO, 25 Nov 1944)

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

BOARD OF REVIEW NO. 2

2 DEC 1944

CM ETO 4453

U N I T E D S T A T E S	35TH INFANTRY DIVISION
v.	Trial by GCM, convened at Amance, France, 6 October 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for 30 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
First Lieutenant HENRY W. BOLLER (O-1310800), Infantry Regimental Headquarters, 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 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: In that First Lieutenant Henry W. Boller, Infantry, Regimental Headquarters, 137th Infantry, having received a lawful order from Lieutenant Colonel Alfred K. Clark, Infantry, Regimental Executive Officer, 137th Infantry, his superior officer, to go forward to a Third Battalion Rifle Company, 137th Infantry, for tactical instruction, the said Lieutenant Colonel Clark then being in the execution of his office, did, at or near Ormes-et-Ville, France, on or about 12 September 1944, wrongfully fail to obey the same.

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

Specification: In that * * * having received a lawful order from Colonel Robert Sears, Commanding Officer, 137th Infantry, his superior officer, to return to the Third Battalion, 137th Infantry, for duty, did at Ormes-et Ville, France, on or about 12 September 1944, wilfully disobey the same.

He pleaded not guilty and three-fourths of the members of the court present when the vote was taken, concurring, he 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 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 30 years. The reviewing authority, the Commanding General, 35th Infantry Division, 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 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, changed the place of confinement to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, and withheld the order directing the execution thereof pursuant to the provisions of Article of War 50½.

3. Lieutenant Colonel Alfred K. Clark, Regimental Executive Officer of the 137th Infantry, a witness for the prosecution testified that on 12 September 1944, accused was a regimental liaison officer and the regimental command post was located at Bois-des-Orme. He had been directed by the regimental commander to have accused report to the Third Battalion commander for the purpose of being attached to a rifle platoon for seven days in order that he could gain practical instruction as a rifle platoon leader with a view to his becoming such. At approximately 1100 hours on 12 September he gave accused this order (R6) personally at the regimental command post and because of accused's hesitancy in the matter, he confirmed it in writing in the name of the regimental commander. The written order was admitted in evidence as Pros. Ex. 1 and reads substantially as per the regimental commander's directions above. On receipt of the order, accused asked permission to speak to the regimental commander and left the post. He returned to the post at approximately 1730 hours the same day. He had not carried out the order for he had not reported to the Third Battalion commander nor had he remained there as ordered. When accused reported back, witness turned him over to the regimental commander (R7). Accused had never been under concentrated small arms fire and he appeared more "jittery" than

the rest of them when the shelling was close (R8). The giving of this order by the regimental executive officer to accused was corroborated by Major Albert W. Frink, Regimental S-3 who was present and heard it given and saw it confirmed in writing (R9-10).

Accused reported to Captain Budd W. Richmond, Third Battalion Executive Officer, about 11 o'clock of 12 September and was by him directed to report to Colonel Butler at the Battalion "CP" as Colonel Clark had phoned and instructed him to have accused go to Colonel Butler for assignment to a platoon. He gave accused a couple of enlisted men as guides, explained the route and informed accused that Colonel Butler was expecting him. Accused, however, did not report to Colonel Butler but returned to the battalion command post about five o'clock, reported to Captain Richmond that "he couldn't make it; that he couldn't go up there; that he couldn't take it" and was directed to report back to Colonel Clark for "if he couldn't get up there, we had no place for him" (R10-11). There was some shelling ahead but other people were going back and forth (R12) and the other men who had gone with accused did not return (R13).

Lieutenant Colonel Albert M. Butler, Commanding Officer of the Third Battalion of the 137th Infantry, on 12 September was located on the west bank of the Moselle River supervising the crossing of the battalion. His command post was some three miles to the rear and people were going back and forth. He had received orders that accused was to report to him for training but he did not report on 12 September (R14).

