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HOLDINGS AND OPINIONS

# BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

# EUROPEAN THEATER OF OPERATIONS

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY CARL E. WILLIAMSON, LT. COL.,
JAGC, ASS'T EXEC ON 30 MAY 54

VOLUME 30 B.R. (ETO)

CM ETO 15788 - CM ETO 16479

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

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY CARL E. WILLIAMSON, LT. COL.,
JAGC, ASS'T EXEC ON 20 MAY 54

Judge Advocate General's Department

Holding and Opinions

B O A R D  O F  R E V I E W

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 30 B.R. (ETO)

including

CM ETO 15788 - CM ETO 16479

(1945)

Office of The Judge Advocate General

Washington : 1946

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY CARL E. WILLIAMSON, LT. COL.,
JAGC, ASS'T EXEC ON 20 MAY 54

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REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY CARL E. WILLIAMSON, LT. COL., JAGC, ASST EXEC ON 20 MAY 54

RESTRICTED

(1)

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

7 SEP 1945

BOARD OF REVIEW NO. 2

CM ETO 15788

| | | |
|---|---|---|
| UNITED STATES | ) | 103RD INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at APO 470, U. S. Army, 18 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |
| Private WALTER W. POLSON (6383192), Company E, 411th Infantry | ) | |

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Walter W. Polson, Company E, Four Hundred Eleventh Infantry, did, at Schillersdorf, France, on or about 1 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Staff Sergeant Conrad E. Herrmann, Company E, Four Hundred Eleventh Infantry, a human being by shooting him with a rifle.

(2)

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for two days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 103rd Infantry Division, approved the sentence, recommended that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case and the recommendation of the convening authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the 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 is substantially as follows:

Accused, on 1 March 1945, was a member of Company E, 411th Infantry Regiment, which was then located at Schillersdorf, France. About 1800 hours on that date accused's squad moved out to occupy positions in the line. Accused remained behind when they left their quarters, joining them about ten minutes later at a point approximately one-half mile from the company command post and about 500 yards before they reached the line, where they had been stopped by mortar fire (R10, 11,18,19). According to persons present, accused was "under the influence of intoxicating liquors", "intoxicated pretty heavily", "very intoxicated" (R12,18) when he joined his squad. He appeared to know what he was doing as he showed one witness his watch to indicate what time it was (R12). An argument ensued between accused and Sergeant Herrmann, his squad leader, concerning whether accused would return to the command post with a Sergeant Norman (now deceased). Accused appeared to be angry and would not go back with Sergeant Norman. Sergeant Herrmann then asked him to accompany him back and accused replied "Hell yes, I'll go back with you". Accused was armed with an M-1 rifle, which had the name "Nell" carved on the side of the stock. He told two of the witnesses this was his wife's name. When Sergeant Herrmann asked him for his rifle, he refused to give it up and together the two of them started back to the company command post. When they left, they were walking side by side and accused carried his weapon slung on his right shoulder (R11-14,16, 17,40).

Privates First Class Stanley A. Ostrowski and Milton C. Schultz of Company E, 411th Infantry Regiment, were detailed to repair a break in their communications line about 1900 hours on 1 March 1945 (R20,21,27). As they walked down the road looking for the trouble, Sergeant Herrmann and accused approached them from the opposite direction. Accused was walking about three yards behind Herrmann and they were "arguing a little bit". Accused was armed with an M-1 rifle and was heard asking, "Why are you taking me back, what have I done". Sergeant Hermann replied, "You know why I am taking you in. You are drunk and not fit to be on the line". Accused was further heard to say, "I am not going back - nothing is wrong with me", to which Herrmann replied, "You know what is wrong with you and I am going to turn you in". Ostrowski and Schultz were about five or ten yards distant when they overheard this conversation and after proceeding about 70 to 100 yards along the road they heard a shot. Ostrowski turned around in the direction the shot came from "and saw Sergeant Herrman laying on the ground and Polson was aiming his rifle at Sergeant Herrmann laying on the road. Just then another shot came off". About three seconds elapsed between the first and second shots. Ostrowski was not looking in the direction of Herrmann and accused when he heard the first shot. Schultz testified he only heard one shot after which he looked down the road to see what happened. He noticed Sergeant Herrmann lying on the road, and saw that accused had his weapon and "He was holding it in a crouch like the kneeling or sitting position". Ostrowski "hit one side of the road and Schultz hit the other side, and at the same time, Polson hit the side of the road". Ostrowski called out to accused to come out on the road without his weapon and with his hands up. When accused refused to do so, he (Ostrowski) fired a burst from his Thompson submachine gun over accused's head and this caused him to appear without his rifle. As he walked to the center of the road he staggered a bit and "it looked like he tried to take a swing at Schultz". Ostrowski hit him in the mouth, knocking him down, and told Schultz to stay with Herrmann, who was gasping and could not talk, while he yelled to some anti-tank men a short distance away to summon medical aid. Ostrowski took accused back to the company command post and turned him over to Lieutenant Kasper. Schultz observed that Sergeant Herrmann "was injured in the chest and found a hole in his jacket" and he saw a weapon about three feet from the injured man. There was "a name of some kind carved on the stock" of this weapon which Schultz did not touch at this time (R21,22,23,26,28,29,30). Accused did not have any special hatred or ill will toward deceased or anyone else in the company (R18,19).

Sergeant Hermann was brought into the battalion aid station at approximately 1915 hours on 1 March 1945. The battalion surgeon testified that Herrmann was in an extremely serious condition upon arrival. He was unconscious, unable to speak, his respiration was

extremely slow and very weak, his pulse was not countable and his heart sounds were very weak but audible. His condition resulted from a small arms bullet wound in the left lower chest. The point of entry was about the tenth left anterior rib in the mid clavicular line and the point of exit was in approximately the same region but slightly in toward the mid line of his back. As a result of this wound, Sergeant Herrmann died in the battalion aid station about 1945 hours on this date (R8,9).

While Ostrowski was taking accused back to the company command post, the latter was "staggering" and argumentative and it was necessary for Ostrowski to use force to take him there (R23). Ostrowski testified that upon arrival at the command post at about 1930 hours, accused did not appear to know what he was doing and was "absolutely" drunk (R24,36). He wasinterviewed at this time by Lieutenant William J. Kasper, his company commander, who testified accused could not answer his question as to how a semi-automatic rifle could be fired accidentally, but "tried to tell me that he had a carbine". He evaded a question as to whether this was his T/O weapon, stating he had no weapon when he came off the line. Accused then told Lieutenant Kasper that he had stumbled and that his rifle discharged accidentally. Accused appeared to recognize Lieutenant Kasper and stood before him "more or less at attention". His speech was blurred and he did not seem to put his thoughts across but he did not appear to be so drunk that he did not know what was going on during the interview. That evening Sergeant Norman brought an M-1 rifle with the name "Nell" on one side to the command post. Lieutenant Kasper could smell powder in the bore and found five rounds of ammunition in the magazine and one in the chamber (R34-38).

Major William E. Willis, Infantry, who interviewed accused about 1915 or 1930 hours on the date in question testified accused was "in a rather stupid, drunken condition". He based his opinion on the fact accused's staggering was pronounced and he could not coherently answer questions. In his opinion, accused "was not in possession of all his mental faculties" (R40,41).

About a minute or two after Sergeant Herrmann died, accused was interviewed by the battalion surgeon at the aid station where he had been taken for examination (R35,42). The doctor testified that at this time someone accused him of deliberately shooting Sergeant Herrmann and accused vigorously denied this accusation, later stating that it was accidental. In his opinion, accused was not highly intoxicated "and seemed to be well aware of the situation he was in and well aware of where he was". The doctor smelled accused's breath and noted a strong alcoholic scent resembling the odor of wine and in response to a question accused stated he drank some wine with his evening meal that day (R41,42).

The next morning two empty cartridges were found at the exact spot where Sergeant Herrmann was shot (R25,30,31).

4. Accused after his rights as a witness were fully explained to him (R48,49), made an unsworn statement through his defense counsel substantially as follows:

On 1 March 1945, he was in the town of Schillersdorf, France, as a member of the first squad, second platoon, Company E, 411th Infantry Regiment. At the noon meal that day he and several members of his squad drank a pitcher of wine and about 1300 hours he walked down to house number 37 to pick up his laundry. Here he drank wine and schnapps for approximately three hours and a half, consuming about ten ounces of schnapps and a quart and a half of wine. He left this house about 1630 hours carrying his laundry and a beer bottle filled with schnapps. On the way back to his quarters, he met two soldiers, who asked him if he would help them obtain some schnapps. One of these soldiers found an empty green quart bottle nearby and he returned to house number 37 with him intending to help him buy some schnapps. The man of the house told them that all the schnapps he had was that which remained in the bottle accused had been drinking from earlier in the afternoon. He gave them each a drink (approximately two ounces) of schnapps and they purchased two bottles of wine, one of which they drank before leaving the house. After leaving this house they went into a vacant building, where the other soldier was waiting for them, and the three of them drank his beer bottle of schnapps and the other quart of wine. To the best of his knowledge, he then proceeded to his quarters and from there went alone to the front line where his squad was to relieve another squad that was on duty. The first person he remembers seeing on the way to his foxhole was Sergeant Herrmann, his squad leader, who called to him from a position approximately fifty yards to the left of the Schillersdorf-Mulhausen road and on the reverse side of the hill. He stopped and waited until Sergeant Herrmann came up to him. The latter said, "You are drunk, I'm taking you back to the Company CP". He remembers leaving this point with Sergeant Herrmann and some guards taking him into a building in town. He knows it was some kind of an office because there were several soldiers and an officer present. - While he doesn't remember anything that happened in this building he does recall that at a later time he attempted to walk a straight line at the command of some officer. He recalls that after this he travelled quite a distance in a jeep to a place where he was given a blood test, after which he again entered the vehicle and his next recollection is of stretching out on the floor of a building to take a rest. He did not sleep because he remembered hearing someone say that he shot Sergeant Herrmann. About noon the next day he asked the military police sergeant if he knew anything about Sergeant Herrmann and he was told that he (Sergeant Herrmann) was dead. To the best of his knowledge, he did not fire an M-1 rifle at any time during the period he described; Sergeant Herrmann and he were the best of friends and he had no argument with him whatsoever at any time (R49,50).

The defense counsel and the prosecution stipulated that if Major Roland E. Nieman, Division Psychiatrist, were present in court and

sworn as a witness he would testify that when he examined accused on 8 March 1945 he found that his "Neurological examination was essentially normal except for a coarse bilateral tremor". There was no evidence of any psychosis and accused is able to distinguish right from wrong but in his opinion is suffering from chronic alcoholism. Accused gave him a history of heavy drinking since age 16, having been jailed three times in civilian life for drinking and disorderly conduct, drinking shaving lotion and rubbing alcohol because he likes the taste of alcohol and does not feel good without it. Major Nieman is of the opinion that a person "if he has drunk enough to a point where his mind can not function, can not form a specific intent" (R47,48).

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

Although no witness actually saw accused fire the fatal shot, competent, substantial evidence establishes beyond any doubt that accused shot and killed Sergeant Herrmann at the time and place alleged. Whether this homicide was perpetrated with malice aforethought and without legal justification was a question for the court to decide and their affirmative answer thereto is amply supported by the evidence of the circumstances under which the slaying took place. The uncontradicted testimony that accused was, immediately prior to the shooting, angrily protesting against being reported for his drunken condition on the front line is conclusive on this point.

The only serious question presented herein is whether accused's intoxication was so severe as to render him incapable of forming the requisite "malice aforethought" to support the finding of guilty of murder. While the evidence on this point was conflicting, the testimony of the battalion surgeon and his commanding officer as to his condition and actions immediately after the shooting, constitutes substantial evidence that supports the court's findings against accused on this vital issue (CM ETO 11269, Gordon). Inasmuch as the question of the effect of intoxication upon accused's deliberative faculties was one of fact for the court and there is substantial evidence to support their conclusions, the same will not be disturbed on review (CM ETO 6229, Creech).

6. The charge sheet shows that accused is 30 years and nine months of age and was inducted 1 September 1944 at Fort Oglethorpe, Georgia. Prior service is shown as "1 September 1933 to 17 September 1936, 34th Ordnance Company; 23 June 1937 to 4 August 1939, 30th Ordnance Company; 5 August 1939 to 31 March 1941, 10 Ordnance Company (MM)".

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

8. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI as amended).

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

(8)

1st Ind.

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

1. In the case of Private WALTER W. POLSON (6383192), Company E, 411th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of 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 15788. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15788).

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

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( Sentence as commuted ordered executed. GCMO 431, USFET, 21 Sept 1945).

15788

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

BOARD OF REVIEW NO. 3

25 AUG 1945

CM ETO 15793

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| U N I T E D S T A T E S | AIR TECHNICAL SERVICE COMMAND IN EUROPE |
| v. | Trial by General Court-Martial, convened at AAF Station 386, APO 744, U. S. Army, 18 May 1945. Sentence: Dismissal and total forfeitures |
| First Lieutenant LORA R. STIDHAM O-672476, Air Corps, 311th Ferrying Squadron, 302nd Transport Wing | |

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HOLDING by BOARD OF REVIEW NO. 3

SLEEPER, SHERMAN and DEWEY, 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.

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

CHARGE: Violation of the 61st Article of War.
(Finding of not guilty)
Specification: (Finding of not guilty)

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

Specification: In that 1st Lieutenant Lora R. Stidham, 311th Ferrying Squadron, 302d Transport Wing, then assigned to 1302nd Airborne Squadron (Prov), 302d Transport Wing, did, without proper leave, absent himself from his station at AAF Station 384, from about 25 February 1945 to about 21 April 1945.

and was found not guilty
He pleaded not guilty of the Charge and its Specification and guilty of the Additional Charge and its Specification. Evidence was introduced of one previous conviction by general court-martial for absence without leave for about five days in violation of Article of War 61. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, Air Technical Service Command in Europe, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces European Theater, although deeming the sentence wholly inadequate punishment for an officer guilty of such a grave offense, confirmed it and withheld the order directing its execution pursuant to Article of War 50½.

3. Competent evidence adduced at the trial shows that on 11 February 1945, accused was sent to a hospital some ten miles from his station for observation and treatment and failed to return to his organization upon being released from the hospital on 24 February 1945. It was further shown that he thereafter remained absent from his unit without authority until 21 April 1945, on which date he was taken into custody at Brussels by an agent of the Criminal Investigation Division.

Accused testified that although his primary duty was that of pilot, when transferred to a new unit where he had expected that his chief duty would involve flying, he was scheduled for comparatively few flights. He was delayed in returning from one of them and, although the delay was not attributable to him but to mechanical difficulties and adverse weather conditions, he was grounded as a result. He was thereafter sent to a hospital and, upon release, feeling that his usefulness as a pilot was ended because he had been grounded, he went to the front and attempted to attach himself to "different front line outfits." He stated that although he was never administratively attached to any of these organizations he participated in some combat while at the front. He was shown to have been in both Brussels and Paris on various dates during the period of his absence.

For a more detailed statement of the facts, reference is made to paragraphs 5 and 6 of the review of the staff judge advocate of the confirming authority, which the board adopts herein.

4. The offense charged was adequately proved. The court could disbelieve accused's account of his actions during his absence, and, even if accepted as true, his act in taking the matter of his assignment and duties into his own hands obviously is no defense and is relevant only in mitigation (Cf: CM ETO 15243, Napolitano). There is substantial evidence to support the court's finding that accused was absent without leave from 25 February 1945 to 21 April 1945, as alleged.

15793

5. The charge sheet shows that accused is 22 years eight months of age and was appointed a second lieutenant at Lubbock Army Flying School, Lubbock, Texas, on 16 February 1943.

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. Dismissal is authorized upon conviction of an offense in violation of Article of War 61.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

RESTRICTED

1st Ind.

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

1. In the case of First Lieutenant LORA S. STIDHAM, O-672476, Air Corps, 311th Ferrying Squadron, 302nd Transport Wing, attention is invited to the foregoing holding by the Board of Review that the Record of Trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 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 15793. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15793).

B. FRANKLIN RITER,
Colonel, JAGD
Acting Assistant Judge Advocate General

( Sentence ordered executed. GCMO 372, ETO, 1 Sept 1945).

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

BOARD OF REVIEW NO. 3 8 SEP 1945

CM ETO 15794

| | |
|---|---|
| U N I T E D S T A T E S | 2ND AIR DIVISION |
| v. | Trial by GCM, convened at AAF Station 147 (England), 11 May 1945. Sentence: Dismissal and total forfeitures. |
| Second Lieutenant ARTHUR C. RUF (O-806912), 703rd Bombardment Squadron, 445th Bombardment Group (H) | |

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

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

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

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

Specification 1: In that Second Lieutenant Arthur C. Ruf, 703rd Bombardment Squadron, 445th Bombardment Group (H), as Club Officer for Officers Club at AAF Station 124, did, at AAF Station 124, on or about 25 September 1944, wrongfully demand of and accept from Stanley Joseph Grove and Reginald W. Perry the sum of £10-0-0 for the privilege of keeping slot machines in said Officers Club.

Specification 2: In that * * * as Club Officer for Officers Club at AAF Station 124,did at AAF Station 124, on or about 14 November 1944, wrongfully demand of and accept from Stanley Joseph Grove and Reginald W. Parry the sum of £15-0-0 for the privilege of keeping slot machines in said Officers Club.

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Specification 3: In that * * * as Club Officer for Officers Club at AAF Station 124, did, at AAF Station 124, on or about 22 November 1944, wrongfully demand of and accept from Stanley Joseph Grove and Reginald W. Parry the sum of £5-0-0 for the privilege of keeping slot machines in said Officers Club.

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

Specification 1: In that * * * as Club Officer for Officers Club at AAF Station 124, did, at AAF Station 124, on or about 25 September 1944, wrongfully demand of and accept from Stanley Joseph Grove and Reginald W. Perry the sum of £ 10.0.0 for the privilege of keeping slot machines in said Officers Club.

Specification 2: In that * * * as Club Officer for Officers Club at AAF Station 124, did, at AAF Station 124, on or about 14 November 1944, wrongfully demand of and accept from Stanley Joseph Grove and Reginald W. Parry the sum of £ 15.0.0 for the privilege of keeping slot machines in said Officers Club.

Specification 3: In that * * * as Club Officer for Officers Club at AAF Station 124, did, at AAF Station 124, on or about 22 November 1944, wrongfully demand of and accept from Stanley Joseph Grove and Reginald W. Parry the sum of £ 5.0.0 for the privilege of keeping slot machines in said Officers Club.

He pleaded not guilty to, and was found guilty of, both charges and their specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, 2nd Air 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, confirmed the sentence, though deeming it wholly inadequate punishment for an officer guilty of such grave offenses and stating that in imposing such meager punishment the court has reflected no credit upon its conception of its own responsibility, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution:

During the period in question, one of the many "fairly extensive

interests" of Mr. Stanley Joseph Grove, 15 A Hay Hill, Berkeley Square, London, England, besides theatrical shows, liquor and munitions manufacturing, was slot machines in which he was interested in a "rather large way", as he leased them to officers' clubs and non-commissioned officers clubs at many United States Army camps in England. The slot machines were leased in each instance under a contract providing for an equal division of profits between him and the club concerned (R7,30,31,39). His personal representative and "regional manager in charge of the slot machines on American bases of the Second Air Division" was Mr. Reginald W. Parry, 94 Mile Cross Lane, Norwich, Norfolk, England (R7,31). About April 1944, such machines were installed at the officers' club at Station 124 under the terms of the "normal contract which was drawn up between the company and each particular site", providing that the gross profits of the machines would be divided equally (R8,37). On or about June or July 1944, accused became the Club Officer at Station 124 and about a month thereafter, Parry got the "impression" in a conversation with him that he wanted a "cut" out of the slot machines. Parry asked him how much he wanted. Accused replied, "£ 5.0.0 a week" (R9,10). Parry thereupon paid him £ 5.0.0 and subsequent payments of £ 5.0.0 a week later, £ 10.0.0 on 25 September 1944 (R10-11;Pros.Ex.1), £ 15.0.0 on 14 November 1944 (R13,15;Pros.Ex.2) and £ 5.0.0 on 22 November 1944 (R16,17; Pros.Ex.3).

A statement made by accused before trial after he had been warned of his rights (R49) was identified and admitted in evidence without objection (R50,53;Pros.Ex.4). Accused stated therein that his intentions were to use the money so received for a "petty cash" fund for the club and that "I admit that I only used some of this money for petty cash and kept the rest for myself". He "continued to receive this payment of five pounds at every settlement of the slot machines, which settlement occurred almost every week".

Accused had no authority to demand or accept money from either Mr. Parry or Mr. Grove (R46).

4. For the defense, two enlisted men testified regarding numerous payments by accused from his own pocket for incidental club expenses (R66-70). An investigation of the club's activities over a period of months disclosed a laxity of administration in various particulars (R92-95). Accused requested on three occasions to be relieved as club officer (R97).

5. After his rights were explained (R100), accused testified. He admitted the agreement with Grove regarding the payment of £ 5.0.0 a week, but thought he had put all the money so received "if not a little more" back into the club (R104-105).

He paid "out of my pocket with the money I had taken from these slot machines" for laundry, towels, expense money for enlisted

men who made trips to London to make purchases for the club, and a "lot of small odds and ends" (R106). He estimated he received approximately £ 30.0.0 from Mr. Grove (R112) and admitted copies of the collector's reports (Pros.Ex.1,2 and 3) evidencing payments to him on 25 September 1944, 14 and 22 November 1944 were "evidently" true (R111). In explanation of his taking the money he testified, "If there had been proper supervision, sir, I would never have been able to accept it" (R118). His pretrial statement in so far as it recited he kept some money for himself was false as he later discovered that what he received from the machines and what he spent for the club "would just about balance" (R115).

6. The offenses charged against accused are closely related to the crime of bribery under the civil law (3 Wharton's Criminal Law (12th Ed., 1932), sec.2234, pp.2522-2525). The evidence shows that accused, in effect, gave his official approval to retaining the slot machines at the officers club for a price,—a "cut" of £ 5.0.0 a week, which he received. Similar offenses have been held to constitute conduct unbecoming an officer and a gentleman, such as

> "Becoming, as quartermaster, corruptly interested in public contracts, and receiving large sums as part of the proceeds--GCMO 57 of 1870: Paying a contractor the face of a false voucher for an amount greater than was due, and receiving back from him the balance--GCMO 31 of 1869; taking money from substitute agents for approving their appointment--GCMO 303 of 1865: Taking bribes from, and aiding and acting in complicity with, substitute brokers--GCMO 565 of 1865; Furnishing substitutes for drafted men for a compensation--G.O.17, Dept. of the East, 1865; * * * Taking bribes to allow civilians to pass the picket line--G.O.48, Dept. of the Gulf, 1863; The same, to allow them to pass goods within the line--G.O.9, Dept. of Va., 1863" (Winthrop's Military Law and Precedents (Reprint, 1920), note 46 at p.717).

The court's findings of guilty are fully supported by the evidence. Accused's offenses were clearly violations of Article of War 96 (MCM, 1928, par.152b, p.188) and as they involved moral turpitude they were also offenses punishable under Article of War 95 (CM 258108, III Bull.JAG 381-382; CM ETO 10362, Hindmarch).

7. The charge sheet shows that accused is 27 years one month of age and was commissioned a second lieutenant 30 June 1945 at Marianno, Florida. Prior service is shown as follows: "16 December 1940 to 10 April 1942 Communications Section, Infantry. 1 September 1942 to 30 June 1943 Flight Schools".

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. A sentence of dismissal is mandatory upon conviction of an offense in violation of Article of War 95 and such punishment as a court-martial may direct is authorized upon conviction of an officer of a violation of Article of War 96.

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B H Crissey Jr Judge Advocate

(18)

1st Ind.

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

1. In the case of Second Lieutenant ARTHUR C. RUF (O-806912), 703rd Bombardment Squadron, 445th 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 15794. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15794).

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

(Sentence ordered executed. GCMO 412, USFET, 15 Sept 1945).

15794

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

BOARD OF REVIEW NO. 3

2 OCT 1945

CM ETO 15814

| | | |
|---|---|---|
| U N I T E D  S T A T E S | ) | 1ST INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at Bad Koingswert, Sudentenland, Czechoslovakia, 5 June 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| Private ALBERT L. DE LOGGIO (33105054), Company "A", 18th Infantry | ) | |

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

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

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

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

Specification 1: In that Private Albert L. DeLoggio, Company A, 18th Infantry, then Private First Class, Company A, 18th Infantry, did, at his assembly area in the vicinity of Aachen, Rheinprovinz, Germany, on or about 5 October 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he was apprehended at Liege, Liege, Belgium, on or about 11 October 1944.

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

Specification: In that * * * did, at Haaren, Aachen, Rheinprovinz, Germany, on or about 3 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Brussels,

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RESTRICTED

(20)

Brabant, Belgium, on or about 21 November 1944.

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

Specification: In that * * * having been duly placed in arrest on or about 16 October 1944, did, at Haaren, Aachen, Rheinprovinz, Germany, on or about 3 November 1944, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. No evidence of previous convictions was introduced. All the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 1st Infantry Division, approved the sentence and forwarded it for action pursuant to Article of War 48 with the recommendation that the sentence, if confirmed, be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life. The confirming authority, the Commanding General, United States Forces European Theater, confirmed the sentence but, owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

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

On or about 1 October 1944, the Ranger Platoon, 1st Battalion, 18th Infantry, with which the accused, a member of Company A, 1st Battalion, 18th Infantry, was then serving, moved to a wooded area near Aachen, Germany, and there was placed in an alert status for an attack which, according to the platoon guide, "we knew had to be made in the near future" (R8-10). On 5 October, accused was present at a formation at which the platoon was briefed for the forthcoming operation. Although the men were not informed as to the exact time when the attack would start, they were restricted to their platoon area and were prepared to move out on two hours' notice (R10,11). It was common knowledge that "it was going to be hot and we knew we were going to be with the assault company" (R11). On the morning of 6 October, as the result of a report that accused was absent, a search was made of the platoon area but he could not be found (R9). On the evening of 7 October, the platoon moved out of the area near Aachen and on 8 October participated in an attack in which severe opposition was encountered and heavy casualties suffered (R11). Although accused had no permission to be absent, he was not present with the platoon from 6 October through 11 October. On 11 October, he was apprehended at Liege, Belgium, by an agent of the 16th Military Police Criminal Investigation Section,

First United States Army, and was returned under guard to the 1st Battalion, 18th Infantry (R13,18,19;Pros.Ex.C).

He reached the 1st Battalion on 16 October at which time he was placed in arrest under armed guard and restricted to the limits of the company area of Headquarters Company, 1st Battalion, then located near Haaren, Germany (R13-15). On 31 October, he was served with a charge sheet embodying a charge of desertion based upon his alleged absence as above set forth. On 1 November, the guard over him was lifted but he was advised that he continued to be under arrest and would remain in the company area. On 3 November, the first sergeant of Headquarters Company, upon failing to locate the accused when he desired to place him on a detail, searched the company area and a neighboring platoon area for him without success. He had not been set at liberty from the arrest and had no permission to be absent (R14). He was thereafter not present with or in the area of Headquarters Company, 1st Battalion, through 21 November 1944 (R15,18). He was apprehended in Brussels on 21 November 1944 by the military police (R18,19;Pros.Ex.C).

4. For the defense, Second Lieutenant David J. Cooper, who had been a member of the Ranger Platoon during the time accused also was a member of that platoon, testified that he had participated in combat with the accused and that

> "I can say that in combat he was a real combat soldier. He displayed a lot of initiative and guts. He put himself out forward and was an incentive to the men in his unit. On one patrol he went out and did a job he wasn't supposed to do and did the job of three men. I was a member of that patrol" (R21).

When asked if he would like to have accused as a member of his platoon, he replied, "No, sir. Not after this past incident. In combat and in a hot spot I would say yes" (R21).

After being advised of his rights as a witness, accused elected to remain silent (R22).

5. Upon the basis of the evidence presented, the court clearly could find that accused absented himself without leave from his organization on about 5 October 1944 with the then existing intent to avoid hazardous duty, as alleged in the Specification of the Charge (Cf: CM ETO 15246, Whitehead; CM ETO 1406, Pettapiece). The evidence also clearly supports the court's finding that he wrongfully broke arrest on about 3 November 1944, as alleged in the Specification of Additional Charge II (MCM 1928, par. 139a, pp.153,154). Although accused's second absence was of comparatively short duration, it was initiated by a breach of arrest and terminated by apprehension and at the time of his departure accused knew he was awaiting trial for his former misconduct. These facts constitute a sufficient basis for the court's inference that at the time of absenting himself or at some time during his absence he intended to remain permanently

away from the service and was thus guilty of desertion, as alleged in the Specification of Additional Charge I (cf. CM ETO 7379, Keiser; CM ETO 2723, Copprue).