Colonel Robert Sears, in command of the 137th Infantry, testified that he saw accused on the morning of 12 September. Accused had been given orders to join the Third Battalion as observer with a platoon and he saw him again when he returned about seven o'clock that evening. Accused then informed him

> "that he couldn't carry out his orders, which were to join the Third Battalion and report to Colonel Butler. He said that there was fire up there and he couldn't take it. Then I advised him of the seriousness of not carrying out his orders, which were to report to Colonel Butler, and explained what might happen if he insisted on his stand of not reporting, and he said that it didn't make any difference, he couldn't take it, and would rather be given any kind of punishment than go up there and face the enemy shelling. I said 'Do you realize that you might be given a very heavy sentence for refusing to obey orders and showing cowardice in the face

> of the enemy?' He said 'I don't care. I can't take it.' Then I gave him direct orders to report to Colonel Butler, and he didn't report to Colonel Butler" (R15).

Colonel Sears did not see accused thereafter until the trial but stated "I know that he did not report, physically" (R15). On 12 September the lines of travel were open and there was plenty of traffic. The places were under fire but they generally are". Accused had to go through a town to get to Colonel Butler but "if you went up to that town and they started a barrage, you simply got behind a building for a little while, knowing it would be clear after that". However, accused did not report to Colonel Butler (R16).

4. Accused was sworn as a witness for the defense and testified that he had been a member of the 137th Infantry for approximately a year, since August 1944 as liaison officer at regimental headquarters, and had been under enemy artillery and small arms fire several times. At these times he became extremely nervous. His father had epilepsy and he has always been conscious of taking sick and when under shell fire gets "afraid of what might happen". On 12 September 1944, Colonel Clark in the presence of Major Frank, advised accused that they were not satisfied with his work as liaison officer because he had failed on two occasions to properly deliver messages (R19). Accused then stated to the court:

> "Gentlemen, I should like to make this statement. While I was Liaison Officer, I was junior officer in the Command Post. There was another liaison officer who remained at the Command Post; a first lieutenant who is very much of an apple-polisher, while I wasn't. He went about making sure everyone was comfortable, that everyone had a chair, that the Colonel was comfortable and all the members of the staff had everything they wanted. I felt that if I were to stay as one of the staff, eating in the dining room with them, I wasn't to polish anyone's shoes" (R20).

Colonel Clark said to him:

> "'The Colonel and I decided that you should be attached to a front line rifle company platoon for a period of seven days'" (R20).

He said he wanted a confirmation of the verbal order and accused signed it, rolled up his bed roll, put his things together to send up and reported to Captain Richmond who sent him on with a second lieutenant and some men going up as replacements. When he got to

the first "OP" the situation was very critical and he called battalion and asked if it was not advisable to wait until dusk but he was advised to continue on. He returned and directed the men follow the telephone wires, a man coming at each five-minute interval. When all reached the edge of the town, they started again but the town was being shelled and accused was "scared half to death about what might happen", so told the men to dig (R21) foxholes and not to continue till the firing stopped and that he (accused) was going back to look for the lieutenant who had not arrived.

> "If I didn't return, they should continue when it was over. I knew I wasn't coming back, but I wasn't going to tell them that".

Accused returned to the battalion command post and reported to Captain Richmond the facts and "that perhaps I wasn't man enough to take it". Richmond ordered him to report to the "CP" and was there directed by Clark to report to the commanding officer which he did and I said,

> "'Sir, I am back' and I said I just couldn't take it. I guess what he said right here today was what he did say. He said 'Do you know what it is to disobey an order? Do you want to get court-martialed?' I felt, truly, gentlemen, that I didn't disobey an order. I said 'Sir, I will accept a court-martial'. He said 'Allright, you are under arrest'. So here I am" (R22).

When accused was asked by the trial judge advocate what he said in answer to Colonel Sears, he replied,

> "'I don't care.' I still don't care, gentlemen. If I can keep my body normal like you, I don't care".

Accused admitted he received the order (Pros.Ex.1) and that he did not report back to the battalion after talking to Colonel Sears on 12 September (R23-24).

Captain Harry H. Schwartz, Medical Corps and 35th Infantry Division Psychiatrist, testified that he had examined accused and submitted a report on him, identified and admitted as Defense Exhibit A. In this report, he states that -

> "8. Impressions: It is felt, that this officer's story relative to epilepsy in family is being used primarily as a defense mechanism for his inability

to stand up as an officer under combat conditions. It is further felt this officer is not insane, but is emotionally inadequate for combat duty.

9. Diagnosis: Constitutional inadequacy for front line duty.

10. Recommendation: This officer be considered for reclassification. He is not a medical case" (Def.Ex.A).

He testified accused did not have the severe type of "anxiety" but believed if exposed to combat, he would develop it and that in his opinion accused was not fit to be an officer but was a sane normal person (R25-26). He also testified that there were many men in the same mental condition as accused who are in the front lines but he was sure they were doing a pretty bad job. Epilepsy is hereditary "but not in this case" (R28).

5. All the essential elements of the offenses charged against accused are not only present and clearly proved but are in fact rather defiantly admitted by accused while a witness at his trial, he in fact agreeing to accept trial by court-martial rather than to obey the orders.

6. The charge sheet shows accused to be 24 years of age. Date of active duty 11 February 1943; assigned to 137th Infantry 9 October 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 of trial is legally sufficient to support the findings of guilty and the sentence.

8. Conviction of wilful disobedience of an order under Article of War 64 is punishable by death or such other punishment as a court-martial may direct. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind. (387)

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

1. In the case of First Lieutenant HENRY W. BOLLER (O-1310800), Infantry Regimental Headquarters, 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 4453. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4453).

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

(Sentence ordered executed. GCMO 122, ETO, 10 Dec 1944)

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

BOARD OF REVIEW NO. 2

3 FEB 1945

CM ETO 4489

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Spa, Belgium, 15 October 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private GLENN E. WARD (35918736), Company F, 12th 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 charges and specifications:

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

Specification: In that Private Glenn E. Ward, Company "F", 12th Infantry, did, at St. Vith, Belgium, on or about 14 September 1944 desert the service of the United States by absenting himself without leave from his place of duty with intent to avoid hazardous duty, to wit: engagement with the German forces in the vicinity of St. Vith, Belgium; and did remain absent in desertion until he surrendered himself near Schlausenbach, Germany, on or about 21 September 1944.

CHARGE II: Violation of the 75th Article of War.

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

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of Schlausenbach, Germany, on or about 23 September 1944, misbehave himself before the enemy, by failing to move out with his patrol, after he had been ordered to do so by Captain William L. Mills, Jr., the Battalion S-3, to engage with the German forces, which forces, the said patrol was then opposing.

He pleaded not guilty, and was found guilty of Charge I and its Specification, of the Specification of Charge II, except the words "failing to move out with his patrol, after he had been ordered to do so by Captain William L. Mills, Jr., the Battalion S-3, to engage with the German forces, which forces, the said patrol was then opposing", substituting therefor the words "abandoning his patrol which was then engaged with the German forces", of the excepted words, not guilty, of the substituted words, guilty, and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the findings of guilty of the Specification, Charge I and Charge I as involved a finding that the accused did, at the time and place alleged, desert the service of the United States by absenting himself without leave from his place of duty with intent to avoid hazardous duty, to wit: engagement with the German forces in the vicinity of St. Vith, Belgium, and did remain absent in desertion until he returned to military control at a place and in a manner not shown, on or about 21 September 1944, in violation of the 58th Article of War, approved only so much of the finding of guilty of the Specification, Charge II, and Charge II as involved a finding that the accused did, at a place not shown, on or about 23 September 1944, misbehave himself before the enemy by abandoning his patrol which was engaged with the German forces, in violation of the 75th Article of War, 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 on 14 September 1944, Company F, 12th Infantry, of which company accused was a member, was assigned the mission of leading an attack on the Siegfried line in the vicinity of St. Vith, Belgium. Accused was with his platoon when it "took off" on the attack (R5). He was detailed as a scout, sent forward by his squad leader, and "went out across a field". Shortly thereafter, he came running back and his platoon sergeant "asked him what he was doing and he said he had no protection up there, so his squad leader sent another man". The rest of the men "moved up to the woods" and delivered fire (R6). When the platoon reached the woods, the enemy "opened up with machine guns" (R5). At about this time, accused's

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platoon sergeant saw him running to the rear. The sergeant "hollered at him" but he did not stop (R6). He was not seen by his platoon sergeant for "four, five or six days" thereafter. The sergeant was present with and had occasion to check his platoon daily during this period (R5,6). The first sergeant of accused's company testified that accused returned to duty on 21 September 1944 (R7). A duly authenticated extract copy of the morning report of Company F, 12th Infantry, which was admitted in evidence without objection by the defense, showed that accused was absent without leave from 14 September 1944 to 21 September 1944 (Pros.Ex.A).