6. The charge sheet shows that accused is 25 years of age and was inducted 30 October 1941 at Philadelphia, Pennsylvania. No prior service is shown.

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

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

E.M. Bleeker Judge Advocate

Malcolm C. Sherman Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 2 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private ALBERT L. DE LOGGIO (33105054), Company "A", 18th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 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 endorsement. The file number of the record in this office is CM ETO 15814. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15814).

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

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( Sentence as commuted ordered executed. GCMO 497, USFET, 20 Oct 1945).

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

BOARD OF REVIEW NO. 2 22 SEP 1945

CM ETO 15817

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| U N I T E D S T A T E S | CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | |
| Technician Fifth Grade LESTER H. SWEENEY (35779783), 3993rd Quartermaster Truck Company | Trial by GCM, convened at Mannheim, Germany, on 31 May 1945. Sentence: To be hanged by the neck until dead. |

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician 5th Grade Lester H. Sweeney, 3993 Quartermaster Truck Company, did, at Heilbronn, Germany, on or about 8 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Loyd Bryant, 3993 Quartermaster Truck Company, a human being, by shooting him with a pistol.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for one day in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Continental Advance Section, Communications Zone, APO 667, U. S. Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater, confirmed the sentence and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the Prosecution: During the early part of May 1945 the 3993rd Quartermaster Truck Company was stationed at Heilbronn, Germany (R6) and occupied one building. The ground floor was used as an orderly room and a dispatcher's office; the upper floors, for sleeping quarters. The accused, a member of the organization named (R6), slept on the second floor about 75 feet from the Dispatcher's Office and his bunk could be reached therefrom in 30 seconds and without being observed by one outside of the building (R31-32). About 4 May 1945, the accused and Sergeant Loyd Bryant, the deceased, had a quarrel and were separated by an officer. Subsequently, accused complained that Bryant had hit him and that that was the first time a man had ever slapped him. He said, "I am going to cut his goddamn throat" and exhibited a long-bladed knife (R6). The next night accused went about inquiring where various enlisted personnel slept (R7). That same day he showed one of the officers two German small-caliber automatic pistols (R10).

Accused and another soldier left the camp area together the night of 7 May. He had two automatic pistols with him and loaned one to the other soldier, telling him that it was loaded with two shells. He also showed the other soldier that the pistol that he retained was loaded. After drinking some wine the two returned to the camp area about one hour after midnight. They stopped to talk to the guards. Accused brandished a pistol and said it was loaded (R19-20). He was described as intoxicated but not drunk (R16,19,21). He remarked, "What a son-of-a-bitch Sergeant Bryant was", and, "I am going to take care of that son-of-a-bitch, and if you don't keep your mouth shut I will take care of you" (R20). He left the guards and headed toward the dispatcher's office (R20). Accused opened the door of that office and went in, followed by his companion of the evening. Sergeant Bryant was asleep lying on a counter. Two other soldiers were also asleep in the room. Accused pointed his pistol at Bryant's head, and said, "If I kill this guy will anybody tell?" His companion

persuaded him to come out of the office, but he could not get accused to go to bed so he left him (R14). Accused then went to Sergeant Long's room and awakened him with a flashlight and told him that Bryant was asleep in the office and that he was "going to get him". Long talked to him awhile and told him to go to sleep (R7). Accused then returned to the dispatcher's office with the pistol in his hand (R23). The two occupants other than Bryant saw him and ran from the office. The first one out, frightened by the sight of the pistol, got only 40 to 50 yards away when he heard a shot (R24). The other one was awakened by accused, who tapped him on the chest with the pistol. He then went out, leaving only the accused and the sleeping Bryant in the office. About 30 seconds later, when he was only 25 feet away, he heard a shot and immediately returned to the office. He saw no one leave the office. When he entered he saw Bryant with blood oozing from his head make a gasp or two. No one else was in the room (R26-28). There was only one door to the office but one could come out of that door and turn right and go upstairs to the sleeping quarters without being seen from where he was (R28). A doctor examined Bryant within 15 minutes and pronounced him dead (R31). An autopsy revealed that a bullet entered Bryant's face to the right of his nose, pierced his brain, and caused his death (R42). An expended 7.35 caliber cartridge was found in the office (R37). The guards got excited and fired several rounds with their guns after the pistol shot was heard (R20). 15 or 20 minutes later, billets were inspected and the accused was found undressed and in his bed (R11,12). No small arms weapons could be found in the organization (R11,31).

There was introduced in evidence a pretrial written statement, voluntarily made by the accused, in which he denied having any pistol other than the one he had loaned to his fellow soldier of the evening and denying any knowledge of, or participation in, the killing of Bryant. He claimed he was undressing and getting into bed when he heard the shots. He did not know where the Dispatcher's Office was located and was never in it. He also denied that he ever uttered any threats against Bryant and did not see him on the 7th or 8th of May 1945 (R37; Pros.Ex.1).

4. The accused, having been fully advised regarding his rights as a witness, elected to remain silent. He stated through counsel that there was nothing he could add to his signed statement which was already in evidence (R44).

5. The accused has been convicted of the murder of Sergeant Loyd Bryant. Murder is the unlawful killing of a human being with malice aforethought. A legal presumption of malice may arise from

the deliberate use of a deadly weapon in a way which is likely to produce, and which does produce, death (Underhill's Criminal Evidence, (4th Ed. 1935) sec.557, p.1090). Personal ill-will and hatred toward the person killed may constitute malice.

The facts shown by the evidence of the prosecution prove beyond any reasonable doubt that the accused deliberately, after expressing his hatred and ill-will or malice toward the deceased, discharged his deadly weapon so as to cause the bullet to go through the deceased's brain while he was asleep. The killing of the deceased was not only widely advertised by the accused in advance, but was planned and executed in apparent cold blood.

> "The proven facts disclose an act of homicidal violence which is inherently 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).

All of the elements of the offense were supported by ample competent evidence(CM ETO 438, Smith; CM ETO 2007, Harris; CM ETO 3042, Guy; CM ETO 4292, Hendricks; CM ETO 6229, Creech).

The accused did not take the stand to deny the act but rested solely upon his pre-trial denial of any participation in the crime. Giving full credit to his pre-trial statement as if it were a valid defense, it raised an issue of fact of the identity of the person who killed the deceased. The court resolved the issue against the accused. Inasmuch as the determination of facts is within the exclusive province of the court, its findings of guilty when based on substantial evidence as here will not be disturbed by the Board upon review (CM ETO 4194, Scott).

Neither insanity nor drunkenness was suggested as a defense. There was, however, some evidence that the accused was intoxicated, but not drunk. Voluntary drunkenness is no excuse for crime committed while in that condition, but it may be considered as affecting mental capacity to entertain specific intent (MCM, 1928, par.126a, p.136). Any suggestion in the instant case that the intoxication of the accused might have affected his mental capacity to entertain the necessary malice aforethought involved in the crime of murder is refuted, not only by his expressed intentions to commit the crime, but also by his cunning and agility in undressing and getting into his bed in his effort to avoid detection. Again, the suggested issue was

one of fact for the court to determine. Its decision, under the circumstances, is final (CM ETO 14745, Rowell; CM ETO 10780, Olsen).

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 charge sheet shows the accused to be 29 years and six months of age. Without prior service, he was inducted on 25 January 1944 at Huntington, West Virginia.

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

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

(20)

1st Ind.

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

1. In the case of Technician Fifth Grade LESTER H. SWEENEY (35779783), 3993rd 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 15817. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15817).

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.

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( Sentence confirmed but after reconsideration commuted to dishonorable discharge, total forfeitures, and confinement for life. Persuant to par 87b MCM 1928 so much of previous action dated 4 Aug 1945 as inconsistent with this action recalled. Sentence as commuted ordered executed. GCMO 499, USFET, 23 Oct 1945).

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

BOARD OF REVIEW NO. 3

29 SEP 1945

CM ETO 15836

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| U N I T E D S T A T E S | ) | CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER |
| v. | ) | |
| Private First Class EDWARD WHITE (34754861), 3717th Quartermaster Truck Company | ) | Trial by GCM, convened at Liege, Belgium, 22 June and 5 July 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Edward White, 3717th Quartermaster Truck Company, did, at Chenee, Belgium, on or about 19 May 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fifth Grade Will Mosely, a human being by shooting him with a pistol.

He pleaded not guilty and, two thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place

as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence:

The 4008th Quartermaster Truck Company held a dance at a theater in Chenee, Belgium, on the evening of 19 May 1945 (R10-11,14). Between the theater auditorium and the street there was a large lobby. Opening off the lobby to its right facing the street was a cafe, which also had an exit on the street. There were a few steps down to the street from the lobby floor exit (R15; Def.Ex.A).

During the evening, before 1145 hours, two soldiers (identified by defense evidence as accused and Private Joseph Powell of his company (R47-48)) were seated at a table in the cafe. Technical Sergeant William Ingram, 4008th Quartermaster Truck Company, observing that one of these soldiers (identified by defense evidence as Powell (R47-48)) had his head on his arms on the table, walked over and asked him if he were sleepy. Powell said "No." The other soldier (identified by defense evidence as accused (R47-48)) said, "What do you have to do with him?" and took out a .25 caliber pistol. Ingram remarked, "You don't have to pull out a gun. I don't mean any harm" and added, "I just asked if he were sleepy". Accused put the weapon in his shoe while Ingram immediately went into the dance hall (R10) to obtain his jacket, the pocket of which contained a pistol. He returned to the cafe with "my hand in my pocket and the gun was in my pocket" (R12). However, his first sergeant relieved him of the weapon, having seen it and being engaged in "taking all the guns he saw in the company" (R13,58,61). Ingram then observed that "they were putting one of the soldiers out the door" (R10). Accused was later observed, his mouth and nose bleeding, backing across the street outside the lobby of the theater (R22-23,31,35). At that time Technician Fifth Grade Will Mosely (deceased) was standing outside the lobby on the steps leading to the street level about ten feet from accused. Accused aimed a .25 caliber pistol toward deceased and fired (R18,21-22,24,27,31-32,36). Deceased fell to the ground with his hands to his stomach (R14,21,24,28,30). His death a few hours later resulting from a bullet wound was caused primarily by a "hemorrhage from the abdominal aorta" (R6-7).

After the shooting, accused delivered to the investigating officer a .25 caliber "Belgique pistol" which he indicated was the weapon he fired the night of 19 May 1945 (R44). Questioned by First Lieutenant Lonnie J. McCall, 4008th Quartermaster Truck Company, accused identified this weapon as his and the one he used the night deceased was killed (R45-46; Pros.Ex.4).

4. For the defense, Powell testified that it was about 2200 hours on 19 May 1945 when he and accused arrived at the dance in

Chenee, Belgium. They danced a couple of dances and went to the cafe where they sat at a table and ordered two beers. Powell leaned on the table with his head in his hands. A sergeant walked up and said, "Wake up, we don't sleep here". Powell did not argue and leaned back on the table after another soldier remarked, "Don't pay any attention to him. He's drunk". The sergeant soon returned with six or seven soldiers, grabbed him by the shoulder and said, "You don't sleep in here". When Powell protested that he was not sleeping, the sergeant grabbed him again by the shoulder, "started arguing, one word after another". The sergeant brought out a .38 caliber pistol and three soldiers pushed Powell out of the door of the cafe. Powell went up the street to his left. Accused walked out and "when he threw up his pistol the first time, it did not go off, and the Sergeant was standing in the doorway when the shot was fired". The sergeant fired and accused "fired twice after this sergeant" (R47-49). The next morning accused said to Powell "if anyone got shot he imagined he did it" (R51).

Charles Cochart, Rue de l'Eglise 97-99, manager of the theater in Chenee, observed two soldiers at a table in the cafe on the evening of 19 May 1945, one of whom was "lying down". He

> "saw from the hall side a soldier coming in who came and shook the one that was lying down and then the one that was opposite seemed to get cross and he pulled a pistol out. I saw the sergeant jump on it. He twisted the soldier's arm and pulled his pistol away from him. I think that he unloaded the gun and put it in his pocket and I think he led him out into the yard" (R52-53).

5. After his rights were explained accused elected to remain silent (R56-57).

6. While there was some conflict between the testimony of the prosecution and defense witnesses, it was clearly established that accused and Powell were seated at a table in the cafe when Ingram, resenting Powell's conduct in assuming a sleeping position at the table spoke to him about it. Accused drew a pistol which caused Ingram to go after his own weapon. Unidentified soldiers ejected Powell from the cafe. Accused left at about the same time and while standing outside in the street fired a .25 caliber pistol at deceased, the bullet striking him in the abdomen and causing his death. There was no evidence to indicate that deceased took any part in the disturbance that followed Powell's conduct in the cafe.

The homicide in this instance follows the pattern of a cafe brawl in which an accused using a dangerous weapon causes the death of an innocent bystander. Such conduct is murder as fully discussed by the Board of Review in the case of CM ETO 3042, Guy, Jr., in which an innocent bystander was killed and wherein it was said:



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"whether or not accused's intent to kill was formed suddenly, under the influence of an uncontrollable passion or emotion aroused by adequate provocation, whether or not a sufficient 'cooling period' had elapsed or whether the formation of the intent was the result of mere anger, were questions of fact peculiarly within the province of the court, whose determination thereof against the accused in finding him guilty of murder rather than manslaughter is supported by substantial evidence and will not be disturbed upon appellate review".

In the present case, the evidence of accused's unjustifiable firing at Mosely, wholly unprovoked by the latter, a mere casual bystander, fully warranted the court in finding him guilty of murder as alleged (CM ETO 3042, Guy Jr., supra; CM ETO 292, Mickles; CM ETO 2007, Harris, Jr.; CM ETO 3180, Porter).

7. The charge sheet shows accused is 21 years one month of age and was inducted 25 June 1943 at Fort Benning, Georgia. He had no prior service.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

[illegible] Judge Advocate



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

BOARD OF REVIEW NO. 2 19 OCT 1945

CM ETO 15840

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| U N I T E D S T A T E S | 69TH INFANTRY DIVISION |
| v. | Trial by GCM, convened at APO 417, United States Army (Germany), 21 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| Private First Class ALBERT F. BISHOP (11014832), Headquarters Company, 3rd Battalion, 272nd Infantry | |

HOLDING by BOARD OF REVIEW NO. 2
HEPBURN, MILLER and COLLINS, Judge Advocates

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

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

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

Specification: In that Private first class Albert F. Bishop, Headquarters Company, 3rd Battalion, 272 Infantry, did, at Borsdorf, Germany, on or about 17 April, 1945, forcibly and feloniously against her will, have carnal knowledge of Maria Ostenska.

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

Specification: In that * * * did, at Borsdorf, Germany, on or about 17 April, 1945, behave with disrespect toward First Lieutenant Marshall Aaron, his superior officer, by saying to him "Like hell I will", or words to that effect.

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

Specification: In that * * * having received a lawful order from First Lieutenant Marshall Aaron, his superior officer, to "Stay where you are", did, at Borsdorf, Germany, on or about 17 April, 1945, willfully disobey the same.

He pleaded not guilty and, all of the members present at the time the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48 with a recommendation that, in view of the accused's previous excellent record and the fact that the victim of the rape was not otherwise physically mistreated, the sentence be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but, owing to special circumstances in the case and the recommendation of the reviewing authority, commuted the sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence for the Prosecution

a. Charge I (Rape): On 17 April 1945, during daylight hours near Borsdorf, Germany, the accused, a private first class in Headquarters Company, 3rd Battalion, 272nd Infantry (R17, 19, 40) drove a "jeep". He stopped and invited a 15 year old Polish girl, Maria Ostanska, whom he had seen on the road to enter the vehicle. Reluctantly and upon the urging of girl companions she accepted the invitation (R8). She could speak and understand only Polish, which language he could not speak. Instead of driving her in the direction she asked him (by sign manual) to take her, he drove toward Borsdorf. He passed the command post of a platoon of an antiaircraft battery located in a house in front of which stood First Lieutenant Marshall Aaron, the platoon commander, and 3 enlisted men (R17,23,26). Accused drove past them, turned around, and returned to within 20 yards of them and there turned sharply into a lane and stopped the jeep in a field at a distance estimated at 50 to 100 yards away (R17-18, 28-29). About 30 minutes later members of this group saw the accused and the girl arise from the grass near the standing jeep and enter it. Accused then turned the jeep about, stopped and lighted a cigarette and then proceeded ahead (R29). As he was about to drive out onto the highway, Lieutenant Aaron halted him because he had broken a

communication wire when he drove in to the lane (R18,29). The girl was crying "but was not making any noise" (R26). The lieutenant thought she was frightened because she was caught with a soldier and concerned himself with having the accused fix the broken wire. Her clothes were not disarranged, torn, or dirty (R26). She appeared frightened and ashamed (R27). "She had been crying and had her hands over her face and she was pretty hysterical" (R19). He turned the girl over to one of the enlisted men who spoke and understood Polish (R19). When questioned by the enlisted man as to what had occurred she said in Polish that she had done something "bad" which meant in Polish that she had had intercourse (R29). She stated that the reason she could not prevent the accused from having intercourse with her was because she could not speak English. She gave no other reason (R32,34), but "she was upset and hysterical" (R33). She was then taken to an officer of the Medical Corps for examination. Upon examination he found a few small tears in the lining of her vagina and upon inserting and withdrawing one finger bright red blood followed which showed that the hemorrhage was the result of injury. The condition indicated that some object larger than the vagina orifice had entered it by force (R35). There were no bruises or other injuries on her body (R36-37), nor did her clothes show signs of a recent struggle (R38).

One of the enlisted men examined the area from which he had seen the accused and girl arise. It looked as if it had been "layed in" but showed no signs of a struggle or scuffle. It was visible from where the group stood, but it was covered with grass of sufficient height to obscure persons lying in it (R34). When a search was made of the place, after the incident, a pair of dark glasses belonging to Maria was found (R14,18,30) and there was blood on leaves and twigs (R30). No one noticed whether accused had a weapon with him at any time (R23), nor whether the girl was weeping when she walked over to and re-entered the jeep after being in the grass. It appeared as if accused and the young woman approached the jeep separately - one followed the other (R23).

Maria testified that when the accused stopped the jeep in the field he dismounted and then ordered her to leave the vehicle. When she hesitated to comply with his demand, he grabbed his weapon. She saw a man and his wife whom she knew near the road and "started to holler", but the accused dragged her out of the jeep. She screamed. He hit her twice and "you know what the rest is" (R8). She insisted that she could not tell what happened because she did not "know how to say it" (R8). After much coaxing and persuasion and leading questions, which failed to elicit from the girl testimony concerning accused's carnal connection with her, the court recessed

> "With the consent of the defense counsel and accompanied by the defense counsel an attempt was made to have the witness forget her embarrassment and tell a full story" (R9).

Upon reconvening of the court the girl testified that

> "When I began to scream he hit me twice and grabbed his weapon and threw me down" (R9).

She testified further he then lifted her dress, and when asked to proceed with the narrative she again stated, "I just don't know how to say it" (R10). Then

> "At the suggestion of the court and with the consent of the defense counsel the witness' mother was brought into the room and advised that she must remain silent - that her presence was to help ease the embarrassment of the witness" (R10).

After the mother's entrance into the court room the girl stated that "he /accused/ lay down on me" (R10) but insisted that she did not "know how to say it" (R10). Again the court recessed for a brief period and upon resumption of proceedings, Maria testified that the accused threw her down and lifted up her dress, removed her pants and "had intercourse with me". When asked if accused's penis penetrated her organ she answered affirmatively (R11). She claimed she did "everything" to stop him, in that she tried to get away from under him, and she pushed him, but she did not scratch, bite, or kick, or pull his hair (R11, 15). She yelled "all I could" until he hit her. She became scared when he took his carbine and threatened her with it (R11-13). She did not scream while on the ground because he covered her mouth with his hand. Her pants were not torn by their removal (R16). She denied that he kissed her or that she kissed him. She stated that she put on her untorn pants after the act occurred. She claimed that she was crying from the time he pulled her out of the jeep and "hollered" loudly. She suffered no pain during the intercourse or thereafter (R46-47).

b. Charges II and III (Disrespect toward and willful disobedience of Lieutenant Aaron).

After the accused had fixed the wire that he had broken, and after the Polish girl had been questioned and taken to an Army medical officer, Lieutenant Aaron and the accused engaged in a heated discussion concerning the girl and the accused's conduct. When questioned as to the presence of the girl in the jeep accused asserted he had "picked her up down the lane * * * picked her up at the second house" (R18). There was no "second house" (R18). Accused further stated to Lieutenant Aaron that he "was taking her to her mother" (R18). They were both angry. The officer then stated to him that his statements were false. The accused's attitude was unsoldierly (R25-26). The lieutenant may have said, "What are you, a God-damned recruit?" but did not remember that (R22). Accused got out of the jeep and wanted to talk to the lieutenant "man to man" as he observed that the lieutenant wore the insignia of the Coast Artillery Corps and the accused had served in that Corps for four years in Panama. The lieutenant told him to get back into the jeep and to watch out how he was talking. He did as directed but when the lieutenant told him to stay right where he was, he looked at

the lieutenant and said "like hell, I will" and drove off. The lieutenant detected the odor of liquor on his breath and wanted him to stay in the jeep so that he could send for someone to take him into custody (R20-21).

4. After his rights as a witness had been explained to him, accused elected to testify in his own behalf. He admitted that he accosted the girl on the road, invited her into the jeep and then drove into a side road for a distance of about fifty yards and stopped. They both left the jeep and walked over to a fence about 4 feet high. There he first lay down and she did the same. She understood what he wanted although they did not speak the same language and when he opened his trousers she lifted up her dress and assisted him in having intercourse with her. When he completed the copulation, he arose, arranged his clothing and entered the jeep. She followed him and also entered the jeep. He drove up the lane and turned around, stopped, lit a cigarette, and started forward. When within 15 feet of the main highway Lieutenant Aaron stopped him. When the girl saw the officer she started to cry. The officer complained about a broken communication wire and accused offered to and did fix it. Lieutenant Aaron escorted the girl from accused's jeep to his own jeep where she was questioned by an enlisted man who spoke Polish, and then the officer commenced to question him concerning his name, his outfit, the girl, and what he had been doing with her. Lieutenant Aaron became angered and called the accused a "God-damned recruit". Accused told him that he had spent 4½ years in Panama in the Coast Artillery. The officer was also in the Coast Artillery and said, "how come we can't get along"? Accused said they could not get along because of the name he called the accused. Lieutenant Aaron then told him to stay where he was. He replied that he had to lay communication lines and added "like hell I will" and drove off (R40-42). He denied that he ever struck the girl or threatened her with any weapon. There was an M-1 in the jeep but he did not use it. She did not scream or resist (R42-43). He had no signs of blood on himself (R44).

One of the enlisted men standing on the highway with Lieutenant Aaron during the time the accused drove by with the girl testified for the defense and stated that he saw the accused drive in to the lane and about 30 minutes later came out of the lane in the jeep. During that time, the accused was within 100 yards of him and if the girl had yelled or screamed he would have heard it. He heard no scream or yell (R39-40).

5. With reference to Charges II and III, the evidence for the prosecution showed and the accused admitted, that when he received a lawful order from a superior officer, Lieutenant Aaron, to stay where he was, he not only willfully disobeyed the order but also behaved with disrespect toward the officer by saying "Like hell I will" and drove off in his jeep. While both offenses were part of the same transaction, it was proper to charge them as separate offenses (CM ETO 6694, Warnock, and authorities therein cited). Such conduct under the circumstances constitutes a violation of Articles of War 63 and 64 (CM ETO 6194, Sulham; CM ETO 106, Orbon; MCM, 1928, par.133, p.146).

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6. a. Preliminary to consideration of the question whether the record of trial is legally sufficient to support the findings of accused's guilt of the crime of rape, it is necessary to determine whether accused's rights were substantially prejudiced by the procedure involved in the interrogation of the prosecution witness, Maria Ostenska, the victim of the alleged rape. The record shows that the young woman was an unwilling, but not a hostile witness. Her testimony was given through an interpreter as she had no knowledge of the English language. Her direct examination is pregnant with proof of her bewilderment and embarrassment. She was at the time of trial but 15 years of age. It is fair to infer that she was a displaced person as she is of Polish nationality and at the time of the incident was discovered deep in the heart of Germany. Her clothing was described by Captain Robert S. Tinkham, Medical Detachment, 272nd Infantry, who made a physical examination of her soon after the affair, as being "unkempt". It was "poor and dirty" (R38). While the record is entirely silent as to her background it does not require much imagination on the part of the reviewer to place her within the large group of civilians on the continent of Europe who are today pathetic and tragic victims of war. Captain Tinkham's testimony permits the definite inference that prior to the act of intercourse with accused she was a virgin.

The young woman was the principal witness before a court-martial in a capital case. She was suddenly thrust into surroundings strange and confusing to her. She was required to relate to men of an alien nationality the details of an event of the most intimate and personal nature. Natural modesty temporarily closed the mouth of the child. She spoke freely of those incidents which did not touch or pertain to the actual coition, but when testimony was necessary to establish accused's carnal connection with her she "did not know how to say it". The rule prohibiting the use of leading questions on direct examination of a witness was properly relaxed (MCM, 1928, par. 121c, p.128). Both the trial judge advocate and the law member by use of leading questions attempted to secure from the witness testimony pertaining to the copulation, but the efforts were futile. The girl persisted in her statement that she did not "know how to explain". After the recess of the court for the purpose of having "the witness forget her embarrassment and tell a full story", she asserted "You know I don't know how to say it" (R10).

The court was thus presented with a difficult situation. In the interest of justice it was entitled to hear from the mouth of the witness the details of her copulation with accused. There is no mandate of law which required the court to remain supine and helpless under such circumstances, and thereby allow the accused an advantage to which he was not entitled. Beyond peradventure the court was not authorized to use physical or moral violence to compel the witness to testify. It is obvious also that the remedies provided by the 23rd Article of War whereby a non-military witness who refuses to testify before a court-martial sitting in the continental United States may be punished were not available to the court in the instant case.

Confronted with the alternative of allowing the vital facts of the case to remain undisclosed and thereby frustrate justice or to devise

means whereby the embarrassed and timid witness might be induced to speak freely, the court adopted the latter course. It was but a natural and practical procedure to bring into the court room the mother of the young girl in the hope that her presence would in some degree relieve the latter from her embarrassment and reticence. The mother was strictly enjoined that she must remain silent and it was explained to her "that her presence was to help ease the embarrassment of the witness". There is not even a suggestion in the record of trial that the mother did otherwise than obey the court's instructions.

In the actual conduct of a trial a large discretion must be vested in a court-martial in order that it may efficiently and expeditiously perform its duties. This discretion does not permit arbitrary, unreasonable or captious exercise of authority. The discretion with which a court is endowed is a judicial discretion to be exercised within limits of reason, logic and common sense. When exercised within such ambit the decision or actions of the court will, on appellate review, be accepted as final (CM ETO 895, Davis, et al). Examples of the proper exercise of judicial discretion are: the relaxing of the rule prohibiting leading questions on direct examination (MCM, 1928, par. 121c, p.128); granting or denying a motion to sever the trial of accused charged jointly (Ibid: par. 7b, p.55; CM ETO 895, Davis, et al) or severally (CM ETO 6148, Dear and Douglas); the order of the introduction of evidence (Winthrop's Military Law and Precedents (Reprint 1920) p.286; MCM, 1928, par. 121a, p.126); the determination of the desirability or necessity of the separation and exclusion of witnesses (Winthrop's Military Law and Precedents (Reprint 1920), p.284; Gates v. United States (CCA 10th, 1941), 122 F(2nd) 571, 577, cert. denied 314 U.S. 698, 86 L.Ed.558; MCM, 1928, par.121, pp. 126, 127), the exclusion of spectators from the court room (MCM,1928, par. 49e, p.38); and the seating arrangement of the accused in the court room (CM ETO 804, Ogletree, et al; CM ETO 1284, Davis et al).

The methods of procedure of the court in the instant case with respect to relieving the victim of the alleged rape from embarrassment and overcoming her reticence to the end that she might freely and fairly disclose the facts and circumstances of accused's carnal connection with her was a matter peculiarly within the sound judicial discretion of the court.

> "The presence in court, in view of the jury of near relatives of the victim of the crime charged * * * is within the discretion of the court * * *"(16 CJ sec. 2059,p.811).

> "* * * generally the presence in court, in view of the jury, of near relatives of the victim of the crime charged, or the presence in court, in view of the jury, of near relatives of accused, is within the court's discretion" (23 CJS sec. 970,pp.297,298).

It cannot fairly be said that the presence of the mother in the court room caused the daughter to color the testimony. Prior to the admission of her mother to the presence of the court she had testified

to facts which, as will hereinafter be demonstrated, supported the finding that the act of intercourse was not voluntary on her part. She had exculpated herself from the accusation that she was a willing and co-operative party to the sexual act. In her embarrassed expression: "I don't know how to say it" (R8); "He * * * threw me down and forced me" (R8); " * * * when he forced me you know what happened" (R9); "I just don't know how to explain" (R9) and "You know I don't know how to explain" (R11), there is the plain and irrefrageable implication that accused had carnal connection with her. After her mother was in the court and the ensuing recess occurred, her testimony met the technical requirement of proof:

> "when he threw me down and lifted my dress
> then he had intercourse with me" (R11).

Upon being asked, "Did his penis penetrate into your organ?", she answered, "Yes" (R11). Without this definite, positive statement as to the coition, her testimony produced the certain inference that the sexual act was performed. Her positive testimony as to the act of intercourse therefore did no more than convert the inference which arose from her prior statements into a definite declaration that accused had carnal knowledge of her.

As a result of a critical analysis of the girl's testimony and a careful study of the court room procedure, the Board of Review cannot say that the court abused its discretion in the handling of this difficult situation. Oppositely, the conclusion is that the court performed its duties in an admirable and conscientious manner, without prejudice to the substantial rights of accused and consonant with fair and honest judicial process.

b. Accused in his testimony in open court admitted that he had sexual intercourse with Maria Ostenska at the time and place alleged. The young woman, as above shown, testified as to the completed act of intercourse including penetration. Therefore, the first element of the crime of rape was proved beyond reasonable doubt (MCM, 1928, par.148b, p. 165). There remains for consideration of the question whether there is substantial evidence that the intercourse was with force and without Maria's consent (Ibid).

In determining this question, the overall evidence should be considered rather than confining the examination to the proof of events at the time and place of the act of intercourse. The young woman entered the jeep driven by accused at his invitation. They were complete strangers, but considering the fact that at the time of the episode, the area wherein the events transpired was but newly conquered by the invading hosts of the American army with consequential displacement of conventions and practices of orderly society, there is nothing surprising that a young girl should accept such invitation from an American soldier. It is but a fair inference that accused was "on the prowl" and his invitation had an ulterior purpose as events proved. Accused then drove his jeep to a point on the road where he obviously saw a lane which led into the fields. This assertion is proved by the fact that he passed the opening

of the lane and then turned about on the road, returned to it and entered the lane. Upon arriving at a place in the field located by the witnesses from 50 to 100 yards from the road, accused stopped his vehicle and ordered the girl to leave it. When she delayed obedience to his command he forcibly dragged her from the jeep. Maria was explicit in her testimony as to her attempts to call for help and of accused's acts in muffling her cries. She insisted that he struck her twice and finally pushed her to the ground. During this time, she commenced to cry (R47). In spite of her protestation, he lifted her dress and removed her pants. He then placed himself on top of her. She resisted by trying to push him away by use of her hands and arms, but "I didn't have strength enough to push him away" (R15). Maria is but a young girl who is rather small and accused is "a pretty good sized man" (R45). She knew accused was armed with an M-1 rifle (R44). The girl asserted,

> "When I was in the jeep it [the rifle] was in the jeep, and when he was in the field it was in the field" (R14).

These facts afford a fair measure of the degree of the victim's resistance.

Upon completion of intercourse accused disengaged himself and he and the girl entered the jeep. Accused turned the vehicle about and following the lane, drove toward the road. When he reached the road, he was halted by Lieutenant Aaron. The girl held her hands to her face and showed evidence that she had been crying. The officer took her to an American soldier who spoke and understood the Polish language. He interrogated her as to occurrences. She exclaimed, "Oh, my God, I hate to tell you what happened", but eventually declared that accused had engaged in sexual intercourse with her. When asked by the soldier why she did not stop accused "The only answer she gave wasthat she could not speak English" (R33). At that time she was crying and was hysterical.

A physical examination by an army medical officer made a short time after the events above described disclosed that there were tears in the girl's vagina with hemorrhage. The condition indicated that some object larger than the vagina orifice had entered it. There were no signs of bruises or injuries to her body except in her private organs.

Considering this sordid story with its exhibition of man's animalism and lust freed from the restraints and inhibitions of peace time society, the Board of Review has no difficulty in concluding that there was substantial evidence presented to the court to support its findings that the act of intercourse was without the consent of the victim and was secured by force and violence administered by accused. The court was fully justified in finding accused committed the crime of rape (CM ETO 1402, Willison; CM ETO 1899, Hicks; CM ETO 2472, Plevins; CM ETO 4194, Scott; CM ETO 6224, Kinney and Smith; CM ETO 7977, Inmon; CM ETO 11621, Trujillo, Gambrell and Price.

There is nothing improbable, contradictory or uncertain in the young woman's testimony with respect to the attack upon her. Inherently it bespeaks the truth. It possesses none of the weaknesses or defects disclosed by the testimony of the prosecutrix in CM ETO 2625, Pridgen. In that case, the girl's testimony contained contradictions and improbabilities and was directly contradicted as to certain facts by the testimony of independent witnesses. In this connection the following quotation is revelant:

> "The case is of familiar pattern to the Board of Review which has consistently asserted in its consideration of like cases that the court with the witnesses before it was in a better position to judge of their credibility and value of their evidence than the Board of Review on appellate review with only the cold typewritten record before it" (CM ETO 8837, Wilson).

7. The charge sheet shows that the accused is 32 years six months of age. He enlisted in the regular Army of the United States on 22 November 1940 to serve three years. 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 offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all charges and specifications and the sentence as commuted.

9. The penalty for rape is death or life imprisonment as the court martial may direct (AW 92), and the penalty for willfully disobeying the lawful command of a superior officer is death or such other punishment as a court-martial may direct (AW 64). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD,8 June 1944, sec.II, pars.1b(4),3b).

Earle Stephens Judge Advocate

Ronald D Miller Judge Advocate

(ON LEAVE) Judge Advocate

1st Ind.

War Department, Branch Office of The Judge ~~Advocate~~ General with the European Theater. 19 Dec 1945 TO: Commanding General, United States Forces, European Theater (~~Main~~) APO 757, U.S. Army.

1. In the case of Private First Class ALBERT F. BISHOP (11014832) Headquarters Company, 3rd Battalion, 272nd Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of 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 15840. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15840).

B. FRANKLIN RITER,
Colonel, JAGD,
Acting Assistant Judge Advocate General.

( Sentence as commuted ordered executed. GCMO 529, USFET, 1 Nov 1945).

15840

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

BOARD OF REVIEW NO. 1

20 AUG 1945

CM ETO 15843

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| UNITED STATES | ) | IX AIR FORCE SERVICE COMMAND |
| | ) | |
| v. | ) | Trial by GCM, convened at Headquarters, 91st Air Depot Group, APO 149, U. S. Army, 7 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |
| | ) | |
| Private BENNIE E. DICKERSON, JR. (34257753), 2004th Quartermaster Truck Company (Aviation), 1513th Quartermaster Battalion Mobile (Aviation) | ) | |
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HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

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

2. Accused was charged under the 94th Article of War with the theft of five jerricans (each of a capacity of five gallons) and 25 gallons of gasoline, property of the UnitedStates furnished and intended for the military service thereof of a value of $14.25, and also with the wrongful and unlawful sale, barter or conveyance of the gasoline to a Belgian civilian. The date of these alleged offenses was 15 May 1945. He was found guilty of both offenses and was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. The reviewing authority approved the sentence. Substantial evidence supported the findings of guilty of the charges and the sentence (CM ETO 10898, Williams and Hutchens

and authorities therein cited: CM ETO 11497, Boyd).

3. The only question which requires consideration is whether accused's confession (R41;Pros.Ex.2) was properly admitted in evidence. The accused was in the custody of the military police on 16 May 1945 at St. Trond, Belgium. He was suspected of being involved in the crimes with which he was ultimately charged and tried. On that occasion and on 22 May, he was subjected to inquisitorial treatment by the military police. He was incarcerated in a Belgian jail for three or four days between the two interviews. During the course of the second interview two written statements were prepared for his signature but were never signed by him. They were destroyed by the police (R7-8,Pros.Ex.1) and no attempt was made to present their substance at the trial. It will be assumed (and there is substantial evidence to support this assumption) that the treatment accorded accused by the police was of such nature as to make both the written statements (had they been signed by accused) and parol evidence of accused's declarations inadmissible because of their involuntary nature. There is certainly some substantial evidence of coercive treatment of accused which condemns his first inculpatory admissions under the principles announced by the United States Supreme Court (Chambers v. Florida, 309 U.S. 227, 84 L.Ed. 716 (1940); Lisenba v. California, 314 U.S. 219, 86 L.Ed. 166 (1941); Ashcraft v. Tennessee, 322 U.S. 143, 88 L.Ed. 1192 (1944)).

Thereafter accused was returned to his company and on 23 May was interviewed by Lieutenant John C. O'Hara, one of the officers of his company. Lieutenant O'Hara explained to accused his rights under the 24th Article of War and there is substantial evidence that no coercion or compulsion were exerted upon him. Accused then talked to Lieutenant O'Hara, who made notes of his remarks and thereafter placed the same in typewritten form. Accused then signed the statement and swore to it (Pros.Ex.2) before First Lieutenant Eugene H. Carroll, the company adjutant. Over objection of defense, the confession given by accused to Lieutenant O'Hara was admitted in evidence.

The situation here presented is controlled primarily by the principles announced by the United States Supreme Court in Lyons v. Oklahoma, _____ U.S. _____, 64 Sup.Ct.Rep.1208 (Adv.Sheet No. 16), June 5, 1944. The question involved in that case was identical with the one in the instant case, viz, whether a second confession was given under such circumstances as to render it invalid and its use at trial a violation of the due process clause of the 14th Amendment (in the instant case the 5th Amendment). The following quotations from the court's opinion are relevant (64 Sup.Ct. at 1212-1214):

> "The federal question presented is whether the second confession was given under such circumstances that its use as evidence at the trial constitutes a violation of the due process clause of the Fourteenth Amendment, which requires that state criminal proceedings 'shall be con-

sistent with the fundamental principles of liberty and justice.'" * * *

"When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands. But where there is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses but the legal duty is upon them to make the decision." * * *

"Review here deals with circumstances which require examination into the possibility as to whether the judge and jury in the trial court could reasonably conclude that the McAlester confession was voluntary. The fact that there is evidence which would justify a contrary conclusion is immaterial. To triers of fact is left the determination of the truth or error of the testimony of prisoner and official alike. It is beyond question that if the triers of fact accepted as true the evidence of the immediate events at McAlester, which were detailed by Warden Dunn and the other witnesses, the verdict would be that the confession was voluntary, so that the petitioner's case rests upon the theory that the McAlester confession was the unavoidable outgrowth of the events at Hugo." * * *

"Of course the fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary. If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such an uncertain situation, that the confession should be admitted as voluntary, cannot be a denial of due process. * * * The Oklahoma Criminal Court of Appeals in the present case decided that the evidence would justify a determination that the effect of a prior coercion was dissipated before the second confession and we agree." * * *

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"The Fourteenth Amendment is a protection against criminal trials in state courts conducted in such a manner as amounts to a disregard of 'that fundamental fairness essential to the very concept of justice,' and in a way that 'necessarily prevent(s) a fair trial.' * * * A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt. The Fourteenth Amendment does not provide review of mere error in jury verdicts, even though the error concerns the voluntary character of a confession. We cannot say that an inference of guilt based in part upon Lyons' McAlester confession is so illogical and unreasonable as to deny the petitioner a fair trial."

We believe that the facts of the instant case place it well within the ambit of those cases where the legal duty is upon the triers of fact (in this instance, the court) to determine whether the second confession was given under continuing duress, coercion or compulsion visited upon the accused which produced an invalid first confession and that the finding of the triers of fact should be accepted as final upon judicial appellate review. There are no conceded facts in the instant case which are irreconcilable with accused's mental freedom when he gave the confession admitted in evidence. The evidence descriptive of Lieutenant O'Hara's attitude and conduct towards accused and the inferences to be drawn from the fact that he was removed from the direct control and influence of the police when he confessed to Lieutenant O'Hara are of such nature as to make it safer and better, both for the prosecution and the defense, that the court be the arbiter on this question rather than the Board of Review.

The Staff Judge Advocate in his review suggested that the holding of the Board of Review in CM ETO 1486, MacDonald and MacCrimmon, III Bull. JAG 227 (1944) cannot be reconciled with the opinion of the Supreme Court in the Lyons case. An examination of the holding in extenso in the MacDonald and MacCrimmon case makes it apparent that it was a case where "conceded facts exist which are irreconcilable" with the conclusion that the second confession was given after the accused had been freed from the effects of the coercive action which produced the invalid first confession. The evidence of the irregular practices surrounding MacDonald's first confession came from the prosecution's witnesses. The chief offender, a Captain Rasmussen, testified as to what he said and did on the occasion of obtaining the first confession. Another officer, a Captain Andrews, corroborated Captain Rasmussen's statements in part. There was, in a consequence no conflict in the evidence. Uncontradicted evidence of coercion visited upon MacDonald by Captain Rasmussen possessed such definite relationship and connection with his second confession as

"to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary."

It then became a matter of law for the court (and for the Board of Review on appellate review) to invalidate MacDonald's second confession. Not so in the instant case. Certain parts of the accused's testimony inherently were not such as to inspire unqualified belief in their verity. In other aspects it traversed the testimony of Lieutenants O'Hara and Carroll and produced an issue of fact. There resulted an ideal situation for the consideration and decision of a fact-finding agency within the purview of the Supreme Court's decision in the Lyons case. Herein, there is no such certainty as to "forbid any other inference" than that the inquisitorial procedure of the police dominated Dickerson's mind when he gave his confession to Lieutenant O'Hara. Conversely, there is substantial evidence that he was free from the effects of the police action.

The Board of Review concludes that its holding in the case of MacDonald and MacCrimmon is not only consistent with its conclusions herein, but also that it in truth supports them. There was no error in admitting in evidence accused's confession to Lieutenant O'Hara.

4. The record of trial is legally sufficient to support the findings of guilty and the sentence.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2

18 AUG 1945

CM ETO 15849

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| U N I T E D S T A T E S | SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | |
| First Lieutenant FRANCES WALTON, (L-204 709) Women's Army Corps, Adjutant General's Section, Headquarters Normandy Base Section, Communications Zone, European Theater of Operations. | Trial by GCM, convened at Paris, France, 19 June 1945. Sentence: Dismissal and total forfeitures. |

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant Frances Walton, Women's Army Corps, Adjutant General's Section, Headquarters, Normandy Base Section, European Theater of Operations, United States Army, did, without proper leave, absent herself from her organization at APO 562, United States Army, from about 8 February 1945 until apprehended at London, England, on or about 30 March 1945.

Upon arraignment, the accused moved the court as a special plea to dismiss the proceedings on the ground that (1) the accused who was arrested on 30 March 1945 had been denied a speedy trial in violation of the 5th

and 6th Amendments of the Constitution; (2) no copy of the charges wasfurnished her within 8 days of her arrest--it was served on her on 13 June 1945--nor was a proper investigation made as required by AW 70; and (3) she was improperly confined, degraded and punished by being confined before trial. The motion or plea was overruled and denied by the law member. The accused thereupon pleaded guilty to and was found guilty of the Charge and its Specification. No evidence was introduced of any previous conviction. She was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved the sentence, remitted that portion thereof relating to confinement and forwarded the record of trial for action under Article of War 48. The confirming authority confirmed the sentence as modified and withheld the order directing execution thereof pursuant to Article of War 50½.

3. Evidence:

a. For the prosecution: There was introduced in evidence without objection an extract copy of the morning report for 10 February 1945 of Adjutant General's Section, Headquarters Normandy Base Section (R12,Pros.Ex.A) which showed the accused to be absent without leave from that organization as of 8 February 1945. A witness testified that the accused was in the military service of the United States and that he apprehended her in uniform at the Great Western Hotel in London, England, where the accused was registered under her own name on 30 March 1945 (R13).

b. For the defense: The accused, after her rights as a witness were fully explained to her, elected to remain silent and no evidence was introduced in her behalf.

4. Discussion: With reference to the reasons advanced by defense counsel as a special plea in bar of trial, MCM, 1928, par.64a,b, pp.50,51 provides inter alia, as follows:

> "64. COURTS-MARTIAL--PROCEDURE--Pleas.--a. General matters.--Pleas in court-martial procedure include plea to the jurisdiction, plea in abatement, plea in bar of trial, and pleas to the general issue. The first three are known as special pleas. * * * b. Inadmissible pleas.--Such objection as that the accused, at the time of the arraignment, is undergoing a sentence of a general court-martial; or that, owing to the long delay in bringing him to trial, he is unable to disprove the charge or to defend himself; or that his accuser was actuated by malice or is a

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> person or bad character; or that he was released from arrest upon the charges, are not proper subjects for special pleas, however much they may constitute ground for a continuance, or affect the questions of the truth or falsity of the charge, or of the measure of punishment. The same is true in general as to objections that are solely matters of defense under the general issue. (Winthrop)".

The accused did not plead to the jurisdiction of the court, nor did she enter a plea in abatement. Her plea was offered as a reason to dismiss the proceedings. It was therefore one in bar. A proper plea in bar of trial falls within the following classes: Statute of Limitations; former trial; or pardon (MCM, 1928, pars.67,68,69, pp.52,53,54). The matters presented by defense counsel may not properly be pleaded in bar of trial. The law member did not err in his ruling when he dismissed the motion or plea.

With reference to the merits of the case the evidence clearly showed, and the accused admitted by her plea of guilty, that she was absent without leave from her organization from 8 February 1945 until apprehended on 30 March 1945 as alleged in the specification. Absence without leave under such circumstances constitutes a violation of Article of War 61 (MCM, 1928, par.132, p.145).

5. The charge sheet shows the accused to be 25 years, nine months of age. She enlisted in the service on 12 April 1943 and was commissioned second lieutenant on 6 July 1943. No prior service is shown.

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. Dismissal is authorized upon conviction of a violation of Article of War 61.

Judge Advocate

Judge Advocate

Judge Advocate

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(56)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 18 AUG 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army

1. In the case of First Lieutenant FRANCES L. WALTON (L-204709), Adjutant General's Section, Headquarters Normandy Base Section, Communications Zone, European Theater of Operations, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the 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 15849. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15849).

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

( Sentence ordered executed. GCMO 371, USFET, 1 Sept 1945).

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

BOARD OF REVIEW NO. 3

21 SEP 1945

CM ETO 15850

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| U N I T E D  S T A T E S | SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | |
| Private CHRISTOPHER L. MILLER, (32245430), 355th Engineer Regiment | Trial by GCM, convened at Paris, France, 1 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Christopher L. Miller, 355th Engineer Regiment, European Theater of Operations, United States Army, did, at his organization, on or about 15 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France, on or about 13 February 1945.

He pleaded not guilty and, all members of the court present when the vote was taken concurring, was found guilty of the Specification and Charge. 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 shot to death with musketry. The reviewing authority, the Commanding Officer, Seine Section, Communications Zone, European Theater of Operations, approved the sentence, recommended commutation, and forwarded the record of

trial for action pursuant to the provisions of Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The prosecution offered an extract copy of the morning report of accused's organization for 15 September 1944, showing that accused was marked for duty to absent without leave as of 0600 hours on that date. Defense objected on the ground that the extract showed no authenticating signature or initials. The objection was overruled and the document received in evidence (R4-5;Pros.Ex.A).

Accused was apprehended in company with a girl in a cafe in Paris on 13 February 1945 (R6). He was then wearing civilian clothes, for his shirt and shoes, which were "O.D." and was armed with "some kind of a toy weapon" *** "not issue" (R6,7). He did not deny that he was an American soldier and, when asked for his dog tags, directed the girl, who had both of them and his wallet, to deliver the tags to the military policeman who apprehended him (R7).

After due warning, accused made a voluntary verbal statement to the investigating officer, admitting absence from his organization for a considerable period of time, approximating the exact initial date as "close to the date charged" (R8).

4. The defense presented no evidence. After accused's rights were explained to him, he elected to make an unsworn statement through counsel in which he denied participation in any black market activities, explaining that during his absence he was living with a French woman who supported him, and that "the reason he was wearing civilian clothes when apprehended was that his GI clothes were worn out" (R9).

5. The recent Board of Review holding in the Osborne case establishes the admissibility, over objection, of the extract copy of the morning report received in evidence in this one, distinguishing

> "the obiter dictum in the Carmisciano case (CM ETO 4756,Dig.Op.ETO,par.416(9),pp.224-225) where, in listing numerous defaults in duty by the defense counsel, failure to object to an instrument like that in this case was cited, and it was stated by the Board of Review that the document should have been excluded upon objection" (CM ETO 12151, Osborne).

Aside from the extract copy of the morning report entry, accused's absence without leave for approximately all of the five months' period alleged was shown by the testimony of the investigating officer. Accused's

unsworn statement through counsel furnished neither excuse for nor satisfactory explanation of his admitted prolonged unauthorized absence. Proof that accused wore civilian clothes while absent without leave and that his unauthorized absence was terminated by apprehension further support the inference of his intent not to return (MCM 1928, par.130a, pp.143-144). Conviction of desertion is sustained.

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 commuted.

7. The charge sheet shows that accused is 26 years five months of age and entered military service 5 March 1942. No prior service is shown.

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

_____ Judge Advocate

_____ Judge Advocate

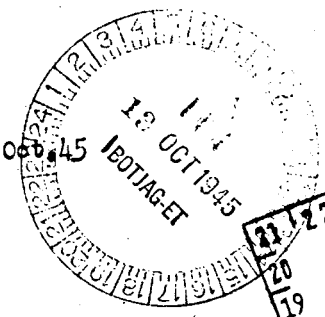
_____ Judge Advocate

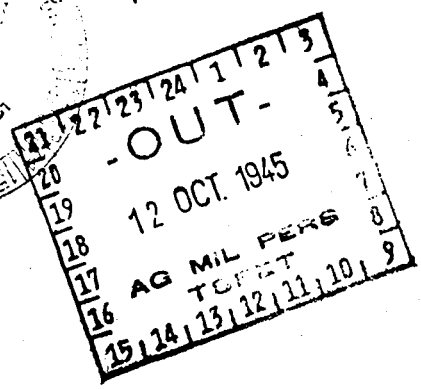
(60)

AG 201- Miller, Christopher L. (Enl) AGPE 2nd. Ind.
Hq. U.S. Forces, European Theater, (Rear) APO 887 12 Oct, 1945.

TO: Assistant The Judge Advocate General, Branch office with the US Forces, European Theater, APO 887

RBE

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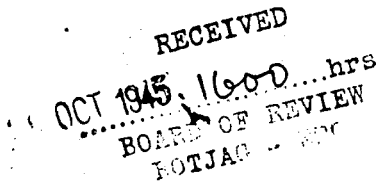


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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 21 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private CHRISTOPHER L. MILLER (32245430), 355th Engineer Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, 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 15850. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15850).

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

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( Sentence as commuted ordered executed. GCMO 471, USFET, 8 Oct 1945).

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

BOARD OF REVIEW NO. 3

21 SEP 1945

CM ETO 15851

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| U N I T E D S T A T E S | SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | |
| Private JACKIE WOLFE (35604316), Headquarters Company, Headquarters Command, European Theater of Operations | Trial by GCM, convened at Paris, France, 11 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U. S. Penitentiary, Lewisburg, Pennsylvania. |

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

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

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

Specification: In that Private Jackie Wolfe, Headquarters Company, Headquarters Command, European Theater of Operations, did, at Paris, France, on or about 25 November 1944, desert the service of the United States, and did remain absent in desertion until he was apprehended near Marseilles, France, on or about 16th February 1945.

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

Specification 1: In that * * * did, at Paris, France, on or about 30 January 1945, knowingly, willfully and unlawfully apply to his own use a Ford Sedan, 1942 Model, of value about $1000.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that * * * did, at St Maxime, France, on or about 16 February 1945, unlawfully and feloniously, by force and violence, and by putting him in fear, take, steal and carry away from the person of Corporal Bernadino Quadrini, one cal. 45 pistol No. 1558607, of value about $30.00, the property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 6 days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding Officer, Seine Section, Communications Zone, European Theater of Operations, approved the sentence but recommended that it be commuted, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution introduced in evidence a duly authenticated extract copy of the morning report of accused's organization for 28 December 1944, showing him "Dy to AWOL as of 25 Nov 44" (R4,Pros.Ex. A). On the night of 25 January 1945, a 1942 model United States Army Ford sedan automobile, stipulated to be of a value of $1000.00, disappeared from the Marbeuf garage in Paris, France (R13-14,16). On 16 February 1945, accused was apprehended without a pass or travel orders by two military policemen in St. Maxime, France (R5,7). He gave them a trip ticket dated 31 January 1945, which, he stated, was all his headquarters required (R5, Pros.Ex.B). He had with him a Ford sedan automobile bearing the same description and number as the one which had disappeared from the Marbeuf garage on 25 January (R5,13). Shortly after he was apprehended, accused

pointed an M-1 rifle at Corporal Bernadino Quadrini, a military policeman, took a .45 caliber United States Army pistol, stipulated to be of a value of $30.00, from Corporal Quadrini's holster, and told him to get out of the car and "start walking". Accused then drove away with the car (R7,16).

Four days later, on 20 February, accused was again apprehended by military police, from whom he again escaped by pointing a .45 caliber pistol at them and firing several shots toward them as he drove away with a weapons carrier in which they were riding (R9-10,11).

On 20 February accused voluntarily signed a written statement, which was introduced in evidence (R15,Pros.Ex.C), and in which he admitted leaving his organization on 15 November 1944 and thereafter living with a "lady friend" in Paris until 31 January, when he took the Ford sedan by slipping it out of a garage at which he formerly worked. He altered an old trip ticket, obtained extra gas and oil, and drove with his friend to various towns and cities in France, stopping at several hotels. About 11 or 12 February, he assisted a French soldier, who had joined him, in getting 25 cartons of cigarettes from a cafe in Marseille, which they sold in various towns. In St. Maxime, after he was apprehended by the military police, he pointed a rifle at the military policeman and said, "Get out and give me your gun". He then took the pistol from the military policeman's holster. He later fired it three times into the air when he escaped from military police in Marseille. He was going to turn himself in when he was arrested on 20 February (Pros.Ex.C).

4. After his rights were explained to him, accused elected to testify (R17-18). He is married and supports his wife and also his mother since his stepfather died of wounds received in the African campaign. The statement he signed is true. He had no permission to be absent from his organization between 25 November and 16 February. He did not intend to hit anybody when he fired his pistol in the air on 20 February 1945. He did not intend to remain away when he left his organization, but after staying away for several hours he knew he would be punished and "might as well make the most of it" until he was apprehended (R18-20). He testified:

> "There was always a thought of fear involved when I would get caught. I saw some fellows get court martial for a few hours and get two or three years. Some other fellow would be gone several weeks and get the same thing. That is why I stayed longer" (R20).

5. Absence without leave of accused from 25 November 1944 to 16 February 1945 is shown by the evidence for the prosecution and admitted by accused in his testimony. From his unauthorized absence for 83 days in an active theater of operations, terminated by apprehension, during which time he took a government vehicle

without authority and engaged in other unlawful acts, the court was fully warranted in inferring an intent on his part to remain permanently away from the service (CM ETO 2216, Gallagher; CM ETO 952, Mosser; CM ETO 2901, Childrey).

The evidence is undisputed that accused took and applied to his own use the army vehicle as alleged in Specification 1 of Charge II. His conduct is clearly a violation of Article of War 94 (CM ETO 11838, Austin, Jr.; MCM 1928, par. 150i, pp.184-185). While the Specification alleges the date of the offense as "on or about 30 January 1945", and the proof indicates the car was missing on 25 January 1945, such variance is clearly not fatal here (CM 173620, Dig. Op. JAG, 1912-40, sec. 451(39), p.325).