At 0830 hours on 23 September 1944, Captain William L. Mills, Jr., Battalion S-3, 2nd Battalion, 12th Infantry, ordered that a reconnaissance patrol consisting of twelve men, six from Company F and six from Company G, be sent out to locate any enemy installations present in the area, to take prisoners and generally to secure intelligence concerning the enemy (R8,9,10). The battalion was at that time in the Siegfried Line (R8,10). Accused was detailed as a member of this patrol (R7). The patrol moved out at 0900 hours, and after it had advanced approximately one half mile, was subjected to an artillery barrage (R7,8). Accused had moved out with the patrol and had accompanied it until the barrage came down but was missing when the patrol reorganized after the barrage (R7,9). At about 1030 hours he reported to the Battalion S-2 and "said something to the effect that he had come back and couldn't take it". When asked whether he had reported his departure to the sergeant leading the patrol, accused stated that "he had just said to the man next to him that he was leaving" (R10). The patrol returned at about 1100 hours. Accused was not with the patrol at that time (R8).

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

5. a. With respect to the offense charged under Charge I, the evidence is clear that accused absented himself without leave from his place of duty from September 14 to 21 as alleged. At the time accused absented himself, his unit was moving forward to attack the enemy and was then being subjected to enemy fire. When sent forward as a scout, he "came running back" and, when asked "what he was doing", he stated that he "had no protection up there". He was last seen "running to the rear" and, although his platoon sergeant shouted at him, he did not stop. He did not return until seven days later. On these facts, the court was clearly warranted in finding that accused absented himself with intent to avoid hazardous duty. All the elements of the offense charged were established (CM ETO 1432, Good).

b. The evidence indicates that accused was returned to duty upon rejoining his unit since, two days thereafter, he was sent out as one member of a twelve-man reconnaissance patrol. An unconditional restoration to duty without trial by an authority competent to order trial may of course be pleaded in bar of trial for the desertion to which such resoration relates (MCM, 1928, par. 69b, p.54). However, where a deserter is restored to duty by a superior not authorized to order trial such restoration does not constitute a bar to a subsequent trial (CM NATO 2139, Grabowski; Dig. Op. JAG, 1912, p.415).

In the Grabowski case, accused was convicted of desertion and misbehavior before the enemy in violation of Articles of War 58 and 75 respectively. There was evidence that after he rejoined his unit, following his offenses, he was placed on duty by his detachment commander. It was said that the rule that 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 the restoration relates

> "contemplates an administrative act to effect removal of the charge of desertion and a consequent restoration to duty, an act which must be accomplished by an authority competent to order trial for desertion, and as trial for wartime desertion may be ordered only by an officer exercising general court-martial jurisdiction there was here no constructive condonation of the offense".

In the instant case, the manner in which accused was restored to duty is not clearly brought out by the record. A stipulation which was entered with reference to the order dispatching the patrol recites only that Captain William L. Mills, Jr., the Battalion S-3, ordered the patrol "of which Private Ward (accused) was a part" to move out on 23 September (R9). The testimony of the Battalion S-2 to the effect that accused "was doing patrol work for the battalion on that day" is similarly uninformative (R9). The sergeant in command of the patrol, who was a member of Company G, 12th Infantry, testified that on 23 September he "was leading a patrol taken from G Company and attached to battalion headquarters". He also testified that he had "six men counting myself and had taken six men from F Company * * *and attached them to my patrol" (R7). When asked whether the Battalion S-2 or S-3 had checked the patrol prior to its departure he testified "They just called the company and asked for us" (R8). On this state of the evidence it is difficult to determine with any certainty in what manner accused was selected for the patrol but it seems probable that he was detailed

for this duty by the company commander of Company F pursuant to a request for men from Battalion Headquarters. Further, it seems rather improbable that in the short time which elapsed from accused's return on 21 September until 0830 hours 23 September, when the patrol was ordered to go out, there had been "an administrative act to effect removal of [a] charge of desertion and a consequent restoration to duty * * * by an officer exercising general court-martial jurisdiction". In any event, defense counsel entered no special plea in bar of trial based upon constructive condonation and it may be presumed that he fully performed his duty to the accused and that had any defense of this nature been available such defense would have been raised (Cf: CM ETO 531, McLurkin; CM ETO 139, Mc Daniels; CM 231504, Bull. JAG, Vol.III, No.2, Feb.1944, sec.396(1), p.56). In view of these considerations, it does not appear that trial of the accused for the desertion alleged under Charge I was barred because of constructive condonation of such desertion.

c. The Specification of Charge II alleges that accused

> "did, in the vicinity of Schlausenbach, Germany, on or about 23 September 1944, misbehave himself before the enemy, by failing to move out with his patrol, after he had been ordered to do so by Captain William L. Mills, Jr., the Battalion S-3, to engage with the German forces, which forces, the said patrol was then opposing".

Under the findings by exception and substitution as modified by the reviewing authority, it was found that accused

> "did, at a place not shown, on or about 23 September 1944, misbehave himself before the enemy by abandoning his patrol which was engaged with the German forces".

A preliminary question thus arises whether the findings, as modified, constituted a fatal variance from the allegation in the Specification.

A question similar to that here presented was considered in CM ETO 1663, Ison. In that case, the Specification alleged that accused did

> "run away from his company, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded".

The court found accused of the Specification, guilty, except the words

> "run away from his company, which was then engaged with the enemy, and did not return thereto un-

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til after the engagement had been concluded",

substituting therefore the words

> "misbehave in the presence of the enemy by failing to advance with his command which had been ordered forward by Lt. King, Platoon Commander, in compliance with the orders of Company Commander".

The following portion of the Board's opinion is pertinent here:

> "The essential nature of the charge was abandonment by the accused of his company when it was 'engaged with the enemy', which phrase is synonymous with 'before the enemy' (CM ETO 1249, Marchetti; par.8b, p.8; CM ETO 1404, Stack; CM ETO 1408, Saraceno). Such also is the essential nature of the offense of which he was found guilty. The distinction between the active abandonment involved in running away from his company was alleged, and the passive abandonment involved in failing to advance with his company as found, is one of verbiage and is technical rather than substantial. The conduct is equally reprehensible and its effect is the same in each case, --- his absence from his company where it was his duty to be. The time and place of the offense alleged and that of which accused was found guilty are identical. * * * The court's action did not change the nature or identity of the offense charged, and it is obvious that it did not increase the permissible punishment. The Board is also of the opinion that accused was adequately notified in the Specification of the offense of which he was found guilty, that he was given a fair opportunity to defend himself, and that therefore the variance did not affect his substantial rights".

Although the precise issue involved in the above case is the converse of that presented in the instant case, the principle enunciated is equally applicable here. The variance above noted is not fatal and did not prejudice the substantial rights of the accused.

The offense of which accused was found guilty constitutes a violation of Article of War 75 (Cf: CM ETO 2205, LaFountain). All the elements of the offense were established by competent, un-

contradicted evidence.

6. The charge sheet shows that accused is 19 years of age and that he was inducted at Cleveland, Ohio, on 13 October 1943. He had no prior service.

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

8. 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).

[signature] Judge Advocate

[signature] Judge Advocate

Benjamin R Sleeper Judge Advocate

(396)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 3 FEB 1945 TO: Commanding General, Headquarters 4th Infantry Division, APO 4, U.S. Army.

1. In the case of Private GLENN E. WARD (35918736), Company F, 12th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. It appears that the Staff Judge Advocate deleted the original charges, consisting of two specifications in violation of Article of War 75, which had been signed, sworn to and investigated, and substituted for the first specification, a charge and specification in violation of Article of War 58, based upon the same facts. The second specification remained as originally preferred as a violation of Article of War 75. A reinvestigation was not necessary as the facts were sufficiently disclosed by the original investigation. However, it does not appear that Charge I and its Specification were ever sworn to, in accordance with the provisions of Article of War 70. Some of the provisions of that Article have been held directory and not mandatory, but it is still a mandate of the Congress as to proper procedure and should be complied with. In a similar case, CM ETO 4570, Hawkins, the Board of Review held that such error was not jurisdictional and that trial upon such an unsworn charge, if otherwise proper, was legal.

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 4489. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4489).

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

4489

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 4490

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Spa, Belgium, 12 October 1944.
Private First Class ROBERT G. BROTHERS (31285141), Company C, 8th 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. 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 58th Article of War.

Specification: In that Private First Class Robert G. Brothers, Company "C", 8th Infantry, did, near Le Compte, France, on or about 21 July 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself near Carrouges, France, on or about 19 August 1944.