The evidence likewise is undisputed that accused took the army pistol as alleged in Specification 2 of Charge II. The Specification alleges and the proof clearly shows the offense of robbery (MCM 1928, par.149f, pp.170-171), which is not an offense denounced by Article of War 94, but by Article of War 93. However, the error in laying the charge under the wrong Article of War did not injuriously affect accused's substantial rights, and the findings will be modified to show a violation of Article of War 93 (CM ETO 9421, Steele; Dig. Op. JAG, 1912-40, sec.394(2), pp. 197-198).

6. The defense moved to strike testimony concerning accused's actions on 20 February in escaping from and firing upon the military police, because such testimony had no bearing upon the specifications and charges for which he was being tried. The motion was denied (R16-17). Assuming that the proof of actions of accused occurring four days after his alleged apprehension was not relevant but improper, his substantial rights were not prejudiced within the meaning of Article of War 37 because his guilt of all specifications was compellingly established and was substantially admitted by him in his statement and testimony at the trial (CM ETO 2644, Pointer; CM ETO 3811, Morgan).

7. The charge sheet shows that accused is 21 years one month of age and was inducted 1 March 1943 at Akron, Ohio. No prior service is shown.

8. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted herein, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specification 2 of Charge II in violation of Article of War 93 and legally sufficient to support the remaining findings of guilty and the sentence as commuted.

9. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized for desertion by Article of War 42, for robbery by Article of War 42 and section 284, Federal Criminal Code (18 USCA 463), and for unauthorized taking of a motor vehicle by Article of War 42 and section 22-2204, District of Columbia Code. The designation of the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

B R Cooper Judge Advocate

Marcellus C. Sherman Judge Advocate

B K Levy Jr Judge Advocate

(68)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 21 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private JACKIE WOLFE (35604316), Headquarters Company, Headquarters Command, European Theater of Operations, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specification 2 of Charge II in violation of Article of War 93 and legally sufficient to support the remaining findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of 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 15851. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 15851).

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

(Sentence as commuted ordered executed. GCMO 454, USFET, 4 Oct 1945).

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

BOARD OF REVIEW NO. 3

29 SEP 1945

CM ETO 15852

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| U N I T E D  S T A T E S | ) SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | ) |
| Private LEROY J. CASEY (33021840), 450th Company, 17th Reinforcement Depot | ) Trial by GCM, convened at Paris, France, 21 February 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

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

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

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

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

Specification: In that Private Leroy J. CASEY, 450th Company, 17th Reinforcement Depot, European Theater of Operations, United States Army, did, at his organization on or about 15 September 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Livry-Gargan, France on or about 4 January 1945.

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

Specification 1: (Disapproved by Reviewing Authority).

Specification 2: In that * * * did, at Livry-Gargan, France on or about 23 December 1944, unlawfully represent himself to be a member of the United States Military Police.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, he was found guilty of the charges and specifications. Evidence was introduced of two previous convictions, one by special court-martial for absence without leave for four days and one by summary court for absence without leave for about three hours, both in violation of Article of War 61. All the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European theater of Operations, disapproved the finding of guilty of Specification 1 of Charge II, approved the sentence, and forwarded the record of trial for action pursuant to Article of War 48 with the recommendation that the sentence be commuted. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The prosecution introduced into evidence, the defense affirmatively stating that it had no objection thereto, an extract copy of the morning report of Detachment 93, Ground Force Replacement System, showing accused from duty to absent without leave on 13 September 1944 (R5; Pros.Ex.A). A French witness testified that he saw a man whom he somewhat hesitantly identified as the accused in Livry-Gargan, France, on or about 23 December 1944, at which time, during certain negotiations with the witness, accused displayed and presented to the witness "sort of an identity card" in the following form (R6-8;Pros.Ex.B):

R E S T R I C T E D

SPECIAL MILITARY POLICE
UNITED STATES ARMY
Name: C A S E Y Jackie
Rank: P.V.T.
A.S.N.: 33021890
/s/ L. J. CASEY

It was stipulated that accused was returned to military control on 4 January 1945.

On 8 January 1945, accused voluntarily made a statement to an agent of the Criminal Investigation Division in which he recited that he was inducted on 12 March 1941, was shipped to England sometime in March

of 1943, and came to France in June of 1944. After being shipped to France, he was sent to various Replacement Depots and about "the last of September I went AWOL and went to Paris". The next day he surrendered to the military police and was directed to leave Paris within two hours. He did so, and, upon going back to his former station, found that his unit had moved. He then returned to Paris in an effort to locate his organization but was unable to secure any information concerning its whereabouts so he went to Bondy where he stayed for "about a month". He then went to Lagny and stayed there "a few weeks" and thereafter to Meaux where he also stayed "a few weeks". Approximately one month before Christmas he became "fed up because of worry about my family affairs" and accordingly started toward Paris with the intention of surrendering himself to the military authorities. En route, he stopped at Livry, started to gamble, and, having won about 6000 francs, took a room in a rooming house. About three weeks before Christmas, he and two other soldiers engaged in certain transactions with a French civilian in Livry and thereafter demanded that the Frenchman return to them certain gasoline cans. Difficulty was had in securing the return of the cans until he displayed a "card stating I was a military policeman". This card had been prepared by "an American P.F.C." whose organization he did not know. He remained in Livry until 4 January 1945 when he was apprehended by the military police. With one exception, he had never been involved in the sale or disposal of property of the United States government (R8;Pros. Ex.C).

4. After being advised of his rights as a witness, accused elected to testify on his own behalf. He stated that he had not come overseas with his "outfit" because he was serving a court-martial sentence at the time it was shipped. Thereafter, he came to England in a "casual outfit" and was sent to a Replacement Depot. In June of 1943, he came to France and

> "was put in the 3rd Replacement Depot. From there I went to the 19th, from 19th to 53rd, and from there I went to the 17th. I stayed there three days and was transferred back to the 19th and then back to the 17th" (R10).

Thereafter, he came to Paris with a non-commissioned officer assigned to the 17th Replacement Depot and got lost. The next day a military policeman asked him for his pass. When he could not produce one, he was taken to the Provost Marshal where he was given a direct order to leave Paris. He found that the 17th Replacement Depot had moved and, after trying to locate it for four or five days, he "got disgusted and gave up". He was not assigned to any unit except Replacement Depots from the time he reached England until the time he absented himself without leave (R10). He closed his testimony by saying

> "I had no intentions of deserting the Army and came overseas for one reason. I volunteered for the Army. I have been in seven Replacement Depots" (R11).

5. With repsect to Charge I and its Specification, the introduction of the abstract copy of the morning report of Detachment 93, Ground Force Replacement System, showing accused from duty to absent without leave on 13 September 1944, his presence in Livry-Gargan, his activities there, and the stipulation that he was returned to military control on 4 January 1945 all tended to prove that accused was absent without leave for the period alleged (cf. CM ETO 4915, Magee). Despite his assertion while on the stand that he did not intend to desert the service, he himself admits both in his pretrial statement and in his sworn testimony that he was absent without leave for a period of approximately 113 days during which time he made no real effort to rejoin his organization. From these facts, together with the other circumstances shown, the court was warranted in inferring that at the time of absenting himself or at some time during his absence he entertained the requisite intent to constitute his offense that of desertion (CM ETO 1629, O'Donnell; CM ETO 15442, Bifano). The evidence also clearly supports the court's findings that he unlawfully represented himself to be a member of the United States Military Police in violation of Article of War 96, as alleged in Specification 2 of Charge II (Cf: CM ETO 2723, Copprue).

6. The charge sheet shows that accused is 26 years four months of age and was inducted 13 March 1941 at Wilkes-Barre, Pennsylvania. No prior service is shown.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. A. Myers Judge Advocate

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(73)

1st Ind.

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

1. In the case of Private LEROY J. CASEY (33021840), 450th Company, 17th Reinforcement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 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 15852. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15852).

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

( Sentence as commuted ordered executed. GCMO 503, USFET, 24 Oct 1945).

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

BOARD OF REVIEW NO. 3

6 SEP 1945

CM ETO 15855

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| U N I T E D S T A T E S | 28TH INFANTRY DIVISION |
| v. | Trial by GCM, convened at Kaiserlautern, Germany, 21 May 1945. Sentence as to Wilson: Forfeiture of $100 per month for four months. Sentence as to Warren: Dismissal. |
| First Lieutenant GORDON W. WILSON (O-342308) and Second Lieutenant GEORGE E. WARREN, JR. (O-1826309), both of Company I, 112th Infantry Regiment | |

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

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

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

WILSON

CHARGE: Violation of the 96th Article of War.

Specification 1. In that First Lieutenant Gordon W. Wilson, Company I, 112th Infantry, did, at or near Durnbach, Germany, on or about 20 April 1945, violate orders prohibiting fraternization with German civilians by entertaining two German women, Miss Elizabeth Kreur and Mrs. Margaret Weber in his quarters and having sexual intercourse with Miss Elizabeth Kreur.

Specification 2. In that * * * did, at or near Durnbach, Germany, on or about 22 April 1945, violate orders prohibiting fraternization with German civilians by entertaining two German women, Miss Elizabeth Kreur and Mrs. Margaret Weber, and having sexual intercourse with Miss Elizabeth Kreur.

Specification 3. In that * * * did, at or near Bendorf, Germany, on or about 20 April 1945, violate orders prohibiting transportation of civilians in military vehicles, by transporting two German women for an unauthorized purpose from Bendorf, Germany to Durnbach, Germany.

Specification 4. In that * * * did, at or near Durnbach, Germany, on or about 21 April 1945, violate orders prohibiting transportation of civilians in military vehicles by transporting two German women for an unauthorized purpose from Durnbach, Germany to Bendorf, Germany.

WARREN

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

Specification: In that Second Lieutenant George E. Warren, Company I, 112th Infantry, was at Bendorf, Germany, on or about 18 April 1945, found drunk and disorderly while on duty as platoon leader of a security guard.

CHARGE II: Violation of 96th Article of War.

Specification 1. In that * * * did, at or near Durnbach, Germany, on or about 20 April 1945, violate orders prohibiting fraternization with German civilians by entertaining two German women, Miss Elizabeth Kreur and Mrs. Margaret Weber in his quarters and having sexual intercourse with Mrs. Margaret Weber.

Specification 2. In that * * * did, at or near Durnbach, Germany, on or about 22 April 1945 violate orders prohibiting fraternization with German civilians by serving food to and entertaining two German women, Miss Elizabeth Kreur and Mrs. Margaret Weber.

Specification 3. In that * * * did, at or near Bendorf, Germany, on or about 22 April 1945, violate orders prohibiting transportation of civilians in military vehicles by transporting two German women for an unauthorized purpose from Bendorf, Germany, to Durnbach, Germany.

Specification 4. In that * * * did, at or near Durnbach, Germany, on or about 23 April 1945, violate orders prohibiting transportation of civilians in military vehicles by transporting two German women for an unauthorized purpose from Durnbach, Germany to Bendorf, Germany.

Each accused pleaded not guilty and each was found guilty of the respective charges and specifications against him. No evidence of previous convictions was introduced as to either accused. Wilson was sentenced to forfeit $100 per month for four months and Warren was sentenced to be dismissed the service. The reviewing authority, the Commanding General, 28th Infantry Division, approved the sentences, ordered the sentence as to Wilson executed, although deeming it inadequate, and forwarded the record of trial for action as to Warren under Article of War 48. The confirming authority, the Commanding General, European Theater, confirmed the sentence as to Warren and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution's evidence established that on the evening of 18 April 1945 between 1900 and 2130 hours at Bendorf, Germany, accused, Lieutenant George E. Warren, was drunk and disorderly while on duty as platoon leader of the Third Platoon of Company I, 112th Infantry, which was then engaged in the town guarding two bridges, checking passes and maintaining order. He appeared on a street without side arms or helmet, staggering, cursing and acting "silly" until guided back to his billet by enlisted men (R13,15,16,18,19,26,28,30). Four military witnesses testified he was drunk (R15,17,26,30).

On 20 April 1945, accused, Lieutenant Gordon W. Wilson, was in command of Company I, 112th Infantry, stationed in Durnbach, Germany. On that evening at about 2300 hours, Lieutenants Wilson and Warren were driven from Durnbach to the town of Bendorf about 13 to 15 kilometers distant in a company jeep where they called at a

certain house for two German women, Miss Elizabeth Kreur and her sister, Mrs. Margaret Weber, both of Bendorf (R31,33,40,41,50,51,54). The women returned with the officers to the latters' quarters in Bendorf, riding in the rear of the vehicle and concealed from view beneath blankets. During their visit the women were taken to separate bedrooms where each had sexual intercourse, Miss Kreur with Lieutenant Wilson and Mrs. Weber with Lieutenant Warren (R33,34,39,41,42). The women were returned in the jeep to their home at about 0200 hours the following morning by Lieutenant Wilson (R33,37,51,52,53). Again on 22 April Lieutenant Warren was driven to Bendorf in a jeep, returned with the same women, who were on this occasion billeted in a house in Durnbach where both officers spent the night with them in separate bedrooms and each again had sexual intercourse as on the previous occasion (R33,34,36,38,40,41). The women remained all day 23 April and food was brought to them from the company mess by Lieutenant Warren (R34,39,57). The officers visited them early in the evening on 23 April and at about 2100 hours a jeep was ordered and again used by Lieutenant Warren to return the women to their home (R33,34,41,42,47).

4. After their rights were explained, Lieutenant Warren elected to remain silent (R71,82). Lieutenant Wilson testified that the women were transported and housed in Durnbach substantially as shown by the prosecution. However, he denied that the blankets were used to conceal them but rather to keep them warm, denied that they were brought from Bendorf to Durnbach for fraternization purposes and denied he had sexual intercourse with either of them (R77). They were transported in accordance with a plan conceived by him and Lieutenant Warren to "trap" certain enlisted men who had been fraternizing. This was the sole purpose of their visits (R76,78,80). He never saw them at the time of their second visit (R80). His plan was unsuccessful on the first occasion because "the whole company was not in" and he was "a bit upset" because the company which was supposed to move "was not at that hour moved" (R78-79). On the second occasion

> "it was a check on the house to house canvas on the fraternizing. If word ever came to me that they found some women or the women reported that somebody had been down there then I would know the men were out again" (R79).

Evidence was received of the good character and excellent prior service of both accused (R68,69-70,71;

Def. Exs. Nos. 1-15).

5. a. As regards Charge I and Specification against Lieutenant Warren, the court was fully justified in finding him guilty as alleged (MCM, 1928, par.145, p.160).

b. With reference to Specification 1 and 2 of the Charge against Lieutenant Wilson and Specification 1 and 2 of Charge II against Lieutenant Warren, the alleged orders prohibiting fraternization were not introduced in evidence. However, the specifications properly set forth offenses in violation of the theater policy in effect at the time alleged as contained in Appendix A to letter, 12 September 1944, Supreme Headquarters, Allied Expeditionary Forces and quoted in CM ETO 10967, Harris. The testimony of Lieutenant Wilson demonstrates that both accused were fully aware of the prohibition against fraternizing and the meaning of the term. His testimony regarding their scheme to discover the enlisted men in his organization who were fraternizing was unconvincing and was overwhelmed by the testimony of the two German women involved, which was corroborated throughout by military witnesses. The findings of guilty are supported by the evidence.

c. Regarding Specification 3 and 4 against Lieutenant Wilson and Specification 3 and 4 of Charge II against Lieutenant Warren, no evidence was introduced of the alleged order prohibiting the transportation of civilians in military vehicles. However, this was not necessary since the specifications describe a violation of Pamphlet, AG 451/2 Pub GC, Maintenance and Operation of Motor Vehicles, Headquarters, European Theater of Operations, 24 January 1944, which was governing at the times alleged and which in effect prohibits the transportation of civilians except on official business. The evidence showed clearly that each accused transported the two German women in a military vehicle as alleged in the specifications against each. The evidence supports the findings of guilty (Cf: CM ETO 2966, Fomby; CM ETO 7269, Van Houten).

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

Wilson is 30 years five months of age and was "Commissioned June 1936; 2nd Lt; promoted 1st Lt Dec 1942; assigned 112th Inf. per Par 13 SO 20 dated 5 Feb.45. Ind. Fed. Service 5 Feb 1942".

Warren is 21 years eight months of age and was "Appointed 2nd Lt. 24 Sept 43; assigned 112th Inf. per Par 2 SO 34 dated 3 Mar 1945 fr 28th Inf. Div. Ind. Fed. Service 12 February 1942".

No prior service is shown as to either accused.

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

8. As to Warren, the penalty for an officer found drunk on duty in time of war is dismissal and such other punishment as a court-martial may direct (AW 85).

B R Keeper Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 6 SEP 1945
TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of First Lieutenant GORDON W. WILSON (O-342308) and Second Lieutenant GEORGE E. WARREN, JR. (O-1826309), both of Company I, 112th Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence as to accused, Second Lieutenant GEORGE E. WARREN, JR.

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 15855. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15855).

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

(As to accused WARREN, sentence ordered executed. GCMO 411, ETO, 15 Sept 1945).

RESTRICTED

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

BOARD OF REVIEW NO. 2

13 OCT 1945

CM ETO 15858

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| U N I T E D S T A T E S | 75TH INFANTRY DIVISION |
| v. | Trial by GCM, convened at Winterberg, Landkreis Brilon, Germany, 26 May 1945. |
| First Lieutenant ALFRED W. INGHAM (01945385), Company L, 290th Infantry | Sentence: Dismissal, total forfeitures, confinement at hard labor for 10 years. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |

HOLDING by BOARD OF REVIEW NO. 2
HEPBURN, MILLER and COLLINS, Judge Advocates

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

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

CHARGE I: Violation of the 75th Article of War.

Specification: In that First Lieutenant Alfred W. Ingham, Company L, 290th Infantry at or near Auf dem Schnee, Landkreis Hagen, Germany, on or about 12 April 1945, then in command as leader of the first platoon, while before the enemy, did, by his misconduct, endanger the safety of his platoon, in that he was drunk and unfit for military duty.

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

Specification: In that * * * did at or near Auf dem Schnee, Landkreis Hagen, Germany, on or about 12 April 1945, while in command of a platoon, during the course of an attack, wrongfully drink intoxicating liquor in the presence of an enlisted man.

He pleaded not guilty to and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. 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 a period of ten years. The reviewing authority, the Commanding General, 75th Infantry Division, approved the sentence and forwarded the record of trial for action under AW 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution: On 12 April 1945, near Auf dem Schnee, Landkreis Hagen, Germany, the accused, First Lieutenant Alfred W. Ingham, platoon leader of the first platoon, Company L, 290th Infantry (R6,13), during an attack against the enemy with the objective of taking that town (R7,12), entered a building therein. He was in possession of a bottle of alcoholic liquor from which he drank (R22,23). He consumed about six drinks (R27). He did this in the presence of at least two enlisted men in his command (R22,26). He offered them a drink from the same bottle (R22,27), and then put the bottle in his pocket (R23). Accompanied by one of the enlisted men he left that building to go to the company command post and on the way a shell was heard coming. They "hit the ground" and the shell struck and exploded about 50 to 75 yards away. The explosion was not visible to them (R23-24). The enlisted man felt no concussion from it. Accused and the enlisted man arrived at the company command post in about 10 to 15 minutes (R24) at about 2030 hours. At that time the accused's breath smelled of alcohol (R7). He was unsteady, and he had difficulty in lighting a cigarette (R16). The company commander inquired of accused as to the whereabouts of his platoon and directed that he bring it to the company command post as it was necessary to relieve the second platoon which was then "pinned down" by enemy fire (R7). When the first platoon did not appear at the company command post after the expiration of a short time, the company commander again inquired of accused as to its whereabouts. Accused replied that "he would go after it himself". However, two soldiers were sent on the mission. During the period the company commander awaited the arrival of the first platoon there was rifle fire and sniper fire (R8,16,20). After the passage of about 20 minutes the platoon had not arrived. The commander again called for accused (R7). Upon being informed that accused was sick and was in the back of the building, the commander went to the rear of the building (R8). Accused had previously left the house with the expressed purpose of locating the sniper and shortly thereafter he "slumped" to the ground outside of the house (R20). It was necessary to drag him inside in order to protect him from being shot (R8,17,21). The partially filled bottle fell from his jacket (R17).

While the company commander was trying to map out the next move in the attack for his company, the accused caused a further commotion by getting up from the floor and trying to go down into the basement of the building. It required three men to bring him back. He became unconscious again. Water was then thrown on him in an effort to revive him without success. He shouted "Bill, get the platoon out of the artillery" in an hysterical manner and then lay stupefied on the floor (R8-9,18). It was feared that accused's shouting would attract the fire of the sniper who had previously given trouble (R8). Accused then vomited on the floor. He emitted a strong odor of alcohol (R8,9). Thereafter he was carried forward to the platoon command post in a tank (R9,25). At 2300 hours accused was able to sit up but could not or did not talk. He stared into space. Because he was "under the influence of alcohol and unsatisfactory to perform military duty", the company commander relieved him from duty (R10). He was placed on his feet and taken in a jeep to an aid station at 0230 and given a sobriety test (R9-10).

The battalion surgeon examined the accused and although there was an odor of alcohol in his breath he was not at that time under the influence of alcohol. He responded normally to all tests. He was in a dazed condition (R29). About 10 minutes later, accused jumped up from the chair in which he was sitting and asked what he was doing there, what had happened to him, and stated that he remembered nothing since a shell had hit near him several hours previous (R32). In the opinion of the surgeon he was not suffering from battle fatigue, blast injury, or hysteria (R33,34,47). The surgeon admitted that under normal conditions one who was unconscious from intoxicating liquor could not pass the sobriety test given within four hours as shown (R30). Accused was given another physical and mental examination on 4 May 1945 and found to be free of any physical or mental defects (R35-36).

4. The accused, having been advised of his rights as a witness, elected to testify in his own behalf. He related his participation in the attack as platoon leader (R39-41). As he was leaving his platoon building and was five yards away from it a shell struck about 20 or 30 yards away. He "hit the dust" when he heard it coming. After it exploded he did not remember anything until he was being questioned by the battalion surgeon at 0230 hours the following morning (R42). On cross examination, he admitted that he had "a drink of beverage" that he did not believe was alcohol about 4:45 p.m. (R43). Some bottles of liquid were found in the house which the platoon occupied. They were opened. He took two drinks and passed the bottle around to the other men in the room, among whom were enlisted men (R44). He took the bottle along with him so as to share it at the company command post with the others (R44). He left the building at 2000 hours and has no recollection of drinking any more out of the bottle (R44-45). During the two days previous he had averaged only 3½ hours sleep (R48).

5. Discussion: The evidence is clear and decisive that on the night of 12-13 April 1945, accused's company advanced toward the enemy and was at that time in continuous combat with it. The first element of the offense under the 75th Article of War was therefore sustained by substantial evidence. Accused and his organization were "before the enemy" (CM ETO 1249, Marchetti; CM ETO 4783, Duff; CM ETO 6694, Warnock).

With respect to accused's misconduct the following quotations are relevant and cogent:

> "a. Misbehavior before the enemy: * * * Misbehavior is not confined to acts of cowardice. It is a general term and as here used it renders culpable under the Article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms. Running away is but a particular form of misbehavior specifically made punishable by this article; * * * " (MCM, 1928, par. 141a, p. 156) (Underscoring supplied).
>
> "Cowardice is simply one form of the offense, which, * * * may also be * * * the result of negligence or inefficiency. An officer or soldier who culpably fails to do his whole duty before the enemy will be equally chargeable with the offense as if he had deliberately proved recreant" (Winthrop's Military Law and Precedents(Reprint, 1920), p. 623) (Underscoring supplied).
>
> "Misbehavior before the enemy may be exhibited in the form of cowardice, or it may consist of a willful violation of orders, gross negligence or inefficiency" (Dig. Op. JAG, 1912 XLII A, p. 128) (Underscoring supplied).

The evidence showed conclusively that accused voluntarily rendered himself incapable of performing his duties as platoon commander by the consumption of intoxicants, at a time and place when his organization was engaged in an attack upon the enemy. He was not only drunk but for a period, his intoxication rendered him insensible. It is probable that mere drunkenness without proof that intoxication was voluntarily produced by the accused "in order to evade taking part in a present or impending engagement or other active service against the enemy" (Cf: Winthrop's Military Law and Precedents,(Reprint, 1920), p. 623; CM ETO 3885, O'Brien) would not constitute an offense under the 75th Article of War. However, the evidence in the instant case goes further than proof of mere drunkenness. While in a highly intoxicated condition, he failed to assemble his platoon pursuant to the orders of the company commander and the attack was conducted without its immediate

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assistance. While in a drunken state he exposed himself to sniper fire which action required other officers and soldiers to imperil themselves to rescue him. He further conducted himself in such disorderly manner as to threaten the safety of fellow soldiers as to invite sniper fire unless he was suppressed. It was necessary to relieve him of his command.

The conduct of accused therefore involved not only drunkenness but also failure to perform his whole duty as platoon commander at a time when his unlimited, intelligent and loyal services were demanded. In addition he was guilty of acts of disorder which tended to distract others from undivided attention to their duties. There is no difficulty in concluding that accused at the time and place alleged misbehaved before the enemy within the meaning of the 75th Article of War (CM ETO 1109, Armstrong; CM ETO 3081, Smith; CM ETO 3301, Stohlmann; Cf. CM ETO 4352, Schroeppel).

Accused contended that he was suffering from shell shock and not from the effects of his admitted imbibing from the bottle found in the building occupied by his platoon. This defense raised a factual question which was within the court's sole province to determine. As its finding is based upon substantial testimony it will not be disturbed by the Board upon review (CM ETO 1404, Stack; CM ETO 4194, Scott). The findings of guilty of Charge I and its Specification are supported by the evidence.

Accused's drinking of intoxicating liquor - shown to be such by its odor, appearance, and its effect upon the accused - in the presence of enlisted men in his command under the circumstances shown was clearly prejudicial to good order and military discipline and therefore violated the provisions of the 96th Article of War. His conviction of Charge II and its Specification will not be disturbed in this review (CM 211937, Raymond, 10 B.R. 169, 175 (1939); Cf, CM ETO 6235, Leonard).

6. The charge sheet shows that accused is 27 years and one month of age. Without prior service he was inducted on 17 June 1942 and served as an enlisted man until 27 April 1943 when he was commissioned in the Army of the United States.

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

8. Dismissal, total forfeitures and confinement at hard labor is authorized punishment upon conviction of an officer of offenses under the 75th and 96th Articles of War. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (Cir.210,WD,14 Sept 1943,sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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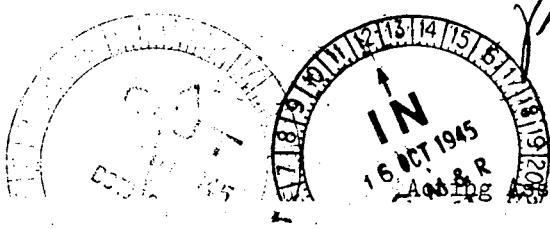
War Department, Branch Office of The Judge Advocate General with the European Theater. 13 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of First Lieutenant ALFRED W. INGHAM (01945385), Company L, 290th 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 15858. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15858).




B. FRANKLIN RITER,
Colonel, JAGD,
Acting Assistant Judge Advocate General.

( Sentence ordered executed. GCMO 526, USFET, 1 Nov 1945).

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

BOARD OF REVIEW NO. 3

28 SEP 1945

CM ETO 15860

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| U N I T E D S T A T E S ) | 101ST AIRBORNE DIVISION |
| ) | |
| v. ) | Trial by GCM, convened at Berchtesgaden, |
| ) | Germany, 5 June 1945. Sentence: Dis- |
| Private JOHN L. ENSLEY ) | honorable discharge, total forfeitures |
| (35558394), Headquarters ) | and confinement at hard labor for life. |
| Company, Second Battalion, ) | U. S. Penitentiary, Lewisburg, Penn- |
| 506th Parachute Infantry ) | sylvania. |

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private John L. Ensley, Headquarters Company, Second Battalion, 506th Parachute Infantry, did, at Ruchsen, Germany, on or about 26 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Alfred Viethees, Company B, 327th Glider Infantry, a human being, by shooting him in the head with a rifle.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous

convictions, one by special court-martial and one by summary court, for absences without leave for six days and one day respectively in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence:

At about 0030 hours on 26 April 1945, Private First Class Alfred Viethees (the deceased) and three other soldiers, all of the 327th Glider Infantry, were leaving a displaced persons' camp at or near Ruchsen, Germany (R52), where they had visited with girls during the evening (R12,14). They had not been drinking. Staff Sergeant Andrew P. Campbell and accused, both of Headquarters Company, Second Battalion, 506th Parachute Infantry, were standing with a girl in the doorway of one of the billets of the camp as deceased and his three companions approached (R11-12,14-15,20,22,27,33). Campbell and accused had been drinking all evening. There had been a lot of soldiers there "with guitars and things. We had music". Campbell was then "pretty well drunk" and accused "was drunk earlier in the evening" (R35-36,39). The girl spoke in German to deceased who with his companions approached Campbell and accused. Campbell asked deceased to tell the girl "she wasn't any good". As deceased spoke to the girl in German, accused said he was trying to take Campbell's girl from him. Campbell produced a pistol, pointed it at deceased and threatened, "You'd better get going". Deceased replied, "Nicht verstehen", whereupon accused pushed him in the face or chest with an M-1 rifle, knocking him to the ground. Deceased carried a carbine slung over one shoulder but had made no unfriendly gestures toward accused (R13,15,17-18,20-21,23-24,28). As deceased slowly arose and started to step back, accused said, holding the rifle at his hip "I'll shoot you" (R13,16-18,21,23,24-25,66-67). An instant later a click was heard of the weapon's safety being released and the rifle fired at deceased from a distance of approximately five feet. Deceased fell with an extensive lacerated wound on the left side of his head which caused his death within a few hours (R9-11,24). All of the soldiers immediately left. Campbell and accused returned to their organization. The former reported the incident by telephone to his battalion commander, who directed that accused report to him in the morning (R39,45,54). Accordingly, at about 0930 hours accused entered his office and reported that he had shot a man (R45) and at approxi-

mately 1000 hours said to his company commander, "Lieutenant I think I've done it this time * * * I think I've killed a man" (R43).

4. After his rights were explained (R46), accused testified. He described the manner in which he spent the evening of 25 April 1945 at a camp where he had been invited by two Russian girls. He drank quite a bit and was feeling the effects, but he was not drunk. He remembered everything that took place and described the details of the shooting as follows:

> "It was 12:30 or 1:00 o'clock. About the time I walked out, four boys from 327 came down the road and stopped there. They got into an argument. Campbell told the fellows to take off. I told all four of the fellows, 'If you want a girl, there are plenty in the barracks. Just go get one. Don't mess with another man's girl'. One fellow said, 'Go fuck yourself', and stepped in towards me. I picked up my Ml. I walked out of the barracks with it in my hand. When he stepped in I didn't want to tangle with four fellows with my fists. Campbell was drunk and I didn't want to tangle four fellows by myself, so I reached down and hit him with my rifle. I just swung and knocked him down. He stood up again and I hit him again, and the second time I hit him the gun went off. Maybe I had my hand on the trigger, but I don't know. I just had it in my hands. If the safety was off the gun it must have been taken off in the barracks. Some Russian guys were playing with it, and I made them put it down. It was loaded. Everybody carried a loaded weapon in Germany. I didn't intend to kill him" (R47).

5. All the elements of the crime of murder were shown beyond any reasonable doubt by substantial evidence and the court's findings of guilty were fully warranted (CM ETO 6159, Lewis, and authorities therein cited). His testimony showed he had a clear recollection of the events that surrounded the homicide. He testified he was not drunk. The court was justified in concluding that at the time he fired at deceased he was not acting in self-defense (CM ETO 1941, Battles; CM ETO 2007, Harris, Jr.). Even if accused's testimony is believed that deceased "stepped in towards me", "a slight assault does not justify killing with a deadly weapon" (1 Wharton's Criminal Law (12th Ed.1932), sec.426, p.651; CM ETO 835, Davis). Accused's claim that the shooting was accidental presented a question of fact that the court was fully warranted in resolving against him under all the circumstances shown.

6. a. While accused was testifying in his own behalf the following statement was made to him by a member of the court in connection with questions asked:

> "It looks to me as though you're not telling the whole story. Possibly it is the whole story, but it doesn't ring true, and a couple of points don't help you very much" (R69).

b. In questioning Staff Sergeant Andrew P. Campbell, recalled as a witness for the court, a member remarked following one of his answers, "I get the impression you're not telling us everything you know" (R54) and inquired of Private Jack H. Decker, Company B, 327th Glider Infantry, similarly recalled, when he indicated he was positive regarding certain of his testimony, "You're not making it up?" (R57).

This quoted language of the court constituted a grave irregularity in the proceedings and improper conduct on the part of the court. However, since the proof of the commission of the offense charged was clearly and conclusively shown, no substantial right of accused was injuriously affected thereby (CM 116012, Dig.Op.JAG, 1912-1940, sec.395(48), p.233; CM ETO 12758, St. George).

7. The charge sheet shows that accused is 26 years eight months of age and was inducted 9 July 1943 at Toledo, Ohio. He had no prior service.

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

9. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and section 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).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B L Newey Jr Judge Advocate

15861

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

BOARD OF REVIEW NO. 2

9 OCT 1945

CM ETO 15862

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|---|---|---|
| U N I T E D S T A T E S | ) | 101ST AIRBORNE DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at |
| | ) | Berchtesgaden, Germany, 2 June |
| Private First Class JAMES | ) | 1945. Sentence: Dishonorable |
| D. McDANIEL (33846487), | ) | discharge, total forfeitures and |
| Company C, 506th Parachute | ) | confinement at hard labor for |
| Infantry | ) | life. United States Penitentiary, |
| | ) | Lewisburg, Pennsylvania. |

HOLDING by BOARD OF REVIEW NO. 2
HEPBURN, MILLER and COLLINS, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class James D. McDaniel, Company C, 506th Parachute Infantry did, at Landsberg Lech, Germany, on or about 30 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Frau Francisca Welz, a human being by shooting her with a rifle in the mouth.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

Accused was a member of Company C, 506th Parachute Infantry. On 30 April 1945 that unit was located in the vicinity of Landsberg Lech, Germany, and had the duty of searching out several small towns in the vicinity for prisoners, military articles, ammunition, arms and food (R28). Accused was detailed on such a searching party and accompanied the other members of the detail until at least 0930 or 1000 hours (R28,29). He was supposed to be carrying a carbine (R30). At about 1600, he and another soldier entered the residence of Anna Gerum in Unter Diessen, Landsberg Lech. Accused asked for weapons and schnapps and went into the bedroom and attic of the house (R35). Anna Gerum did not see him drinking nor notice him staggering, and he was "standing pretty straight". She did not smell his breath (R35,36). Her house is located about 100 metres from the house of Anton Ried (R34).

Accused was seen by another German civilian to enter the Ried house at about 1710 or 1715 on the day in question. At that time "he was drunk" and not acting in a normal manner. His eyes were "glassy" and he was staggering back and forth. He was not holding his rifle steady (R16). This civilian did not see accused point his gun at anyone, and the only words or gestures he observed were when accused "told me (the witness) to come to him. Then I went towards him. I had a loaf of bread under my arm and I thought he wanted that loaf of bread" (R17). A short time after he saw accused enter the Ried house, he heard the sound of crying and yelling from that direction and investigated (R15). He saw Frau Welz's body lying on the kitchen floor in that house "covered with blood" (R16).

A twelve-year old grandson of Anton Ried, Manfred, observed accused and another soldier pass by the yard of the Ried house and go out to the stable. Accused pointed his weapon at a Russian who was in the stable while he inquired as to his nationality. Thereafter the Russian told the boy to "go out, that this was a drunken American soldier", and Manfred left the stable (R18). A few minutes later he saw accused in the hallway and kitchen of the Ried house (R10,18).

In the Ried house were Anton Ried and his daughter Francisca Welz (R7). Ried first observed accused with the other soldier, in the hallway of his house, at about 1715 hours (R7,10). Accused was then "drunk", "wasn't very steady on his feet" and "wasn't walking very steady" (R10). Accused saw the grandson Manfred in the hallway, "pulled" him out of the kitchen and held the weapon "against" him, but the boy escaped from him and went through the kitchen into the pantry, locking the door behind him (R8,19). Accused did not chase him, and though he followed him he could not push through the locked door (R8,10). The boy went from the pantry into the cellar and was just climbing out of the cellar window when he heard a shot nearby (R19).

After Manfred left, accused, Ried, and Francisca Welz remained in the kitchen quietly standing about five feet apart from each other. According to Ried, accused "didn't shoot right away" (R8). For about two minutes he stood holding his weapon at his waist and pointing it at Frau Welz's stomach and chest (R8,11,12). During that time, the witness

"believe/d/ he was steady on his feet, but /he/ wasn't always looking at him," did not know whether the rifle was waving and didn't notice when it was raised to point at his daughter's head (R11,12). During that time accused did not say or gesture anything to her, nor touch her, nor did she say anything. They were standing there "very quietly" (R14). Suddenly a shot was fired, and Frau Welz sank to the floor and died immediately (R8).

Accused then left the kitchen for a minute or two but soon returned and "let himself down on the floor and picked up both her wrists as if trying to feel her pulse" (R8,9). Ried left the kitchen, and accused locked the door and was in the room about ten minutes. Then the other soldier "came along" and accused left the house with him (R9,10). When Ried returned to the kitchen Frau Welz was lying on the floor with her legs spread apart and her body nude up to her waist (R9). A medical officer found that she had been shot through the mouth, the bullet emerging from the back of the skull, and that the bullet wound caused her almost instantaneous death (R23).

At about 1800 on the same day, accused's platoon commander observed him near a small town, the name of which witness did not remember (R29). Accused was "very drunk", and the officer ordered him placed in confinement because of his condition (R30). Shortly afterwards, he was turned over to Private First Class Hounshell, a member of accused's unit, to be put to bed (R31). Accused then had his carbine (R33). He was "drunk"; he could not control himself, he couldn't handle his body" (R32). Accused talked to Hounshell and told him that he had killed a Kraut woman; however, the witness "didn't know whether to believe it or not"; he "thought the man was mighty drunk and didn't know what to think" about the statement he had heard accused make (R31,32). When accused was put on the bed he went "right off to sleep". In answer to the question whether the accused "passed out", the witness stated, "I wouldn't say he passed out. He was just gone. When you put a drunk to bed you know how that is" (R33).

4. The defense called as a witness Corporal Nimmo, the soldier who was with accused at the home of Anton Ried on the day of the homicide (R37). He testified that they were at that place at about 1645 hours and he and accused separated at the garage. At that time accused was "pretty well drunk" and "staggered a little". Seven or eight minutes later the witness heard a shot (R37). He looked for accused in the hallway of the house but did not find him there (R40). He went outside the house and next saw accused a few minutes later when the latter came up behind him in the front yard of the place (R37). At that time accused appeared to be "drunker" than he had been before. He did considerable talking to Nimmo, "saying quite a bit, a little bit of everything."I /Nimmo/ wasn't paying much attention to him. He told me he killed a man, and I said, "what did you do that for"? and he said "he was giving me some trouble". They then walked approximately three quarters of a mile to the next town where accused was picked up by his platoon leader. Accused had difficulty walking and fell down several times (R38).

Private Hounshell, recalled as a witness for the defense, stated that upon Corporal Nimmo's return to camp the day in question, he told the witness that "McDaniel had killed a woman", and that he, Nimmo went in and brought accused out of the house (R47,48).

The accused, after his rights as a witness were fully explained to him, elected to be sworn and testify as a witness (R48,49). He confirmed that his unit's mission was to search the small towns in the vicinity for "Germans, for prisoners, clothes, guns, anything [they] could find". They searched the first town thoroughly, that operation requiring about two hours (R49). There he got a bottle of cognac out of a German house and started drinking (R49,62). He drank almost all of it, though an assistant machine gunner named Linkum drank with him (R49,67). Then they searched another town (R49). They assembled with the rest of the company and had dinner at about 1300; however, accused ate only one raw egg (R49,70). He continued drinking steadily all of this time (R49), having had, in addition to the cognac above mentioned, about half a bottle of wine and several drinks of schnapps (R60). He was taking "quite a few" drinks and "drinking here and there" (R67), though he is not able to "hold his liquor" very well (R51), and it does not take "too many drinks" to get him drunk (R69). After dinner they went to a third town (name unrecorded), and accused and Linkum set up a machine gun at the cross road in the town. Accused stayed there a few minutes, then left the gun and went to "try to find something to drink" (R49). He went in one or two houses and found a quart bottle of schnapps which he started drinking (R49,58,59). He was very drunk at this time, and remembered meeting up with another soldier, or soldiers, but did not remember who they were (R49,58). Together they finished up the bottle of schnapps by a garage, barn, or shed, and he set it up on a box. He testified that "from there on everything seems to be a daze. I can't remember everything except when Hounshell and Lt. Robinson came down on a motorcycle. I don't remember them again. It seemed like they stopped in front of me and Hounshell said, 'he's drunk'. From then on, I don't remember anything that happened until 8:30 or 9:00 o'clock" (R49).

He did not remember the name of the third town (R57), nor of the soldier whom he met there (R58); nor seeing any women there (R58), nor of anything happening with reference to the deceased whom he had never seen and had no reason to have killed (R51); nor the making of any statements with reference to having killed anyone (R49-51). He was thoroughly cross-examined by the prosecution and examined by the court (R52-70), and few, if any, inconsistencies were developed in his testimony.

5. The accused has been found guilty of the murder of one Frau Francisca Welz. Murder is the killing of a human being with malice aforethought without legal excuse or justification (MCM, 1928, par.148a, p.162). From the evidence outlined above it is clear that the accused killed Frau Francisca Welz at the time and place alleged in the Specification and that he had no legal excuse or justification for his act. The only element in issue was that of malice.

"Malice or malice aforethought is an essential ingredient of assault with intent to murder. As in the case of murder * * * malice may be either express or implied. It includes not only anger, hatred, and revenge, but every unlawful and unjustifiable motive. It is not confined to ill will toward an individual, but is intended to denote an action flowing from any wicked and corrupt motive, done with a wicked mind under such circumstances as evince a plain indication of a heart reckless of social duty and fatally bent on mischief. It is implied from any deliberate or cruel act against another which shows an abandoned and malignant heart. It is the opposite of an act performed under uncontrollable action which prevents all deliberation or cool reflection in forming a purpose.

* * *

* * * The existence of malice as an element of assault with intent to murder may be inferred or presumed from the surrounding circumstances, such as the use of a deadly weapon, the character of the assault, the unexplained attempt to take life, or where the assault is unlawful and is done without reasonable provocation or circumstance of palliation, or is committed deliberately and is likely to result fatally, or from the reckless disregard of human life" (40 CJS, sec.78, pp.940-942) (Underscoring supplied) (CM ETO 2899, Reeves).

In the light of this definition it is clear that there was ample substantial evidence of record from which the court could properly and legally presume malice. Notwithstanding his acts resulting in the death of the decedent, the accused contends that as a matter of law he was not guilty of murder because, due to his drunkenness, he was not mentally able to entertain malice aforethought.

"In every case of apparently deliberate and unjustifiable killing, the law presumes the existence of malice necessary to constitute murder, and devolves upon the accused the onus of rebutting the presumption" (Winthrop's Military Law and Precedents, 2d Ed., Reprint 1920, p.673).

The burden of proving his inability to entertain malice because of drunkenness was therefore on the accused.

> "Drunkenness: It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense.
>
> Such evidence should be carefully scrutinized as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act.
>
> In courts-martial however, evidence of drunkenness of the accused, as indicating his state of mind at the time of the alleged offense, whether it may be considered as properly affecting the issue to be tried, or only the measure of punishment to be awarded in the event of conviction, is generally admitted in evidence" (MCM, 1928, p.136, 126b).

The evidence concerning his drunkenness and its extent was properly admitted and it must be presumed that it was considered by the court in reaching its findings. By its findings of guilty the court has in effect found as a fact that the accused was not drunk to the extent that his mental capacity to entertain malice aforethought was affected. Although admittedly intoxicated, the accused was able to and did talk coherently. He was able to walk three-fourths of a mile after the shooting even though he did so unsteadily and fell a few times. He was able to stand motionless with a gun pointed at his ultimate victim for two minutes. Before exposing to his own view the lower part of the deceased's body he was thoughtful enough to lock the kitchen door. He realized that he had killed a German woman because he told others that he had done so shortly after the shooting. One witness who saw him about an hour before the occurrence was of the opinion that he was not drunk at that time. His conduct toward that witness of pulling down her "braces" indicated a sex desire which may have been his motive when he killed Frau Welz. His act may also have been inspired by a reckless disregard for human life.

> "While intoxication is no defense to homicide, it may be operative to reduce murder to manslaughter if sufficiently extreme to render the accused incapable of entertaining malice aforethought * * *" (CM ETO 9365, Mendoza).

A casual reading of the evidence, summarized above, as to accused's condition at the time of the homicide will satisfy any reasonable minded

person that it shows in a substantial manner that he was not intoxicated to such extreme degree as to negative the ability to possess malice aforethought, as known and defined by law. Oppositely it convincingly shows that accused's faculties were not beclouded or benumbed to the extent that he was deprived of the powers of deliberation and judgment. Under such circumstances the merciful principle announced in the Mendoza holding has no application. The evidence which supports the finding of malice is substantial (CM ETO 2899, Reeves; CM ETO 4149, Lewis; CM ETO 15416, Radcliffe). Neither was it necessary to prove a specific intent to kill.

> "A specific intent to kill does not enter into the definition of murder at common law or under statutes declaratory thereof; it is sufficient if the unlawful killing is with malice aforethought either express or implied, and a homicide may be malicious, and hence may be murder, although there was no actual design to take life" (29 C.J. par 64, p.1095).

The evidence in the case presents fundamentally questions which were within the exclusive province of the court for determination. Inasmuch as the findings are supported by competent substantial evidence they will be accepted as final by the Board of Review upon appellate review (CM ETO 895, Davis et al; CM ETO 1554, Pritchard; CM ETO 1631, Pepper).

6. The charge sheet shows that accused is 19 years and ten months of age. Without prior service, he was inducted 18 March 1944 at Washington, D. C.

7. 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.

8. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454,567). 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).

Earle Asplund Judge Advocate

Ernest D. Miller Judge Advocate

John J. Collins Jr. Judge Advocate

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

BOARD OF REVIEW NO. 2 28 SEP 1945

CM ETO 15867

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|---|---|
| U N I T E D S T A T E S | ) AIR TECHNICAL SERVICE COMMAND IN EUROPE |
| v. | ) |
| First Lieutenant LYNDON R. MITCHELL, (O-569435), 10th Airdrome Squadron, 27th Air Transport Group | ) Trial by GCM, convened at AAF Station 379, APO 633, U. S. Army, 14 May 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |

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

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

CHARGE: Violation of the 63rd Article of War.

Specification 1: In that First Lieutenant Lyndon R. Mitchell, 10th Airdrome Squadron, 27th Air Transport Group, did, at AAF Station 385, on or about 2 February 1945, behave himself with disrespect toward Captain Jay A. Shroyer, his superior officer, by saying to him "You are a no good God-damned Captain just like others who have tried to get me into trouble", or words to that effect.

Specification 2: (Findings of not guilty)

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

Specification: In that * * *, did, while en route between AAF Station 385 and AAF Station 590, without proper leave, absent himself from his command from about 16 February 1945 until apprehended in civilian clothes about 20 March 1945.

He pleaded not guilty, and was found not guilty of Specification 2 of the Charge and guilty of the remaining charges and specifications. Evidence was introduced of two previous convictions by general court-martial, one for absence without leave for two days and wrongfully taking and using a government vehicle in violation of Articles of War 61 and 96, respectively, and the other for wrongfully making and uttering worthless checks (two specifications), wrongful failure to pay debts (two specifications) and dishonorable failure to keep a promise to pay a debt, all in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for two years. The reviewing authority, the Commanding General, Air Technical Service Command in Europe, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence stating that it was wholly inadequate punishment for an officer guilty of such grave offenses and that in imposing such meager punishment the court reflected no credit upon its conception of its own responsibility, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

Accused was a member of the 10th Airdrome Squadron of which Captain Jay A. Shroyer was the commanding officer (R8). Accused was assistant billeting officer and Secretary and Treasurer of the Officers' Club (R8). Captain Shroyer, shortly after 24 January 1945, ordered him to close the Officers' Club on 31 January 1945 (R8). On the morning of 2 February 1945, Captain Shroyer inspected the club and found it in a "deplorable condition" (R9). Early that afternoon he called the accused to his office and asked him about the condition of the club. Accused replied "It was none of my God-damned business - it was his personal property and I had nothing to do with it". Captain Shroyer informed him he should be reclassified for making such remarks to a superior officer. Accused hit the top of his desk with his fist and said "God-damn it, you can't do it nor anyone like you" (R9). After first telephoning him, Captain Shroyer started to take accused to the office of the Group Executive Officer. As they went out the door of the Captain's office, accused said he would "bust my God-damned ass for this" (R9). They reported to the Group Executive Officer where Captain Shroyer related the immediate prior occurrences. Accused denied making the statement attributed to him

and the Executive Officer instructed Captain Shroyer to prefer charges against accused (R9,10). After being dismissed by the Executive Officer and while going down the back steps to the Administration Building, the Captain asked accused why he had lied to the Executive Officer, with reference to the statements he had made to the Captain in his office. Accused replied to Captain Shroyer that he "was a no good God-damned Captain and just like some others that tried to get him into trouble" (R10). On 3 February 1945, Captain Shroyer summoned accused to his office and announced to him that he (Captain Shroyer) was preferring charges against him. At this time accused apologized to Captain Shroyer "for the way he had talked and the way his actions toward me were" (R15,21).

An authenticated copy of paragraph 6, Special Orders Number 24, Headquarters, 27th Air Transport Group, APO 774, U. S. Army, dated 28 January 1945, was received in evidence (R11; Pros.Ex.1). This order relieved accused from assignment with the 10th Airdrome Squadron, AAF-385, and assigned him to Headquarters, Base Air Depot Area, AAF-590, in Lancaster, England (R23; Pros.Ex.1). About 10 February 1945, he came into the 10th Airdrome Squadron supply room seeking a clearance on property and stated that he believed he was going to Burtonwood AAF-590. On 16 February 1945 accused left his station, apparently in accordance with the above order, and was a passenger on an airplane that left Le Bourget Field, France, about 1400 hours and landed at Biggin Hill, near London, England, about two hours later. He took a bus into London, went to the London Transportation Office and was last seen there about 1730 hours (R23,24). Accused had not been granted any leave or delay en route (R15). The Assistant Adjutant General, Base Air Depot Area, AAF-590, testified (by deposition), that he was the custodian of the officer's register maintained at that headquarters; that he could ascertain from his records whether accused reported to that headquarters on or after 28 January 1945 and that accused did not report to Base Air Depot Area, AAF-590, on or after 28 January 1945. On cross-examination, he stated that he did not know of his own knowledge whether every officer reporting to his headquarters signed the officers' register and that it was possible for an officer to have reported for duty and still not have signed the official officers' register (R26; Pros.Ex.3). The court took judicial notice of paragraph 6, AR 605-120, requiring officers to register in person at the local headquarters, upon arrival at a place where there are United States troops on foreign service, and to furnish certain data (R49). On 17 March 1945, Captain Shroyer went to England on official orders to search for accused (R12,18) and, on 20 March 1945, with the help of the Assistant Provost Marshal from London and four military policemen, he apprehended accused as he entered a civilian residence at 16 Cranswater Park, Southall, England. Accused was accompanied by a civilian woman, was wearing a civilian sport coat and sport trousers and was highly intoxicated. He was confined in a detention barracks in London (R13,14; Pros.Ex.2).

4. Accused, after his rights as a witness were fully explained to him (R30), was sworn and testified in substance as follows as to

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Specifications 1 and 2 of the Charge:-

The night before 2 February 1945 he attended a farewell party at the Officers' Club for officers who were leaving the base the following day (R32,40,41). He became exceedingly drunk and does not know if he was able to get to bed himself or not (R33). They party lasted until about 0300 hours (R33) and some property was broken in the club that night (R32). He was called by a messenger the next morning about 0800 or 0830 hours and told to report to Captain Shroyer (R33,39). He experienced some difficulty in dressing and reported about 0900 or 0930 hours, saluted and said "Lt. Mitchell reporting" (R39). Captain Shroyer "asked me what the hell went on in the Club the previous night" and witness told him that the property that was broken over there was no concern of his as it was personal property (R34,40,41). Because of his excessive drinking the previous evening his mental condition was not normal but he knew where he was, and he knew Captain Shroyer was his commanding officer (R40,44). While returning to the billeting area from the Group Executive Officer's office, Captain Shroyer told him he thought he (accused) was "the kind of a punk that the Army didn't need", and "I just told him he was a no good Captain" (R42). He was "very nervous and jumpy" because of his over-indulgence the night before and it caused him to answer Captain Shroyer in a manner he would not have used had he not been feeling the effects of the aforementioned drinking. He would, however, have given the Captain the same answer concerning the damaged property had he been entirely normal (R44). On 3 or 4 February he was summoned to Captain Shroyer's office and told that charges were being preferred against him. After this interview he apologized to the Captain "for the condition in which he found the Club the day he wanted to use it" (R33).

A copy of the special orders, dated 7 March 1945, revoking accused's transfer to Base Air Depot Area, AAF Station 590, was received in evidence (R29; Def.Ex.A).

5. a. Clear and substantial evidence established that accused addressed his commanding officer with the disrespectful language alleged in Specification 1 of the Charge. In his sworn testimony he admits he used some of the language in question, and that his attitude was not his natural one. There is substantial evidence of all the elements of the offense charged in the Specification (MCM, 1928, par.133, p.147; CM ETO 2866, Woodson).

b. Concerning the offense charged in the Specification of the Additional Charge, while there is no direct evidence accused did not report to his new station during the period of his alleged absence, as his orders required him to do, the uncontradicted proof that he left France by airplane and landed in England, that he failed to sign the officer's register at his new station as required by Army Regulations and his apprehension over a month later in civilian clothes in a different locality from that of his new station, constitutes a strong chain of circumstantial evidence from

which the court could properly infer that accused was absent without leave for the period alleged (CM 126112, Dig.Op.JAG, 1912-40, sec.419 (2), p.282; CM ETO 527, Astrella).

6. The charge sheet shows that accused is 25 years, ten months of age and that his commissioned service began 9 December 1942 at Miami Beach, Florida. He had three years enlisted 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. Dismissal, total forfeitures and confinement at hard labor are authorized punishments for violations by an officer of 61st and 63rd Articles of War. 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).

TEMPORARY DUTY Judge Advocate

Judge Advocate

Judge Advocate

RESTRICTED

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 28 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of First Lieutenant LYNDON R. MITCHELL, (O-569435), 10th Airdrome Squadron, 27th Air Transport Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15867. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15867).

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

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( Sentence ordered executed. GCMO 483, USFET 13 Oct 1945).

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

BOARD OF REVIEW NO. 3

7 SEP 1945

CM ETO 15868

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| U N I T E D S T A T E S | ) | 1ST AIR DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at |
| | ) | AAF Station 121, APO 557, |
| First Lieutenant JAMES E. | ) | U. S. Army, 28 May 1945. |
| CONNOLLY (O-2068368), 322nd | ) | Sentence: Dismissal and |
| Bombardment Squadron, 91st | ) | total forfeitures. |
| Bombardment Group (H) | ) | |

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

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that First Lieutenant James E. Connolly, 322nd Bombardment Squadron, 91st Bombardment Group (H), did, at Army Air Force Station 121, APO 557, U. S. Army, on or about 1 March 1945, wrongfully and knowingly sell a bicycle No. 777, Frame No. T-79050, of the value of less than $20.00, property of the United States furnished and intended for the military use thereof

Specification 2: (Disapproved by reviewing authority)
Specification 3: (Disapproved by reviewing authority)

Specification 4: In that * * * did, at Army Air Force Station 121, APO 557, U. S. Army, on or about 25 February 1945, feloniously take, steal,

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and carry away bicycle No. 777, frame No. T-79050, of the value of less than $20.00, 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 dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, 1st Air Division, disapproved the findings of guilty of Specifications 2 and 3 of the Charge, approved the sentence, and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, United States Forces European Theater, although deeming the sentence wholly inadequate punishment for an officer guilty of such grave offenses, confirmed it and withheld the order directing its execution pursuant to Article of War 50½.