He pleaded to the Specification, "guilty, except for the words 'desert' and 'in desertion', substituting respectively therefor the words, 'absent himself without leave from' and 'without leave'; of the excepted words not guilty, of the substituted words guilty"; and not guilty to the Charge but guilty of violation of Article of War 61.

Two-thirds of the members of the court present when the vote was taken concurring, he was found guilty of the Charge and Specification. 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 when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 50 years. The reviewing authority approved the findings of guilty except that termination of the desertion was "at a place not shown", approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. The prosecution's evidence discloses that on 21 July 1944, accused's organization was in a small French town, standing by waiting for the "push-off" which came on 25 July. Accused and another member of the same squad had dug a hole together and pitched a tent over it. Accused left to go "down to a building to get some cider" (R5). He left his rifle belt and grenade near the hole (R6). When his partner who had gone to sleep, woke up, "the rifle belt and grenade were gone". He did not see accused until "quite a while after that, * * * a good twenty days, I would say, anyway". At the time accused left he was neither ill nor wounded and seemed mentally all right (R5). He was not present in the squad when it made the big push on 25 July (R5) and his squad leader knew of no reason for accused's absence which he discovered sometime between the 20th and 25th when a futile search for him was made. He did not see him again until about 19 August (R7). At the time accused left it was common knowledge in the organization that they were about to take off on a big operation (R8-10). His squad leader had known accused for a month or six weeks prior to this time and had regarded him as a good soldier (R7,8).

It was stipulated that if First Lieutenant William E. Woodruff, 8th Infantry, were "present in court, he would identify Exhibit A as an extract copy of the morning report of Company C, 8th Infantry, for 22 August 1944 with an entry" concerning accused, "showing his absence from 21 July 1944 to 19 August 1944" (R10). The communications officer of Headquarters 1st Battalion, 8th Infantry, testified that his organization was in the vicinity of the St. Lo highway just prior to their break-through on 25 July and information of the proposed general operation was given the men in the battalion. On 22 July 1944, Company C received artillery and mortar fire and 13 men were killed and several wounded. Their attack was preceded by bombing and they broke through on July 25th;

from then until 19 August "it was more or less a rat race across France, except for scattered resistance" (R10-11).

4. The defense presented no witnesses except accused who was sworn and testified in substance that when he left his foxhole he intended going down to this house for a drink and coming right back but that he met another fellow down there and started drinking and got drunk. He testified he turned himself in "to an Army MP" on 19 August. When he left the organization there was "not much" talk about a big operation about to come off, "just rumors". He admitted staying away for a month and he heard about the break-through and knew his organization was moving deeper into France. He also admitted that he made no effort to return for a month after he left (R12-13).

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

The evidence clearly shows that accused left his organization on the eve of a heavy engagement, which resulted in a break-through of the enemy lines during which action his unit suffered severely; and that the break-through was followed by a continuous advance deep into France during which time various areas of resistance were encountered. Accused knew something of the contemplated attack and of the progress of his organization for the month following but made no effort to return during this time. He says he left to get a drink intending to immediately return but got drunk. He did not remain drunk for the entire month. If he got drunk and did not return, as he claims, who removed his rifle belt and grenade from his foxhole? The conclusion is inescapable that he absented himself and remained absent without leave, as alleged, intending at the time to avoid the hazardous duty just ahead; and that his absence was for the time alleged and covered the period of his unit's important and dangerous advance. From his absence for a month under the circumstances shown, the court could infer the necessary intent.

6. The charge sheet shows accused is 20 years of age, and, without prior service, was inducted at Springfield, Massachusetts, 19 February 1943.

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

(400)

8. Desertion in time of war is punishable by death or such other punishment as a court-martial may direct (AW 58). Designation of the Eastern Branch, United Stated Disciplinary Barracks, Greenhaven, New York, is proper (AW 42; Cir. 210, WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(401)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 7 DEC 1944 TO: Commanding General, Headquarters 4th Infantry Division, APO 4, U. S. Army.

1. In the case of Private First Class ROBERT G. BROTHERS (31285141), Company C, 8th 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 4490. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4490).

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

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BY AUTHORITY OF TJAG
BY CARL E. WILLIAMSON, LT. COL.,
JAGC, ASST EXEC ON 20 MAY 54