3. The evidence for the prosecution shows that early in March of 1945 accused was seen painting a bicycle green and cream in color and that he sold this bicycle a short time later to Second Lieutenant Glen A. McClure for the sum of four pounds (R14,27). The bicycle in question was identified by serial number and other characteristics as one which was issued to Technical Sergeant Henry Heuberger in March of 1944 and reported missing by him on or about 22 February 1945 (R9,11,13;Pros.Ex.3). When first missed, the bicycle was olive drab in color and the paint was in perfect condition (R10). A memorandum receipt covering the issuance of the bicycle to Heuberger described it as "Base Ordnance Property" (R9;Pros.Ex.3).

In a sworn statement made by accused on 7 March 1945, he recited that he had purchased the bicycle approximately one month previously from an officer who was leaving the station. The bicycle was then being repaired and delivery was not made at the time the sale was consummated. He later went to the repair shop and took possession of a bicycle which fitted the description given him and which he believed to be the one he had purchased. After repairing this bicycle, he sold it to Lieutenant McClure for four pounds (R16,17;Pros.Ex.5). It was stipulated that the officer from whom accused asserted that he purchased the bicycle was transferred from the station by orders dated 22 January 1945.

An officer who had known accused intimately since October of 1944 testified that in the period during which he had known accused he had never manifested undesirable traits of character, had never committed any act involving moral turpitude, and that he, the witness, would trust accused fully "with anything that I had" (R39-40).

Accused did not testify.

For a more detailed statement of the facts, reference is made to paragraphs 5 and 6 of the review of the Staff Judge Advocate of the confirming authority, which the Board of Review adopts herein.

4. The physical appearance of the bicycle in question before repainted by the accused, the manner of its issuance, and its description as base ordnance property on the memorandum receipt all evidenced the fact that the bicycle was property of the United States, furnished and intended for the military service. There was evidence that Heuberger missed the bicycle on or about 22 February 1945 and accused was shown to have been in possession of it shortly thereafter. Accused's explanation that he acquired the bicycle on or about 7 February 1945 by purchase from an officer departing the station, made in a pre-trial statement of which no corroboration was attempted at the trial, was weakened by the fact that the officer from whom he asserted he purchased the bicycle was shown to have been transferred to another station by orders dated 22 January. His act in repainting the bicycle from its original olive drab color also casts doubt on the credibility of his story. It was clearly shown that he sold the bicycle to Lieutenant McClure. The Board of Review is of the opinion that there is ample evidence to support the court's findings that he was guilty as charged.

5. The charge sheet shows that accused is 23 years nine months of age, served as an enlisted man from 13 November 1942 to 26 August 1944 and was appointed second lieutenant at Ellington Field, Texas.

6. Dismissal is authorized upon conviction of offenses in violation of Article of War 94.

_____ Judge Advocate

Malcolm C. Sherman Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 7 SEP 1945 TO: Commanding General, United States Forces European Theater (Main), APO 757, U. S. Army.

1. In the case of First Lieutenant JAMES E. CONNOLLY (O-2068368), 322nd Bombardment Squadron, 91st 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 in this office is CM ETO 15868. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15868).

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

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( Sentence ordered executed. GCMO 407, USFET, 15 Sept 1945).

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

BOARD OF REVIEW NO. 3

6 OCT 1945

CM ETO 15870

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| U N I T E D S T A T E S | ) | SEVENTH UNITED STATES ARMY |
| | ) | |
| v. | ) | Trial by GCM, convened at |
| | ) | Gutersloh, Germany, 21 June |
| Technician Fifth Grade ROBERT | ) | 1945. Sentence as to each: |
| HARRIS (38299110), and Private | ) | Dishonorable discharge, total |
| LEONARD HARRIS (38392919), | ) | forfeitures, confinement at |
| both of the 402nd Quartermaster | ) | hard labor for life. United |
| Truck Company | ) | States Penitentiary, Lewisburg, |
| | ) | Pennsylvania. |

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Tec. 5 Robert Harris, 402nd Quartermaster Truck Company, did, at Lenstrup, Lippe, Westfalen, Germany, on or about 15 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mairianne Grossjohown.

Accused Leonard Harris was tried upon the following charges and specifications:

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

Specification: In that Private Leonard Harris, 402nd Quartermaster Truck Company, did, at Lenstrup, Lippe, Westfalen, Germany, on or about 15 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mairianne Grossjohown.

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

Specification: In that * * * did, at Lenstrup, Lippe, Westfalen, Germany, on or about 15 April 1945, with intent to do him bodily harm commit an assault upon Meier zu Beerentrup, by wilfully and feloniously striking the said Meier zu Beerentrup on the back of his hand with a revolver.

Each pleaded not guilty to and was found guilty of the charges and specifications preferred against him. As to Robert Harris, evidence was introduced of one previous conviction by summary court for entering a house of prostitution in violation of Article of War 96. As to Leonard Harris, evidence was introduced of one previous conviction by special court-martial for misappropriating sugar of a value of approximately $2.00 in violation of Article of War 94, and of four previous convictions by summary court for speeding and wrongfully appearing without his weapon, both in violation of Article of War 96, and for three absences without leave for a few hours each in violation of Article of War 61. Three-fourths of the members of the court present at the time the votes were taken concurring, each 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 might direct for the term of "your" natural life. As to each, the reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for prosecution:

On 15 April 1945, the prosecutrix, Mairianne Grosjohown, a married woman 24 years of age with two children, was in the home of Meier zu Beerentrup (R17) near Lenstrup (R12), Lippe, Germany (R17). About 2100 hours the prosecutrix, hearing a knocking at the door, opened it and found herself face to face with two negro soldiers (R18) and a Russian (R20). The negro soldiers, who were identified at the trial by the prosecutrix (R18,23-24) and by Frau Emile Meier zu Beerentrup (R12,13) as the accused, entered (R18,20); the Russian did not (R23). Robert, who was the shorter (R14), remained standing just inside the door (R20) with his pistol (R14). Leonard asked a railroad employee there whether he was a German officer. Then he demanded and was given cognac by Meier zu Beerentrup (R13,20) to whom he returned the bottle to drink thereof first. During this time he caused Meier's hand to bleed by hitting it with his pistol (R14,20).

Leonard then grabbed prosecutrix and pulled her crying into the adjoining room (R14,20). With his pistol drawn he indicated that she should lie down. When she remained standing, he blacked her eye, pushed her onto the couch, ripped off her stockings and undergarments (R20-21) and, despite her crying (R14,21), had intercourse with her.

Having finished, he left the room (R21) and took Robert's place at the door. Robert then entered (R15) the room where the prosecutrix was (R22) and there, despite her cries (R15,22-24), had intercourse with her (R22). Afterwards, the two "drove right away" firing a shot as they left (R15).

Over objection, Erich Wetzel testified that the two accused came to his house in Lenstrup one night, where they demanded and were given cognac, and Robert insisted on seeing a camera belonging to a nurse who was present (R30-32). At about 2030 or 2100 hours, they drove away in an army vehicle, whose number he wrote down. The following evening, 16 April 1945, he traced the vehicle's tracks to the Beerentrup farm about one and one-half kilometers distant. The road consisted of gravel covered with sand. He was a farmer -- not a detective or policeman. The tracks were very obvious around the curve -- not quite as obvious on the straight road because it was a hard road. There was another track on the road but they were narrow tracks (R9-11).

The prosecutrix testified that, at a parade of American soldiers on 11 May 1945, she picked out a soldier. She believed it was Robert Harris "but when Robert Harris came in front of me by himself, I said that I don't think it was him because I could not say that it was him and not be convinced it was him". She was convinced at the time of trial "because right now I recall the picture in my mind and I know that it could not have been nobody else" (R23-24). Emile Meier zu Beerentrup testified that she picked out a soldier in the parade but when she saw him closely she saw she was wrong (R16). Erich Wetzel testified he was unable to identify anyone at the parade (R10).

After he was advised of his rights, Leonard Harris made a voluntary statement to an agent of the Criminal Investigation Division which was admitted in evidence over objection and with the caution that it was to be disregarded insofar as it implicated Robert Harris (R27-29; Pros.Ex.I). Therein Leonard Harris stated that he was 20 years of age, entered the service in July 1943 and came overseas in August 1944. About 1830 hours, 15 April 1945, he and Robert Harris went in the latter's truck to a German farm, asked for and were given cognac. While there he was shown a camera by a "German Red Cross nurse". They then drove to another farm house where they demanded and were given cognac. He asked a woman to have intercourse with him. She went into another room where she laid down on a sofa and he had "a sexual act" with her. When he finished, he went out and Robert Harris went in and had intercourse with the woman. They then went back to camp (Pros.Ex.I).

After being advised of his rights, Robert Harris made a voluntary statement to a CID agent which was admitted in evidence over objection (R26-27,32; Pros.Ex.2). Therein he stated he was 24 years of age, married, and with one child. He was inducted in the fall of 1942 and came overseas the early part of 1945. After supper, 15 April 1945, he and Leonard Harris went in a truck to a German farm house where they were given cognac by a nurse. He remembered nothing that --

happened after he drank the cognac (Pros.Ex.2).

4. Evidence for defense:

After his rights as a witness were explained to him, each accused elected to remain silent (R38).

Erich Wetzel, when called as a witness for the defense, testified he gave the number of the truck to American police. When the two negro soldiers were at his home they were not accompanied by a Russian. Asked whether Frau Beerentrup had Russian labor in the vicinity of her farm, Wetzel replied "Not in Lenstrup but there were Russians at Beerentrup" who, he further testified, lived in an adjoining house (R33).

A major testified that on 11 May 1945, at a parade of soldiers, including Robert but not Leonard Harris, five civilians, including the prosecutrix and Wetzel, identified four soldiers, none of whom was either accused. When brought face to face with the identified soldiers they said the soldiers they had identified were not the guilty ones (R34-35). He further testified to receiving from higher headquarters a letter stating the number of a truck which, upon investigation, he found to have been assigned to Robert Harris. He had examined the road between the Wetzel and zu Beerentrup houses. Because of the type of the road it would be difficult to trace tracks on the road (R36-37).

5. a. Each accused's identity was sufficiently established to support the court's findings of guilty. Each was identified in court by the prosecutrix and by Emile Meier zu Beerentrup. In addition, they were identified in court by Erich Wetzel whose testimony placed them in the vicinity of the Beerentrup house on the evening in question. While no other negro soldiers were present in court other than a member of the court (R12), "there is no requirement in the law that * * * an accused * * * be identified as the culprit either as one of a group or in any other particular way" (CM ETO 8451, Skipper, Dig. Op. BOTJAG, ETO, p.456). There was no error in requiring accused to don helmets so that a witness might distinguish one from the other (R13). "While such practice is susceptible of abuse * * * accused's constitutional privilege under the Fifth Amendment * * * was not infringed" (CM ETO 2002, Bellot, Dig.Op. BOTJAG, ETO, p.441). Whether it was proper for the trial judge advocate, in having a witness distinguish between Robert and Leonard Harris, to point out the latter and to ask if he were the one (R3), need not be determined (see CM ETO 3859, Watson et al, Dig. Op. BOTJAG, ETO, p.445-446; Underhill's Criminal Evidence (4th Edition) sec.126, p.171). They were properly distinguished by the prosecutrix whose testimony furnishes complete proof of the offenses charged. That prosecution witnesses had failed to identify accused in an identification parade was a matter going only to the weight of their evidence in identifying them in court (cf: CM ETO 9246, Jacob, Dig. Op. BOTJAG, ETO, p.459-460).

b. Substantial evidence supports the findings of rape (CM ETO 10857, Welch et al). Substantial evidence likewise supports the findings of an assault with intent to do bodily harm. "A pistol used

as a billy or club is a dangerous weapon" (CM ETO 3366, Kennedy, Dig. Op. BOTJAG ETO p.491; see also CM 144295, Dig. Op. JAG, 1912-40, sec.451(11) p.313). While the assault consisted of no more than a striking of a hand with a pistol with such force as to cause the hand to bleed, the court, under all the circumstances shown, had substantial evidentiary basis for inferring therefrom that the assault upon zu Beerentrup was with the intent to do bodily harm.

6. The charge sheet shows that Leonard Harris is 21 years four months of age and was inducted, without prior service, 8 July 1943 at Shreveport, Louisiana; that Robert Harris is 25 years nine months of age and was inducted, without prior service, 5 October 1942 at Tyler, Texas.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

22 SEP 1945

CM ETO 15879

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| U N I T E D  S T A T E S | SEVENTH UNITED STATES ARMY |
| v. | Trial by GCM, convened at Augsburg Germany, 15 June 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| Privates ROBERT JACKSON (34843910) and JAMES LOWERY (34676870), both of 4461st Quartermaster Service Company. | |

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HOLDING BY BOARD OF REVIEW NO. 3.
SLEEPER, SHERMAN AND DEWEY, 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:

JACKSON

CHARGE: Violation of the 92nd Article of War.

Specification 1: (Finding of not guilty)

Specification 2: In that Private Robert Jackson, 4461st Quartermaster Service Company, did, at Gernlinden, Germany, on or about 3 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Anneliese Birnstiel.

LOWERY

CHARGE: Violation of the 92nd Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Private James Lowery, 4461st

Quartermaster Service Company, did, at Gernlinden, Germany, on or about 3 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Anneliese Birnstiel.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the votes were taken concurring, each was found not guilty of Specification 1 and guilty of Specification 2 and the Charge against him. As to Jackson, evidence was introduced of two previous convictions by special court-martial for absences without leave for 9½ hours and 10 days respectively in violation of Article of War 61. As to Lowery no evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution with respect to Specification 2 against each accused shows that at about 1230 hours on 3 May 1945, both accused walked up and gestured for admittance to the house of Frau Katherin Rieder in Gernlinden, Germany, at which prosecutrix, Frau Anneliese Birnstiel, and Frau Rieder were present. Accused had rifles in their hands which they "later brought to a ready position". Frau Rieder admitted them to the house (R7-8). After they entered the kitchen and opened drawers in a cupboard, prosecutrix followed Lowery upstairs, thinking he was looking for weapons and being afraid he might take something away. At the top of the stairs she started to turn back when Lowery grabbed her by the army and pulled her into a room (R8). He put his rifle in a corner of the room (R10). She testified:

"With gestures he made me understand he wanted to have sexual intercourse with me and I shook my head and tried to go outside the room. I tried to go out the door but he stood in front of the door. I fought him, and in the struggle he forced me to the floor* * *He threw me to the floor * * * I jumped up right away and tried to go out the door but he again threw me on the floor. I again rose from the floor and then he hit me with the butt of the rifle in the face. I again fell on the floor and I continuously cried out. He tried to choke me. * * * As I was lying on the floor he tore off my clothes and threw himself upon me" (R8-9)

When she screamed, at one time he put part of a table cloth in her mouth (R13-14). Although she continued to struggle, he succeeded in penetrating her private parts with his sexual organ for about 10 minutes (R9)

When Lowery had finished, Jackson came upstairs and prosecutrix immediately jumped up, thinking she could run away, but Jackson pushed her down on the floor and "forced his penis into my vagina", in spite of kicking, shoving and struggling by her (R9-10,13). He had his rifle "always with him" (R10). Hearing someone coming upstairs, Jackson let prosecutrix go and went with her out the door, where they saw a priest (R10). Prosecutrix asked the priest to go for help, and Jackson "took him by the back of the neck and shoved him down the steps" (R14)

Lowery then pushed prosecutrix into another room, and although she kicked her legs, moved her arms and cried out, he had intercourse with her again. Then Jackson came in and pushed Lowery away and had intercourse with her a second time in spite of resistance by her (R11-12). Through the window she showed Jackson two French policemen who had arrive outside the house, and after one of the policemen fired a shot, he buttoned his pants and both accused left (R12,14). Prosecutrix was excited and in very great pain. Accused were at the house for more than an hour (R12)

At about 1515 hours that afternoon, a German doctor examined prosecutrix, who told him what had happened. She was "crying and very nervous", and her left eye was bloody. The outside and inside of her vagina was bloody and swollen. No examination for the presence of semen was made (R14-17).

The priest testified that he came to the house at the summons of Frau Rieder and called out, whereupon Lowery jumped over the fence with a rifle and forced him to go upstairs, where he heard prosecutrix calling for help and then saw her come out of a room with her blouse in disorder. He went for help, and when he returned he saw prosecutrix standing outside the house. "Blood was running down the inside of both her legs" (R17-21)

Frau Rieder corroborated the testimony of prosecutrix as to the initial actions of accused, neither of whom she was able to identify positively. She heard crying and screaming upstairs while Lowery was with prosecutrix, and saw Jackson go upstairs, after which she went out on the street and called to the neighbors. (R21-24).

4. After their rights as witnesses were explained to them, accused Jackson elected to testify and accused Lowry to remain silent (R39-400. Jackson testified that he is 22 years old and completed the seventh grade in school (R40). He denied having intercourse with Frau Birnstiel (R42), or ever visiting the home of Frau Rieder (R43). He admitted carrying a rifle and bayonet to town at about 1145 hours on 3 May with Lowery (R42-43,50), but said they went over to a refugee camp and talked a long time (R41). Most of his testimony relates to Specification 1 as to which he was found not guilty.

5. The testimony of prosecutrix, which is strongly corroborated by that of a doctor, a priest and Frau Rieder, vividly shows that each accused physically overpowered her and had carnal knowledge of her, forcibly and against her will, at the time and place alleged. While accused Jackson testified in denial of any connection with the acts, identification of him by the prosecutrix and the priest is positive and compelling. The acts of accused, as established by the evidence, clearly constitute the crime of rape and the findings of guilty are amply supported by the record of trial (CM ETO 611 Porter; CM ETO 1202, Ramsey; CM ETO 4608, Murray; CM ETO 10103, Washington).

6. The charge sheets show that Jackson is 23 years seven months of age and was inducted 2 September 1943 at Fort Jackson, South Carolina; Lowery is 20 years one month of age and was inducted 6 July 1943 at Fort Bragg, North Carolina.

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

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

B R S Leeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B C Lowery Jr Judge Advocate

15879



15879

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

BOARD OF REVIEW NO. 3

28 SEP 1945

CM ETO 15881

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| U N I T E D S T A T E S | ) 3RD INFANTRY DIVISION |
| v. | ) Trial by GCM, convened at Salzburg, Austria, 28 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |
| Private CLIFFORD B. HALVERSEN (32967472), Company "E", 30th Infantry | ) |

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: 1. In that Private Clifford B. Halversen, Company "E", 30th Infantry, then Private First Class, Company "E", 30th Infantry, did, at or near St. Die, France, on or about 5 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he was apprehended at or near Plombieres, France, on or about 27 December 1944.

Specification: 2. In that * * * did, at or near Kingheim, France, on or about 7 January 1945, desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he was apprehended at or near Blamont, France, on or about 14 January 1945.

Specification: 3. In that * * * did, at or near St. Croix, France, on or about 22 January 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he surrendered himself at or near Munich, Germany, on or about 5 May 1945.

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

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

On 5 November 1944, at a time when Company E, 30th Infantry, was receiving small arms and artillery fire, a platoon runner was ordered to notify accused that he was detailed to go on a patrol. When the runner went to the foxhole which accused had been occupying earlier in the day, accused was not there. A search of the area for him proved unsuccessful. His equipment was found the following day (R8,9). To the knowledge of the platoon runner, no one had permission to be absent from the platoon (R10).

On or about 7 January 1945, accused was brought to the command post of the second battalion, 30th Infantry, then located in Kunzheim, France, for return to his unit (R11). He was told that his company was engaged with the enemy and intermittent artillery fire was being received at the battalion command post at the time (R12-14). Accused at first told the adjutant that he would not go back but later promised that he would return (R12). In the normal course of events, he would have been taken to his company either by a company runner or by the supply sergeant. However, on 7 January no one took him back to his company because "he wasn't around" (R14). A search of the area occupied by the battalion command post was made but he could not be found (R12-14).

For five days prior to 22 January 1945, the second platoon, Company E, 30th Infantry, then at St. Croix, France, had been undergoing training for a river crossing (R15). According to the platoon leader, accused

"was present to my knowledge at least one day of training, and all of the members of the platoon were aware of the fact that we were going into the attack, and this man [accused] was there in time enough to know we were going into the attack" (R17).

On or about 22 January, as the company was moving to the assembly area, the platoon leader checked his men and accused was absent (R15,16; Pros.Ex.A). In making the crossing, in which accused did not participate, mine fields and artillery fire were encountered (R15,16).

On 15 May 1945, accused voluntarily made a statement to an investigating officer. His statement reads as follows:

"On or about the 2nd of November 1944, I returned to the Company from hospital. I just couldn't stand it in the lines and on or about 5 November 1944, I left my position, and went back to Plombieres, France. There I stayed around the hospital area until I was picked up there on or about 26 December 1944.

"I was returned to Battalion CP, and told that I was to go to my Company. At that time I was still sick, so I went back to the Medics. The Medics gave me some pills and told me I was O.K. I then went back to Plombieres, France. I stayed there until I was picked up by the MP's on the 14th of January 1945, and returned to the Company, then in a rest area.

"On or about the 20th of January 1945, while the Company was still in the rest area, I left the Company and went back to an Ordnance Outfit. I stayed there, with them, until they came to Munich, Germany. I then went to the 3rd Division Personnel Office, and on the 5th of May 1945, I turned myself into Captain Lewis, the 30th Infantry Personnel Officer" (Pros.Ex.B).

4. For the defense, a non-commissioned officer of accused's unit testified that he had seen accused in action for about a month before the date of the offenses here alleged and that, in the opinion of the witness, accused had been a good combat soldier. Another enlisted witness testified that prior to 5 November 1944 accused "carried out his duties as directed" (R20). Accused, after having been advised of his rights as a witness, elected to remain silent.

5. The evidence adduced by the prosecution, including accused's own pre-trial statement, shows that he absented himself without leave from his organization at the times and for the periods alleged. There was also evidence from which the court could find that, on the initial date of each absence, hazardous duty was either impending or actively in progress and that accused was aware of that fact. Accordingly, the court was warranted in finding that accused absented himself without leave to avoid hazardous duty in each instance, as alleged (Cf. CM ETO 14792, Langan; CM ETO 7413, Gogol).

6. The charge sheet shows that accused is 25 years of age and was inducted 9 June 1943. He had prior service with Company C, 14th New York Infantry (National Guard) from 9 March 1937 to 8 March 1940.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

20 SEP 1945

BOARD OF REVIEW NO. 3

CM ETO 15901

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| U N I T E D  S T A T E S | SEVENTH UNITED STATES ARMY |
| v. | Trial by GCM, convened at Gutersloh, Germany, 6 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |
| Private JAMES A. HICKS (33456088), 440th Quartermaster Truck Company | |

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James A. Hicks, 440th Quartermaster Truck Company did, at Stolberg, Germany on or about 0730 hours 24 March 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at Liege, Belgium on or about 1545 hours 15 May 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of three previous convictions, one by special court-martial for absence without leave for three days, one by summary court for failure to repair, and one by special court-martial for applying to his own use a government vehicle, all in violation of Article of War 61 (sic). 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 re-

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

3. The prosecution introduced in evidence a duly authenticated extract copy of the morning report of accused's organization for 25 March 1945, showing accused "Fr dy to AWOL as of 0730 hrs 24 Mar 1945" (R5, Pros.Ex.A). Testimony by accused's company commander shows that on 24 March 1945, the company was at Stolberg, Germany, engaged in transporting signal supplies from Liege. Accused was with the company "for detail and for guard duty" (R8,10). At about 0730 or 0800 hours, upon receiving a report from the first sergeant, witness ordered a search of the area and personally conducted a search of both the installations and the area, but accused was not found (R6). He had no permission to be absent (R9), and was not seen again until 5 June (R7). Several months before, in January or February, accused had requested permission to marry a young lady he said he had "in a family way". The request was sent to battalion headquarters, but no action was taken on it (R8-9). The company commander's testimony relating to accused's absence was corroborated substantially by that of the first sergeant (R10-14).

At about 1600 hours on 15 May 1945, accused was apprehended in uniform, without a pass, by the military police in Liege, Belgium. He was with a girl who had some papers, and told the military police that she was pregnant by him and that he was trying to get their troubles straightened out (R15-19).

4. After his rights as a witness were explained to him, accused elected to remain silent and no evidence was introduced in his behalf (R19-20).

5. The evidence clearly establishes absence without leave of accused from his organization from 24 March to 15 May 1945. Whatever may have motivated him in remaining absent for such time, there is no evidence that he at any time attempted or intended to return to military control. From his unauthorized absence for 52 days, most of which was in an active theater of operations, terminated by apprehension, the court was authorized to infer an intent on the part of accused to remain permanently away from the service (CM ETO 1577, Le Van; CM ETO 1629, O'Donnell; CM ETO 5406, Aldinger; CM ETO 15593, Joseph).

6. The charge sheet shows that accused is 27 years five months of age and was inducted 2 March 1943 at Fort Myers, Virginia. 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

the findings of guilty and the sentence.

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

B R S Cooper Judge Advocate

Malcolm C. Sherman Judge Advocate

B I Gaston Jr Judge Advocate

and unlawfully, and with premeditation kill one, Martha Gary, a human being, by shooting her with a sub-machine gun.

He pleaded not guilty. All members of the court present at the time the vote was taken concurring, he was found guilty of Specifications 2 and 3 and of the Charge, and of Specification 1, guilty except the words "have carnal knowledge of Elfriede Weissbarth" substituting therefor "commit an assault upon Elfriede Weissbarth with intent to commit a felony, viz. rape, by willfully and feloniously pointing a firearm at her, forcing her to lie down, and attempting to insert his penis in her vagina"; of the excepted words, not guilty, of the substituted words, guilty and, of the Charge, pertaining to Specification 1, not guilty but guilty of a violation of the 93rd Article of War. 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, 45th Infantry Division, approved the findings of guilty of Specifications 1 and 2, and of Specification 3 with substitution of the word "gun" for "machine gun", approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater, confirmed the sentence and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for prosecution:

American soldiers entered Lauf, Germany, on 15 April 1945 about 1930 or 2000 (R7,25). On the morning of the 16th, fourteen or more German men, women and children were assembled in the air raid cellar of the castle there (R9,25). The cellar was about 70 square meters in area, contained one electric light (R9), and was the second or bottom cellar (R8,32). About 0400 or 0500 an American soldier and a Pole entered the cellar and were followed in a few minutes by accused (R7-9,18,25,36-37), who did not speak German (R9,13,15,26,32). He went to Elfriede Weissbarth, pointed his rifle at her (R26) and motioned for her to leave (R9,26). She departed, followed by accused holding his weapon at her back (R19,26), and by the other American soldier and the Pole (R9).

Outside accused stopped and "was going to tear my clothes open". To prevent this Fraulein Weissbarth opened her coat. He then forced her into a corner, tore her pants down, and forced her to lie down. Accused must have been with her for 15 or 20 minutes. From what she believed, accused's penis entered her vagina, but she did not know for she was "constantly semi-conscious". Her doctor would know. She was "ninety-eight percent" certain that accused was the soldier. When she dressed later, she found her "panties full of blood". Also, there was a little on her coat and around her private parts. She was not

menstruating and did not know from where the blood came. She did not give accused permission to have intercourse with her. She couldn't do anything. "I was afraid * * * because before he had constantly pointed his rifle at us. * * * I wanted to yell, but he held my mouth". She did ask the other soldier for help (R26-29,41).

Within 10 or 20 minutes, accused returned alone to the cellar (R9,19), approached Frau Martha Gary, a 41 year old civilian, and made some sounds and motions. Frau Gary stated she was a Swedish citizen and exhibited her passport (R13,20,32-33). She also gave him her pocket book and ring (R20,33), but accused returned everything (R20) and motioned by placing his hands on his chest and throwing them to the side. The others present told Frau Gary that accused wanted her to undress (R13,20) which she began to do slowly (R20). All the while accused held his gun in a "ready position" (R21,32). She undressed (R20,33-34) to a point that the top of her sanitary pad was visible (R21). Asking "What is that?", accused pointed his finger at Frau Gary who replied, "I am ill", whereupon accused fired (R14-15) as she was about to open her girdle (R20,33-34). Frau Gary fell (R14) backwards (R21,34). It was then about 0515 or 0530. At about 0630, still in the cellar, she remarked that she "has to die" and requested some coffee (R39). Between 0900 and 1000 a witness saw Frau Gary laying in the cellar "without a sign of life". In her right side was a wound about the size of the little finger (R21-24). About 0930 Frau Gary's body was prepared for burial by an assistant undertaker. In her right side was a bullet hole which "tore out the back" (R11-12).

After accused had fired he reloaded his weapon (R10,14,16-17). With his rifle "in readiness" (R14), he motioned for Frau Babette Kuhndorfer to go with him (R14,21,34,37). With accused following with his rifle in his arm, she went up to the "house floor", undressed, laid down whereupon accused inserted his penis in her private parts. She allowed this "because I thought I would be shot" (R37-38).

Two witnesses were asked upon cross-examination whether accused seemed to have been drinking. One testified accused had a little trouble reloading his rifle (R10,16-17); the other, "He had a very staring look but when I look at him now he has that " (R36).

4. Evidence for defense:

After his rights as a witness were explained to him (R42), accused testified that he was a "full blooded Navajo Indian", 29 years of age. He had attended an Indian school for 6 years and completed the third grade at the age of 13. Since Anzio he had been with the tank company, first as assistant gunner and then as gunner. He had killed a lot of German soldiers in battle. After the company came to Lauf, he drank "very much" cognac and schnapps (R43-44). Upon cross-examination, with defense strenuously objecting, accused also testified that his personal weapon was a tommy gun; that upon entering the town, he had a little

something to eat and, with another soldier and a civilian, "took some cognac and went down to where some Polish and Russian people were in a cellar"; that thereafter he remembers nothing until the next morning when he found himself in the turret of his tank (R44-47).

Introduced into evidence by the defense (R48-49) were the proceedings of a board of officers (Defense Ex.1), concluding as follows:

> "Although this man has a mentality of 11 years (high-grade moron) he has shown by past behavior, actions, and accomplishments to have adjusted to a satisfactory level to the rules of normally accepted society. He denies civilian conflicts with the law. His Army life has shown satisfactory ability to adjust. As the examiners on the board did not have the opportunity to examine this man on or about the 16th of April, they are not in a position to venture an opinion as to whether or not he was intoxicated at that time. It is the unanimous opinion of all the members of the board that this man does not have psychoneurosis or psychosis (insanity)".

Included in the proceedings were accused's testimony that he had been in the army in excess of four years and came overseas in August 1942, and that he had no recollection after going into the cellar - he was drunk. Also included was the testimony of his company commander and a tank driver. The former stated accused was a calm soldier under combat conditions but when drinking "he seems to go wild". The latter stated that when accused got to drinking he "gets' off his nut' * * * playing around with the women and chasing after them * * * to get in their pants" (Def. Ex.1).

A German physician testified that about 1 May 1945 he examined the condition of Fraulein Weissbarth's hymen. It was not damaged and, in his opinion, she had never had sexual intercourse (R49-51).

5. Rebuttal evidence for prosecution:

An American medical officer examined Fraulein Weissbarth on 23 May 1945. Her hymen had been ruptured and was in a condition ordinarily found in married women (R54-56). Another examined her on 26 May 1945 and likewise found her hymen ruptured. Its condition was not such as would normally be found in a virgin (R56-57). Fraulein Weissbarth testified she had not engaged in any sexual acts since the alleged offense.

6. a. Defense interposed drunkenness. Voluntary drunkenness, while not an excuse, "may be considered as affecting mental capacity to entertain a specific intent" (MCM, 1928, par.126a, p.136). "Whether he was too drunk to entertain a specific intent * * * was a question for the court's determination" (CM NATO 774, 2 Bull.JAG 427). Aside from accused's testimony, there was little or no evidence of drunkenness. One prosecution witness did testify that accused had some trouble reloading his weapon. And another stated "he had a very staring look but when I look at him now he has that". From the testimony adduced and from accused's conduct, the court could reasonably infer that he was in sufficient possession of his faculties to entertain the necessary specific intents (CM NATO 774, supra; CM ETO 6159, Lewis; CM ETO 10957, Turner).

b. Specification 1:

Though accused was charged with rape, he was found guilty of an assault with intent to commit rape. "Among the lesser offenses which may be included in that of rape" is assault with intent to commit rape (MCM, 1928, par.148b, p.165). While Fraulein Weissbarth was only "ninety-eight percent" certain as to the identity of accused, two other witnesses identified accused as the soldier who forced her to leave the cellar. Accused's actions in forcing Fraulein Weissbarth to leave the cellar at the point of a gun, commencing to tear open her clothes, pulling her pants down, holding her mouth, and forcing her to lie down, particularly when construed in the light of his subsequent doings of the evening, support the court's finding that accused intended to have carnal knowledge of her whether she consented or not. While she seems to have resisted only to the point of asking help of the other soldier, she testified she was afraid of his gun and well she may have been as shown by accused's subsequent conduct. The record supports the finding (CM ETO 4386, Green, et al).

c. Specification 3:

The evidence shows that Frau Martha Gary was disrobing, before others, pursuant to accused's unlawful demand. When she had disrobed to her girdle, accused, apparently enraged to find she was menstruating, suddenly, unexpectedly, and without shown reason, shot her. From the evidence adduced the court was justified in concluding that her death resulted from the wound inflicted by accused. Medical testimony was not a sine qua non. "Murder is the unlawful killing of a human being with malice aforethought" (MCM, 1928, par.148a, p.162). "Malice is presumed from the use of a deadly weapon" (MCM, 1928, par.112a, p.110). In CM ETO 190 Miranda; CM ETO 6159, Lewis, and CM ETO 10957, Turner, sudden and unexpected killings, to all appearances without motive, were held to be murder. In accordance with the principles and authorities there considered, the evidence is sufficient to support the finding of guilty.

The variance between the allegation and finding on the one hand that Frau Gary was shot with a "sub-machine gun" and the action on the other hand that she was shot with a "gun" was not fatal (Cf: CM 144295 and CM 155377 Dig.Op. JAG, 1912-40, sec.451(11), p.313; CM ETO 3614, Davis, III Bull.JAG 514). Whether accused used a carbine or sub-machine gun was immaterial. He did not claim surprise.

d. Specification 2:

While Frau Babette Kuhndorfer offered no resistance but instead went meekly to a room, undressed, and allowed accused to have intercourse with her, she testified she did not resist because she was afraid. And well she may have been for accused had just shot Frau Gary. Where a woman "ceases resistance under fear of death or other great harm * * * the consummated act is rape" (1 Wharton's Criminal Law (12th Ed. 1932), sec.701,p.942). The circumstances belie that accused could have thought she consented voluntarily. Throughout the night he elected to rely upon his lethal weapon to accomplish sexual intercourse. The record supports the findings of guilty (CM ETO 5584, Yancy).

7. One question requires independent comment. The defense objected strenuously and repeatedly to the prosecution's cross-examination of accused, contending that it went beyond the scope of the direct examination and violated accused's constitutional right against self-incrimination. It need not be determined whether the cross-examination was too great in latitude or infringed accused's constitutional right against self-incrimination. In total, accused, upon cross-examination, admitted that he was in the cellar and that his personal weapon was the "tommy gun". Independent of accused's admission the evidence is compelling that accused was present in the cellar. Five witnesses so testified. Except that one of the five was only "ninety-eight percent" certain as to accused's identity, the record contains no suggestion that some person other than accused may have committed the alleged offenses. Accused's admission to his presence in the cellar did not injuriously affect his substantive rights (Cf: CM 160986 and CM 192609 Dig.Op. JAG 1912-40, sec.395(10), p.206; CM ETO 2297, Johnson and Loper). Nor did his admission that his personal weapon was the "tommy gun". Five witnesses testified accused had a gun, the majority identifying it as a carbine. Whether the weapon was a carbine or submachine gun was immaterial (see par.6c hereof).

8. The charge sheet shows that accused is 29 years one month of age and was inducted, without prior service 8 March 1941 at Santa Fe, New Mexico.

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 murder and rape is death or life imprisonment as the court-martial may direct (AW 92).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. L. Levy Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 7 SEP 1945 TO: Commanding General, United States Froces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private First Class BLAKE W. MARIANO (38011593), Company C, 191st Tank 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. The accused is a full blooded Navajo Indian, who finished the third grade of school, has a classification test score of 51 and is classified by a medical board as a high grade moron. He undoubtedly was intoxicated and claims to remember none of the events of his criminal rampage. His shooting of Martha Gary is inexplicable except that he was an Indian with too much liquor, similar to the case of Joe Lewis, CM ETO 6159. He states he began using liquor by buying "beer at the PX".

He has been in the Army for more than four years and overseas 34 months. He served in England and Africa, was in combat at Anzio and throughout the later Italian campaign, fought continuously in France and Germany until his arrest on 16 April 1945. Fellow soldiers testified that he was calm and composed in battle and always obeyed orders.

In War Department letter 21 July 1945 on the subject of courts-martial, par. 3d reads:

> "While a creditable combat record does not endow the individual with any special immunity, neglect to give it due weight is equally an injustice and an impairment of public respect for the Army's administration of military justice".

In spite of his conviction of murder and two other major crimes, I think commutation of the sentence should be seriously considered. The Board of Review expressed the same view.

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 15902. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15902).

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4. Should the sentence as imposed by the court and confirmed by you be carried into execution, it is requested that a full copy of the proceedings be forwarded to this office in order that its files may be complete.

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

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( Sentence ordered executed. GCMO 458, USFET, 6 Oct 1945).

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

BOARD OF REVIEW NO. 3

22 SEP 1945

CM ETO 15905

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| U N I T E D S T A T E S | ) | 7TH ARMORED DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at APO 257, U. S. Army, 19 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U. S. Penitentiary, Lewisburg, Pennsylvania. |
| Private First Class LUPE R. ARIAS (39418223), Company B, 23rd Armored Infantry Battalion | ) | |

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private First Class Lupe R. Arias, Company "B", Twenty Third Armored Infantry Battalion, did, at Rosdorf, Germany on or about 27 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Else Bergrath.

Specification 2: (Finding of not guilty).

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification 1, and not guilty of Specification 2. Evidence was introduced of three previous convictions, one by summary court for absence without leave for 10 days, and two by

special court-martial for respective absences without leave for 35 days and 14 days, all in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be shot to death with musketry. The reviewing authority, the Commanding General, 7th Armored Division, approved only so much of the sentence as provides that the accused be shot to death with musketry, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that at about 0330 hours during the morning of 27 April 1945, accused climbed through a window of a house in Rosdorf, Germany, and went into a room in which 26-year-old Frau Gertrude Pelzer, her 13-year-old niece, prosecutrix Else Bergrath, and five other persons were sleeping. Carrying a pistol in his hand, he lit a match, then a candle which was handed him, and asked that the shades be pulled down. He also "talked out of the door as if there were other people present outside" (R7-8,12,14). He forced a male occupant of the room to accompany him to various rooms both upstairs and downstairs, and then to return to bed (R8-9). He asked the age of Else, whose mother said she was 13. He pulled the covers off of Gertrude and made her go with him upstairs, where he had intercourse with her (R9-12). The court found him not guilty of rape as to this act.

Gertrude testified that on returning downstairs, accused motioned that Else should go with him, and Else asked, "Aunt Gertrude, what is he going to do to me?" He took Else upstairs, where she was later heard to cry "out loud". After about thirty minutes they came back down and Else's father said, "Child, I cannot help you", and Else said, "But father, I am not going any more". She then went back upstairs and her groans were heard later downstairs (R12-13,16-17).

Else testified that when accused kept motioning, her father told her she had to get up (R18). She dressed and went upstairs with accused, who had a pistol in his hand. He motioned for her to remove her pants and lie down, which she did. He went downstairs for about five minutes and then returned, unbuttoned his pants, and lay on her (R19). She did not know exactly what he was going to do, but she "was too much in fear" to try to prevent it if she had known. He had intercourse with her against her will. He "pushed it in" and, because it pained her, she "cried out and he held the pistol against my temple". Part of his body was inside her genitals about an inch and a half.

"He took it out and put it in several times" (R20-21). They went back downstairs and then accused made her bring the bed clothes upstairs and lay down again. He again pushed his male organ into her female organ for about an inch and a half, against her will. After five to ten minutes he lay beside her and went to sleep. She was naked (R21-23). Her female organ was bloody (R24).

In response to the summons of a civilian, an American soldier on guard duty came to the house, and on finding accused upstairs, nude from the waist down, lying on a mattress beside Else, he took accused away (R23,26-29).

At about 1500 hours that day, Else was examined by a medical officer, who found two tears of the hymen, one of which contained some ecchymosis and blood, indicating it was a fairly recent tear. There was also some tenderness, but no spermatozoa were found. As to puberty, Else was about half-developed (R25).

4. After his rights as a witness were explained to him, accused elected to remain silent and no evidence was offered in his behalf (R29).

5. The testimony of the 13-year-old prosecutrix shows that accused had carnal knowledge of her two times, on the date and at the place alleged, against her will, by putting her in fear of death or serious bodily injury by the use of a pistol. Her account of the acts is strongly corroborated by the testimony of a medical officer as to her physical condition following the acts, by the testimony of her aunt as to accused's actions prior to going upstairs and her cries after going upstairs, and by the testimony of an American soldier who found accused asleep beside her after the alleged acts. Under all the circumstances shown by the evidence, the elements of the crime of rape were clearly established and the findings of guilty are amply supported by the record (CM ETO 3933, Ferguson et al; CM ETO 3740, Sanders et al; CM ETO 10841, Utsey; CM ETO 12472, Syacsure).

6. The charge sheet shows that accused is 28 years old and was inducted 11 August 1943 at Sacramento, California. No prior service is shown.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a United States



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penitentiary is authorized upon a conviction of the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

D R S Caper Judge Advocate

Malcolm C. Sherman Judge Advocate

B H Levey Jr Judge Advocate

1st Ind.

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

1. In the case of Private First Class LUPE R. ARIAS (39418223), Company B, 23rd Armored Infantry Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved and commuted, 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 15905. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 15905).

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

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(Sentence as commuted ordered executed. GCMO 465, USFET, 7 Oct 1945).

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

BOARD OF REVIEW NO. 3

28 AUG 1945

CM ETO 15929

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| U N I T E D S T A T E S | 63RD INFANTRY DIVISION |
| v. | Trial by GCM, convened at Headquarters 63rd Infantry Division, APO 410, U. S. Army, 16 July 1945. Sentence as to ANDERSON and FRISON: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. Sentence as to ATKINS: Confinement at hard labor for six months and forfeiture of $18.66 per month for six months. Seventh Army Stockade. |
| Private JOHN R. ANDERSON (36790431), Private LUTHER FRISON (36582801) and Private R. D. ATKINS (35721449), all of 898th Quartermaster Laundry Company | |

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

ANDERSON

CHARGE I: Violation of the 61st Article of War.
(Nolle prosequi)

Specification: (Nolle prosequi)

CHARGE II: Violation of the 96th Article of War.
(Nolle prosequi)

Specification: (Nolle prosequi)

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

Specification: In that Private John R. Anderson, 898th Quartermaster Laundry Company, did, at Reutsachsen, Germany, on or about 6 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Ilse Rudolph.

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

Specification: In that * * * did, at Reutsachsen, Germany, on or about 6 May 1945, unlawfully enter the dwelling of Otto Erich Friedrich Gustav Rudolph, and Elise Wollmerheuser, with intent to commit a criminal offense, to wit, rape therein.

FRISON

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

Specification: In that Private Luther Frison, 898th Quartermaster Laundry Company, did, at Reutsachsen, Germany, on or about 6 May 1945 forcibly and feloniously, against her will, have carnal knowledge of Ilse Rudolph.

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

Specification: In that * * * did at Reutsachsen, Germany, on or about 6 May 1945 unlawfully enter the dwelling of Otto Erich Friedrich Gustav Rudolph and Elise Wollmerheuser with intent to commit a criminal offense, to wit, rape therein.

ATKINS

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private R. D. Atkins, 898th Quartermaster Laundry Company, did, at Reutsachsen, Germany, on or about 6 May 1945, unlawfully enter the dwelling of Otto Erich Friedrich Gustav Rudolph and Elise Wollmerheuser, with intent to commit a criminal offense, to wit, rape therein.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the votes were taken concurring, was 15929

was found guilty of the respective charges and specifications against him. Evidence was introduced of two previous convictions against Anderson, both by special court-martial, one for violation of the 61st Article of War and one for violation of the 65th Article of War. Evidence was introduced of two previous convictions against Frison, one by special court-martial and one by summary court, both for violations of the 61st Article of War. No evidence of previous convictions was introduced against Atkins. Three-fourths of the members of the court present at the time the votes were taken concurring, Anderson and Frison each were 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, and Atkins 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 (10) years. The reviewing authority approved the sentences against Anderson and Frison, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½. As to Atkins, he approved only so much of the findings of guilty of the Specification of the Charge and the Charge as involves a finding of guilty of wrongfully entering the dwelling of Otto Erich Friedrich Rudolph and Elise Wolimerheuser at the time and place alleged, in violation of the 96th Article of War, approved and ordered executed only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of $18.66 per month for six months, and designated the Seventh Army Stockade as the place of confinement.

3. The evidence for the prosecution shows that at about 1900 hours on 6 May 1945, the three accused and a Serbian or Yugoslavian soldier knocked at the door of the dwelling of Otto Erich Friedrich Gustav Rudolph and Mrs. Elise Wollmerheuser in Reutsachsen, Germany (R37,89). Upstairs in the house were Mr. and Mrs. Rudolph, the maid, a small son, and two daughters, one eight years of age, and Ilse Rudolph, the prosecutrix, age 20 (R11-12). On hearing the knocking, Ilse preceded her father downstairs and locked herself in a room with Mrs. Wollmerheuser, who resided downstairs (R30). After loud banging and threats by the Serbian soldier to break in the door, Mr. Rudolph opened it (R9,24). All three accused were armed (R11), and were "completely sober" (R23). Accused Anderson said, "Where is the Frau? Where is the lady?" Mr. Rudolph replied that "they were gone", whereupon all three accused entered the house (R10,20). They first searched the barn, after which Anderson and Frison came back and ordered the family upstairs, while Atkins remained at the door (R10). Accused had no permission to enter any rooms of the house (R16,26,37). Anderson and Frison kept asking



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for the daughter, Ilse, and searched the house for her, at the same time forcing the family up and down the stairs by grabbing, shoving and pushing them, and pointing their guns at Mr. Rudolph (R10-13). Finally, one accused, or perhaps "all three" of them, broke the lock on the living-room door downstairs and forced or smashed open the door (R11-12,29,37). Anderson and Frison then went into the kitchen where Ilse and Mrs. Wollmerhouser were, and Frison "held a gun at our chests" and forced them to go into the hall (R12,29). Atkins and the Serbian soldier went outside with Mrs. Wollmerhouser, and Ilse and her family were forced upstairs by Anderson and Frison at the point of their guns (R11-13,29).

After they reached an upstairs bedroom, Anderson pulled Ilse from the room into the hall. She and the children were crying. Mr. Rudolph warned Frison that he would report any offenses against his daughter to the military government, whereupon Ilse came back into the room and told her father to "be quiet, not to do anything", because she knew he had trouble with his heart. Anderson then pulled Ilse down the hall into an adjoining bedroom. Mr. Rudolph attempted to get up from a chair, but Frison punched him in the chest and threatened to shoot him (R13-14,29).

Prosecutrix testified that Anderson tried to make her go up to the attic but she would not go. He told her to go into another room "but I didn't want to go and then he turned his gun around as if to threaten that he wanted to hit me on the head with it if I didn't go with him". He then took her into the room and locked the door and put the key in his pocket (R29-30). She knocked on the wall and her father heard it (R14,31). Then, she testified:

> "I stood against the wall and he said to me that I should give him a kiss. I said no and he said I should lay on the bed and I resisted again. He then fooled around with his gun and said he would shoot my father and hit me over the head with it and he pulled me on to the bed and wanted to take my coat off but I took that off myself and I resisted again and I wanted to get up and he held me down. Then he pulled down my pants and loosened my stockings. Then he started - * * * I always pushed him away with my hands and wanted to get out of the room. * * * With one hand he held me tight and with the other hand he pulled down my pants" (R29-30).

She held her legs closed tightly, but he took his hands and forced them apart (R32). He then had sexual intercourse with her, penetrating her vagina with his penis (R30-32). She did not cooperate with him. His

gun was between the bed and the door. She did not call for help because she knew her parents could not help her and the people in the other houses were afraid for themselves (R30). She was too afraid to cry out (R55). After Anderson had been in the room for three to five minutes (R22), accused Frison knocked on the door and had a conversation with him, after which Anderson left the room. She testified:

> "I, of course, wanted to go out too and I tried to get out but at the same moment this /Frison/ came and he took my hand and threw me on the bed and started in too and in the meantime I didn't get a chance to put my pants back on again. And then he held me tightly and held me on the bed. I tried to resist again and I couldn't do anything and he started in and I didn't cooperate with him whatsoever" (R31).

Frison had intercourse with her, the act being "exactly the same as with Anderson". He penetrated her person with his organ (R31,33).

Apparently while Frison was still engaged in the act, accused Atkins ran upstairs and yelled that the police were coming, whereupon Frison left the room and ran away across a field (R15,31,34). Anderson also looked out and saw the police and went downstairs "like lightening", after which he and Atkins were taken away by some officers in a car (R14-15). Anderson's clothing was orderly when he came from the room with Ilse (R16). Prosecutrix' mother testified that Ilse "was very excited and upset" about five or ten minutes after accused had left the house (R27). Ilse immediately told the officers that Anderson had threatened to "smash her head with the barrel of the gun" and shoot her parents if she made any outcry (R16).

4. After their rights were explained to them, each elected to remain silent (R46-47).

For the defense, it was stipulated that Dr. Georg Sauer, M.D., Rothenburg, Germany, if present, would testify that he examined Ilse Rudolph on 9 May 1945 and found no evidence of physical violence, venereal disease or pregnancy, and that subsequent examinations failed to show evidence of venereal disease or pregnancy (R41; Def.Ex.A).

Mrs. Wollmerheuser testified that Ilse Rudolph had associated with German "SS soldiers", who had visited her house. American colored soldiers had been to the house prior to 6 May, but the witness and her maid always left the house when they came (R42-43). The maid, Luisa Riedinger, aged 17, testified that the colored soldiers had visited

the Rudolphs every day for about eight days and "used to sit on the sofa and smoke cigarettes" and gave Ilse cigarettes. The witness left the house because she was afraid of them. Ilse was not married and had a child about two and one-half years of age. The witness left the house on the night of 6 May by the window, and Ilse did not go through the window also "because the nigger came in the room too fast" (R44-46).

5. The testimony of prosecutrix, which is corroborated in part by testimony of her parents and Mrs. Wollmerheuser, clearly shows that accused Anderson and Frison each had carnal knowledge of her by force and without her consent at the time and place alleged. In its entirety the evidence fairly supports the conclusion that she was put in fear of losing her life or of suffering great bodily harm if she resisted to any greater degree, and that she took such measures to frustrate the design of each accused as were called for by the circumstances (MCM, 1928, par.148b, p.165; CM ETO 3933, Ferguson et al; CM ETO 10841, Utsey; CM ETO 14382, Janes).

The unlawful entrance of each accused into the dwelling of Mr. Rudolph and Mrs. Wollmerheuser is established by their testimony. It is of no significance that Mr. Rudolph actually opened the door as a result of loud banging upon it and threats to break it in, since the circumstances clearly show a constructive breaking (CM ETO 3707, Manning; MCM, 1928, par.149d,e, p.169). The intent of accused Anderson and Frison to commit the crime of rape at the time of the unlawful entrance is shown by their demands and searches for the prosecutrix and the subsequent actual commission of the offense by them (CM ETO 3679, Roehrborn; CM ETO 4071, Marks et al). The unlawful entrance of accused Atkins into the dwelling was clearly a violation of Article of War 96 (CM ETO 5362, Cooper).

6. During interrogation of the prosecutrix by the court, she was asked whether she had ever had intercourse with American soldiers before (R33), and on cross-examination by the defense she was asked if any "SS troops" ever visited her except for two days during which she admitted they were quartered at her house (R52). Objections by the prosecution were sustained in each instance. In view of the well-recognized rule that bad reputation of the prosecutrix for chastity may be shown as bearing on the probability of consent (CM 218643, Bright, 12 B.R. 103; 52 CJ, sec.109, p.1079), and in view of the showing that colored soldiers had visited prosecutrix for eight days prior to the visit by accused and that she had an illegitimate child, it would have been more proper to allow a thorough interrogation of prosecutrix by the court and defense. However, from an examination of the record of trial as a whole, it is concluded that the rulings did not injuriously affect the substantial rights of any of the accused.

7. The charge sheets show that accused Anderson is 23 years and one month of age and was inducted 10 July 1943 at Chicago, Illinois. Accused Frison is 20 years eight months of age and was inducted 10 March 1943 at Detroit, Michigan. Accused Atkins is 22 years eleven months of age and was inducted 2 January 1943 at Evansville, Indiana. No prior service by any accused is shown.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B K Geary Jr Judge Advocate

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

BOARD OF REVIEW NO. 2 7 DEC 1945

CM ETO 15990

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| U N I T E D S T A T E S | THIRD UNITED STATES ARMY |
| v. | |
| Corporal CLARENCE S. THOMAS (34486312), 650th Quartermaster Truck Company | Trial by GCM convened at Regenstauf, Germany, 16 May 1945. Sentence: Dishonorable discharge (suspended), total forfeitures, confinement at hard labor for five years. |

HOLDING by BOARD OF REVIEW NO. 2
HEPBURN, HALL and COLLINS, Judge Advocates

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

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

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

Specification: In that Corporal,Clarence S. Thomas, 650th Quartermaster Truck Company, did, at or near Birkenfeld, Germany, on or about 1 April 1945, offer violence against, First Lieutenant EDWARD B. BZDULA, his superior officer who was in the execution of his office, in that he said, "Come and get me", and did make striking movements with his arms.

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

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Specification: In that * * * did, at or near Birkenfeld, Germany, on or about 1 April 1945, assault Staff Sergeant, Robert L. Morrow, a Non-Commissioned Officer, who was then in the execution of his office, by striking him on the face with his fist.

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 the 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 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 10 years. The reviewing authority approved the sentence, remitted 5 years of the confinement, suspended the execution of that portion of the sentence adjudging dishonorable discharge, designated the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as the place of confinement and, as thus modified, ordered the execution of the sentence. The proceedings were published in GCMO No.295, Third United States Army, 2 August 1945.

3. About 2 P.M. of the afternoon of (R19) 1 April 1945, the accused, a member of the 650th Quartermaster Truck Company, drove one of the trucks in a convoy on a road near Birkenfeld, Germany, under the command of Lieutenant Edward B. Bzdula of the same organization (R6-7). Just what took place at that time and place is fairly and ably described in a summary of the evidence of record prepared by the Military Justice Division of the Branch Office of The Judge Advocate General with the European Theater, U.S.Army. The conclusion reached by the Military Justice Division was based upon the facts contained in that summary and therefore this Board adopts it for the purposes of the review as constituting all of the facts of the case under discussion material to the issues. It reads as follows:

a. Evidence for the prosecution:

On 1 April 1945 the accused, a Corporal, was in a convoy driving a truck (R7). Accused's truck apparently ran into the truck preceding it, and First Lieutenant Edward B. Bzdula, the officer in charge of the convoy, came to the scene to investigate (R7,24). Accused was found sitting in his truck uttering unintelligible words (R8). He was ordered by Lieutenant Bzdula to get out of the truck (R8). Accused did not obey the order, whereupon the Lieutenant had seven enlisted men who were present

remove accused from the truck for the purpose of transferring him to another (R8,9). During this bodily transfer of accused, accused broke away from the seven enlisted men who were trying to handle him and was running wild around the immediate vicinity of the trucks with the seven enlisted men, together with five officers, trying to stop him (R10,11). During this commotion accused struck Staff Sergeant Robert L. Morrow on the face with his fist (R8,17,18). At that time Morrow had been ordered to place accused under arrest and was attempting to do so (R17,18). After accused had struck him with his fist, Sergeant Morrow hit accused over the head with the stock of his carbine, breaking the stock (R8,17,18,21). Accused then struck another soldier who was present (R17,18,21). During this time accused was in an "uproar state" and was swinging his arms wide in a sort of flailing movement (R13,14). Accused thereafter was placed in another truck than his own, got on the driver's side of the seat and attempted to start the truck but was unable to do so because the rotor had been removed (R9,11). Lieutenant Bzdula then ordered accused to get out of the driver's seat (R9). At the time the order was given Lieutenant Bzdula was standing very close to the window of the cab of the truck in which accused was seated (R14). Accused at the time of the order said "Come and get me", and leaned out of the window of the truck cab making striking motions with both of his hands, swinging from his shoulder (R9,11,14). Lieutenant Bzdula moved away from accused and was not hit by him, but stated that he would have been struck by accused had he not moved away (R9,14).

( The above is this reviewer's interpretation of the order of events from a very confused record of trial. There is some evidence in the record indicating that accused was placed in the second truck by the 7 enlisted men, that thereafter he struck at the Lieutenant and that following that incident he got off the truck, struck the Sergeant and "ran wild" (R24).)

Lieutenant Bzdula testified that he smelled liquor on accused's breath, that accused was in no condition to drive a truck, that he was in an "uproar state", was "running wild" and was drunk (R10,12,13,15). Staff Sergeant Morrow testified that he saw accused at noon and could tell that he had been drinking; that the above incident occurred some two hours later and that at that time accused couldn't have been sober and was drunk (R19, 20).

b. Evidence for the Defense:

Lieutenant Bzdula testified that he had known accused for approximately 14 months prior to the above incident, had had an opportunity to observe him during that period of time, and considered him to be an excellent soldier of excellent character (R15,16). Staff Sergeant Morrow testified that he had known accused

for 15 or 16 months and that during that time accused has been a good soldier and has never had any trouble (R22). Technician Fifth Grade Johnson, another soldier accused struck at the time of the above incident, testified that accused was a good soldier (R26).

Accused was sworn as a witness and testified in his own behalf(R29). On the night before the incident in question occurred accused had not eaten supper, and the next morning he had no breakfast (R31). When he got up in the morning he drank a half bottle of champagne which was all he drank that day (R30,31). Thereafter he went out with his truck, the truck broke down and he took the truck to ordnance. His platoon sergeant told him not to drink any more. He does not remember leaving ordnance, and from that time he does not recall what happened until about seven dclock that night when he woke up in confinement (R30).

4. The Military Justice Division after examining the record found the evidence [redacted] legally sufficient to support only findings of guilty of assault and assault and battery in violation of Article of War 96 and not in violation of Article of War 64 or 65. This conclusion was reached upon the reasoning that the accused was so drunk that "he did not possess sufficient mental perception to understand the nature of his conduct and to know the persons against whom it was directed".

In other words, that he was not drunk enough to be excused from committing the offense of assault and battery in violation of Article of War 96 but was too drunk to know who the persons were upon whom he committed the assaults - notwithstanding the testimony that they both knew the accused at least 14 months, were in the same organization with him, and the event took place during daylight hours - and therefore he could not be guilty of violating Articles of War 64 or 65.

The question presented is whether the accused was so drunk at the time that the Board of Review may reverse the findings of guilty of the court and hold as a matter of law that the accused was excused from being held responsible for knowing the military rank of the persons whom he assaulted. It is conceded that he did at the time and place alleged in the specifications offer violence against First Lieutenant Edward B. Bzdula and that he did strike Staff Sergeant Robert L. Morrow on the face with his fist, while those two were acting in the execution of their respective offices.

All of the elements of proof necessary to support a finding of guilty of violating Articles of War 64 and 65as set forth in MCM, 1928, pars. 134a and 135,pages 148 and 149 were clearly proved. However, the Manual for Courts-Martial recognizes as a defense to Charge I (an offer of violence against a superior officer in violation of Article of War 64) that the accused "did not know the officer to be his superior" (ibid,p.147). Although the

Manual is silent on the subject, nevertheless, to be consistent, the defense that he did not know the soldier that he struck was a non-commissioned officer should also be available to the accused in defense of Charge II. We will recognize such a defense for the purpose of this case.

It should be noted that the accused did not contend nor introduce any evidence to show that he did not know that those whom he assaulted were superior in rank but contended that he was unconscious of any wrongdoing and all other conduct on his part during the entire afternoon because of the effect of the intoxicating liquor that he had consumed on an empty stomach. There was therefore no direct evidence of the extent of his knowledge at the time of the incident under discussion. The only direct evidence on the subject was the accused's testimony that he was entirely unconscious mentally. As against this was the evidence of the surrounding circumstances and the accused's actions from which the court might infer accused's intentions, thoughts and knowledge.

Undoubtedly the accused was drunk at the time he committed the alleged illegal acts. Evidence of his drunkenness and its extent was properly admissable not only to prove the possible lack of knowledge on the part of the accused of the rank of his assaulted victims but also in extenuation of the offenses.

> "It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense.
>
> Such evidence should be carefully scrutinized as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act.
>
> In courts-martial, however, evidence of drunkenness of the accused, as indicating his state of mind at the time of the alleged offense, whether it may be considered as properly affecting the issue to be tried, or only the measure of punishment to be awarded in the event of conviction, is generally admitted in evidence" (MCM, 1928, par.126a, p.136).

The court having heard all of the evidence found the accused guilty and thereby indicated that it inferred from the accused's acts committed under the circumstances shown and found as a fact that the accused was not so drunk that he did not know the rank of the persons assaulted by him but that he possessed sufficient

sense of vision and reasoning power to observe and to recognize in daylight the rank of his victims. In our opinion this question was purely one of fact for the sole determination of the court and it is beyond the province of the Board to reverse its decision under the circumstances. It must be assumed that the court took into consideration all of the evidence when it deliberated upon and determined the guilt of the accused. According to his own statement the half bottle of champagne which he drank when he got up in the morning was all he drank that day. Thereafter he was able to drive his truck and had sufficient judgement to take the truck to Ordnance for repairs when it broke down. He remembered that his platoon sergeant advised him not to drink anymore. The accused apparently was conscious and possessed his sense of sight so that he could see, observe, and recognize his own superior commissioned and non-commissioned officers and their rank. No doubt the court balanced the above facts against the various descriptions of the accused's conduct indicating drunkenness, and his testimony that he was mentally unconscious. The issue presented was one of fact and not one of law. The accused although voluntarily drunk had the right to show that fact to the court and have the court take that fact under consideration in reaching its findings. Having resolved the issue against the accused, it is not within the province of the Board in reviewing the case to hold that he was too drunk to be able to see and recognize that which was obvious simply because the Board may differ from the court as to the inferences which may be drawn from the evidence. That would be weighing the evidence - a function vested exclusively in the fact - finding body. The comment of the Board of Review with respect to factual situations similar to that disclosed in this case is appropiate:

> "The weighing of evidence and determining 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, Davis, et al 3 B R (ETO) 5997).

The findings of guilty of the Charges and Specifications are therefore sustained.

In a similar case (CM ETO 2484, Morgan). the Board held that:

> "Whether or not accused had knowledge that the

person he struck was a commissioned officer was a pure question of fact to be determined by the court from a consideration of all revelent circumstances revealed by the record

'Knowledge * * * of particular matters, by its very nature, is not susceptible to direct proof, but must be determined by inference from indicative conduct or from the inherent quality of the occurrences or circumstances by which it was acquired" (Equitable Life Assur.Soc.v. Saftlas (D.C.,E.D.Pa., 1941(38 Fed.Supp. 708, 712,affirmed (CCA - 3rd Cir. 1942) 129 Fed. (2d) 326)'."

In CM 223336 (1942), 1 Bull JAG 159, the Board of Review held as a matter of law, where an officer and a non-commissioned officer gave orders to a soldier who was very drunk and whose acts were described as "inconsistent", "uncontrolled" and obviously "out of control" and the soldier testified that he remembered nothing after drinking some ethyl alcohol and he was convicted of willfully disobeying the orders and thereby violating the 64th and 65th Article of War, that the record was legally sufficient to support only as much of the findings of guilty, as involved findings of guilty of failures to obey the orders, in violation of Article of War 96. The Board in its opinion stated:

"The gravamen of the offenses alleged by these Specifications was willful disobedience or 'intentional defiance of authority', a deliberate refusal or omission to do what was ordered. Mere wrongful omission or neglect to obey is not willful disobedience. Manifestly, a conscious rational mental process is involved in willful disobedience, else the design and purpose which, according to authoritative definitions, characterize an intentional act, would be absent (pars.134b, 135a, MCM)".

The word "willfully" in AW 64 and AW 65 applies only to disobedience and does not qualify striking or offering violence. The 64th AW reads in part "Any person * * * who, on any pretense whatsoever, strikes his superior officer or * * * offers any violence against him" (underscoring supplied).

In the companion case of CM 223335, Price, 13 B.R. 383 a conviction of a violation of AW 64 and AW 65 was sustained when a drunken soldier struck an officer and a non-commissioned officer who were then in the execution of their office.

The conclusion reached by the Board in the instant case does not, in its opinion, conflict with the conclusion reached in CM ETO 9162, Wilbourn wherein the conviction of a violation of AW 64 was reduced to a violation of AW 96 because the accused was drunk. In that case the assaulted officer testified that the accused "apparently failed to recognize him as an officer" because of the accused's intoxicated condition. It was also shown in that case that the accused failed to recognize a fellow member of his company at the same time. There was therefore evidence of his inability to recognize an officer which is lacking in the case under discussion.

No reference is made to recognized authorities on law aliunde military authorities because the civil authorities do not favor the defense of voluntary intoxication to the extent indicated by the military precedents above (1 Whartons Criminal Law, sec. 68, p. 98; 22 C.J.S. sec. 66, p. 130) and the offense under discussion is purely a military offense.

5. The charge sheet shows that the accused is 24 years and four months of age. He was inducted into the service on 6 December 1942 at Jackson City, Mississippi. 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.

7. The penalty for offering violence against a superior officer in the execution of his office is death or such other punishment as a court-martial may direct (AW 64).

Earle Stephens Judge Advocate

Clarence W. Hall Judge Advocate

(DISSENT) Judge Advocate

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

BOARD OF REVIEW NO. 3

5 OCT 1945

CM ETO 15995

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| UNITED STATES | ) | SEVENTH UNITED STATES ARMY |
| | ) | |
| v | ) | Trial by GCM, convened at |
| | ) | Gutersloh, Germany, 29 June |
| Private JAMES LEWIS | ) | 1945. Sentence: Dishonorable |
| (33742762), 3456th Quarter- | ) | discharge, total forfeitures |
| master Truck Company | ) | and confinement at hard labor |
| | ) | for life. United States |
| | ) | Penitentiary, Lewisburg, |
| | ) | Pennsylvania. |

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

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

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

CHARGE: Violation of the 92nd Article of War

Specification: In that Private James Lewis, 3456th Quartermaster Truck Company, did, in vicinity of Shepmilse, Germany, on or about 13 May 1945 forcibly and feloniously against her will have carnal knowledge of Elfrieda Esta.

He pleaded notguilty to and, was found guilty of, the Charge and Specification. Evidence was introduced of one previous conviction by summary court for appearing in Toul, France without an authorized pass 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. Prosecution's evidence:

On 13 May 1945 between 0400 and 0500 hours accused, armed with a rifle, knocked at the door of the home of Karl Esta in Shepmilse, Bielefeld, Germany. Herr Esta opened the door. Accused pushed him into the house. Herr Esta ran around the accused, left by a window and proceeded on his bicycle to the home of his sister. Accused meanwhile grabbed Elfrieda Esta, age 21, daughter of Karl Esta and, by hitting her on the head and pointing his rifle at her, forced her to go a short distance from the house (R5,8,13). Her cries for help were heard by Frau Emma Becker, a neighbor, who got out of bed, went downstairs and outdoors to observe accused about 100 meters away following Elfrieda with a rifle.. After Elfrieda warned, "He will shoot", accused "shot at me". She could see him pushing the girl in front of him. Frau Becker "went back" (R14,-15). Accused continued to pull or push Elfrieda along, hit her again on the head when she repeated her calls for help, pushed her into a bomb crater and made her lie down. After again pointing his rifle at her he inserted his penis into her vagina. She did not know how far. He then grabbed her arm, walked with her a short distance, again made her lie down and repeated the act of inserting his penis into her vagina. She had intercourse with him because she "had to" and because when she "refused to go, he pointed the rifle at me" (R6-8). He had a pocketful of money and after the second intercourse gave her 200 marks which she took in her hand because he held it out as though "he was going to hit me, if I didn't take it" (R7,10-11).

At this moment, Herr Esta with an interpreter, his sister and two soldiers arrived on the scene in an automobile. Accused was standing about a yard from the girl, whose hair was "disheveled and dirty" with an "imprint of a hand-mark" on her cheek. Accused and the girl were taken to the command post of Battery B, 215th Field Artillery, where she told her story to an army officer (R7-10,19-21). Within two hours thereafter she was examined by a doctor (R8-9).

4. For the defense, Dr Heinrich Upmann, Hillegossen, Kreis, Bielefeld, Germany, testified that he made a vaginal examination of Elfrieda Esta on May 13, 1945 at about 0700 hours. He was unable to determine whether or not her vagina had been penetrated earlier that day. He did not notice any bruises or marks of any kind upon her (R26,28).

5. After his rights were explained, accused elected to remain silent (R28-29).

6. The court's findings of guilty are supported by substantial evidence, which contains all the elements of the crime of rape and are final and binding upon appellate review (CM ETO 4661, Ducote, and authorities therein cited)

7. The charge sheet shows that accused is 28 years ten months of age and was inducted 5 June 1943 at Fort Myer, Virginia. He had no prior service.

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

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AW92). Confinement in a United States Penitentiary is authorized upon conviction of rape by Article of War 42 and section 278 and 330, Federal Criminal Code (18 USCA 457, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec II, pars. 1b (4), 3b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. L. Keating Jr. Judge Advocate



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RESTRICTED

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

BOARD OF REVIEW NO. 2

CM ETO 16005

28 SEP 1945

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| U N I T E D  S T A T E S | ) 10TH ARMORED DIVISION |
| v. | ) Trial by GCM, convened at Garmisch-Partenkirchen, Germany, 3,4,5 August 1945. |
| Technician Fifth Grade WELDON W. JONES (34449780) and Private First Class BENJIMON D. HOUGH (34475131), both of Troop "C", 90th Cavalry Reconnaissance Squadron (Mechanized) | ) 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. 2
VAN BENSCHOTEN, HEPBURN and MILLER, Judge Advocates

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

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

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

Specification: In that Technician Fifth Grade Weldon W. Jones, Troop "C", 90th Cavalry Reconnaissance Squadron (Mechanized), and Private First Class Benjimon D. Hough, Troop "C", 90th Cavalry Reconnaissance Squadron (Mechanized), acting jointly and in pursuance of a common intent, did with malice aforethought willfully, deliberately, feloniously, unlawfully and with premeditation kill one Michael Floritz, a human being, by striking said Michael Floritz about the body with their hands and feet at or near Oberapfeldorf, Germany, on or about 8 July 1945, then and there inflicting upon the body of said Micahel Floritz wounds from which the said Michael Floritz died on or about 9 July 1945 at Schongau, Germany.

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

Specification: In that Technician Fifth Grade Weldon W. Jones, Troop "C", 90th Cavalry Reconnaissance Squadron (Mechanized), and Private First Class Benjimon D. Hough, Troop "C", 90th Cavalry Reconnaissance Squadron (Mechanized), acting jointly

and in pursuance of a common intent, did, at Oberapfeldorf, Germany, on or about 8 July 1945, in the night time feloniously and burglariously break and enter the dwelling house of Michael Floritz with intent to commit a felony, viz: robbery, therein.

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

Specification: In that Technician Fifth Grade Weldon Jones, Troop "C", 90th Cavalry Reconnaissance Squadron (Mechanized), and Private First Class Benjimon D. Hough, Troop "C", 90th Cavalry Reconnaissance Squadron (Mechanized) acting jointly and in pursuance of a common intent, did, at Peiting, Germany, on or about 8 July 1945, wrongfully take and use without authority a certain vehicle, to wit: one (1) one quarter (¼) ton truck No.W-20224044, Property of the United States, furnished and intended for the military service thereof, of a value of more than $50.00.

Each accused pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications preferred against them, except the words and figures "No.W-20224044" in the Specification of Charge III, and of the excepted words not guilty. Evidence was introduced of one prior conviction of Hough by summary court for being drunk on duty in violation of Article of War 85. No evidence of previous convictions was introduced as to Jones. Three-fourths of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. A summary of prosecution evidence is as follows:

On 7 July 1945 accuseds' organization was stationed at Peiting, Germany (R64). Private First Class John P. Grady, of accuseds' organization testified that about 8:30 o'clock in the evening on 7 July 1945 he, the two accused and another soldier went to Apfeldorf, Germany, in a government vehicle for which he (Grady) had a trip ticket from Division Dispatch, for the purpose of the trip to Peiting, but had no trip ticket to go to Apeldorf (R47) In testifying Private Grady repudiated previous written statements that he had made to the Division Provost Marshal and in view of the apparent perjury of the witness, the court rejected his testimony and previous written sworn statements in entirety. Previous written statements of Private Grady which had been introduced into evidence as Pros.Ex.No. "4" and "5" were withdrawn (R63).

Technician Fifth Grade Max J. Knouse, of the same organization as accused, testified that he was on duty as guard at the Division outpost check-point on the road between Peiting and Apfeldorf, about one mile from Apfeldorf, from 2100 to 2400 on the night of 7 July, 1945. That between 9:00 and 9:30 pm a jeep headed for Apfeldorf on the road from Peiting stopped at his outpost in which jeep were Private Grady, the two accused and a fourth occupant not known to him (R66). He did not check the dispatch ticket (R67). The vehicle did not return past his outpost prior to the time he was relieved at 2400 on 7 July, 1945 (R65-67).

At approximately 2400 hours, 7 July 1945 (R13,2729), occupants of house 123, Apfeldorf, Germany, were awakened by a noise at the door and the sound of shattered glass (R13,14,24,29). The house was occupied by Michael Floritz, age 70, his daughter, Anna Floritz, his daughter-in-law, Kreszenz Floritz, her two children, and Anna Grund, sister of Kreszenz Floritz (R13,22,23,29). Photographs of the exterior and interior of the house, taken and identified by the Division photographer, were introduced in evidence without objection by the defense as Pros.Ex. "A" through "J" inclusive (R8,9). Also sketches drawn to scale and identified by a draftsman of the 55th Engineer Battalion, of the house, the floor plan and contiguous terrain were introduced in evidence without objection by the defense as Pros. Ex. No. "2A", "2B" and "3" respectively (R8-12). Pros.Ex. No. "3" was prepared from a map, scale 1/100,000, which was introduced into evidence without objection by the defense as Pros.Ex. No. "3A" (R28).

Kreszenz Floritz when awakened went to the window and called "What's going on here?" to which one voice replied in German "Where husband?" and the other exclaimed also in German and repeated about ten times "I shoot" (R29,30,32). Anna Grund followed by Michael Floritz then proceeded down the stairway in order to open the door (R14,30,32), but when half way down the staircase, Anna saw that the front door was broken open and a vehicle with headlights burning was at the door (R14,15). Two American soldiers were in the hall; one was "a tall blond with a long face" and the other had "a round face" and wore a steel helmet (R13,14). The tall blond grabbed Anna Grund by the neck (R14) while she was still on the staircase and asked for "schnopps" (R21), but the other soldier released her from his grasp (R14). The soldier who grasped her by the neck was probably injured in the hand because the scarf she wore was "full of blood" (R18). On cross-examination, this witness testified in connection with this incident, "It was the soldier with the round face, he grabbed by the scarf" (R21). "One of the soldiers" then dragged Michael Floritz downstairs (R16). The "blond one" then went up to the room of Kreszenz Floritz (R16,18,30), where he pulled her from bed (R30). After a brief struggle during which "drunk as he was he fell upon me in the bed" she managed to escape and fled to the barn (R30) through an upstairs door (R27), where she remained until the soldiers had departed (R30).

Ann Grund in the meantime had followed the "blond one" upstairs to her sister's room (R16). After her sister escaped to the barn, he grabbed her by the wrist and questioned her about her husband, pulled a picture from the wall and jumped on it (R17). He then went back downstairs and from the head of the stairs she saw him grab Mr. Floritz by the shoulder. Then he knocked him over with his foot and stamped on his chest with his foot (R17-19). After the soldiers left between 12:30 and 1:00 o'clock 8 July 1945, the women assembled downstairs where they found Michael Floritz lying unconscious on the floor near the door, bleeding from his mouth, ears, eyes and nose (R25,31). They moved him to a couch and later secured a doctor who arrived at 5:00 o'clock that morning (R25,34). They noted at this time that the door and window near it were broken (R15,20,24,25). The bolts were torn out of the door and a piece was broken off where the vehicle hit the door (R15).

Dr. R. Raab, physician of Apfeldorf, Germany, testified that he was called to the Floritz home and arrived there at 5:00 o'clock on 8 July 1945 (R34). He found the door and the first window to the right of the door broken (R34), Michael Floritz was on the couch unconscious, and blood was flowing from his right ear and out of his nose. He had wounds on his nose and on the right and left eyeballs and the upper lip. There was a deep wound on the skull base behind his right ear and wounds on both hands. The main injury was on the skull behind the right ear (R34,35). The wounds appeared to have been inflicted three to five hours prior to his examination (R36). At the direction of the doctor the patient was removed to a hospital in Schongau, Germany, where he died the next day without regaining consciousness (R35-39). On 16 July 1945, the body of Michael Floritz was exhumed and removed from the cemetery for the purpose of an autopsy. Father Comrade Wier, priest of Apfeldorf, Germany, identified the body as that of Micahel Floritz (R40). Captain George H. Parks of the 9th Evacuation Hospital, who performed the autopsy, testified that deceased died as a result of a skull fracture, contusions of the brain and hemorrhage (R43); that such injuries could have been inflicted by someone kicking deceased and that the location of various bruises and contusions discounted the possibility that he died as a result of a single fall (R43). Report of autopsy was introduced into evidence, after removal of page 3 thereof at request of defense, as Pros.Ex.No. "3B" (R42).

Technician Fifth Grade Knouse after completing his tour as guard at the road check point near Apfeldorf at 2400 hours on 7 July 1945, visited a house in Apfeldorfhausen, Germany, about three kilometers from Apfeldorf (R121). He was accompanied by Private First Class Joseph Fadleyich also of Troop "C", 90th Cavalry Reconnaissance Squadron (Mechanized). Between 0030 and 0100 hours on 8 July 1945, both of the accused appeared at this house to seek aid for Jones who had cut his hand (R77,113). Knouse and Fadlevich wasked and bandaged the cut which was on one of the middle fingers of Jones' left hand (R77,78,114,118). Accused at this time had

a quarter ton truck in which they departed about ten minutes after their arrival and after the finger had been bandaged (R116), stating that they were going to Peiting (R80). Knouse could not positively identify the vehicle as being the same one which had passed his outpost earlier in the evening, but they "both had the top up" (R81).

Corporal Alvin T. Monson, Troop "C", 90th Cavalry Reconnaissance Squadron (Mechanized), testified that he was on duty at the Division check point outside of Apfeldorf, Germany, on the road between Apfeldorf and Peiting, from 2400, 7 July 1945 until 0300, 8 July, 1945 (R84). That during said tour only two vehicles passed his post, both being quarter ton peeps coming from the direction of Apfeldorf (R84,85). The first one containing Technicians Fifth Grade Turner and Loper who were known by witness, stopped shortly after 2400, 7 July 1945. The other quarter ton came by his post between 0100 and 0200, 8 July 1945, but did not stop. That the top was up on this latter vehicle and he did not see or recognize the occupants (R85).

Captain Robert P. McPeak, Provost Marshal, 10th Armored Division, testified that he conducted an investigation of the facts and circumstances concerning an alleged murder that took place near Apfeldorf, Germany, on or about 7 or 8 July 1945. Civilian witnesses were afforded the opportunity of viewing all suspects, but did not identify either of the accused (R87). On 13 July 1945, in conjunction with Captain Rugh, Trial Judge Advocate, he obtained statements from each of the accused (Pros.Ex.No. 6 and 7), after explaining to each of them his rights under Article of War 24 (R88,89).

Statements subsequently made by the accused to Major John E. Finch, Investigating Officer, on 18 July 1945, after being duly warned of their rights, were also admitted into evidence over objection of the defense as Pros.Ex. No. 8 and 9 (R141,143).

In his sworn statement dated 13 July 1945, accused Jones stated that he and Hough stopped at a house to obtain some schnapps and an old man who came to the door said he had none. Hough knocked him down with his fist and went upstairs where some women "hollered". Hough came down and "stomped on him (the old man). I think it was on the head. I tried to get him not to do it". This occurred between 12:00 and 12:30 at night. Jones admitted he broke the window, but denied touching the "old man" (Pros.Ex.6).

In his sworn statement also of 13 July 1945, accused Hough admitted he was "stuck" in front of the house in the peep; that he entered the house and went upstairs. When he came down "Jones was beating the old man * * * The old man was laying there". He told the old man to help push the peep and "he did not get up and I thought he was playing around. I kicked him on the shoulder". He further stated "Jones was kicking the old man with his foot. He was kicking him on the head or body somewhere.

I just saw him kicking and stomping * * * When I went in I hit the old man backhanded with my fist * * *"(Pros.Ex.7).

In their sworn statements dated 18 July 1945, both accused told in greater detail, substantially the same stories (Pros.Ex.8 (Jones) and Pros.Ex.9 (Hough)).

4. Pursuant to an agreement between the trial judge advicate, accused and their counsel, which was ratified by the court (R96,97) each accused took the stand for the express and limited purpose only of testifying regarding the facts and circumstances surrounding the obtaining of their statements or confessions by the Division Provost Marshal on 13 July 1945, which were subsequently admitted into evidence as Pros.Ex. No. 6 and 7 (R97-112).

In defense First Lieutenant James J. Flood, Troop C, 90th Cavalry Reconnaissance Squadron (Mechanized), testified that he was the commander of Troop C and had known both the accused for approximately two and a half years (R145); that accused Jones was a very good soldier, that he had a distinct dislike for German soldiers; that he volunteered for all types of patrols and was never one to hesitate and that witness would rate his character as "Superior" (R146). That accused Hough's ability as a peep driver was well known throughout the platoon; that he was always present and ready for combat with his platoon during eight months of combat and that the witness would rate his character as "Excellent" (R146).

Each accused after his rights as a witness were fully explained to him, elected to remain silent (R147).

5. a. The action of the law member in directing that

> "In view of the apparent perjury of this witness (Grady) that all statements made by this witness, either prior or during the trial, be, as, a matter of law, disregarded by the Court" (R63)

was manifestly erroneous. Grady was a witness for the prosecution. He testified to certain facts in direct conflict with statements made in his prior extra judicial statement. Thereupon the trial judge advocate interrogated him upon the conflicting declarations contained in said prior extra judicial statements, and the statements themselves were admitted in evidence (R54,55;Pros.Ex.4; R60; Pros.45). The prosecution asserted that the statements were introduced in evidence "for the purpose of impeaching the creditability (sic) of the witness" (R54) and "for the purpose of impeaching the witness now on the stand" (R60). It is evident that the trial judge advocate, law member and defense counsel wholly ignored the established principle that forbids the prosecution to impeach its own witness, but which permitted the prosecution to invite Grady's attention to prior conflicting statements "to refresh his memory and move him to speak the truth by probing his conscience" (CM ETO 438, Smith, 1 BR (ETO) 377, 389). The prior statements were not original substantive evidence in aid of establishment

of the prosecution's case against accused (70 CJ, sec.1236, p.1042, note 86; CM ETO 4581, Ross and authorities therein cited).

The difficulties which arose in dealing with this recalcitrant witness resulted from the non-observance of these legal principles. The successful impeachment by the prosecution of its own witness, however, did not justify the action of the law member in striking all of Grady's testimony and ruling as a matter of law that it was inadmissible and not worthy of belief. Whether the testimony given by Grady was worthy of belief or possessed any evidential value were questions for consideration by the court when it deliberated in closed session upon its findings. It was no function of the law member to pass upon said questions. He usurped authority when he excluded Grady's testimony, and committed an error which was inexcusable no matter the provocation (16 CJ sec 2291, pp 930, 931; AW 31; MCM,1928, par. 124, p132; Winthrops Military Law and Precedents - Reprint-p.360).

The question remains, however, whether this manifest error prejudiced the substantial rights of accused. Grady was a prosecution witness, The fact that the prosecution was deprived of his evidence, regardless of its value, is no cause for complaint by accused. In this aspect of the matter of accused benefited by the erroneous action of the law member (see also par.8 infra), unless there was contained in Grady's excluded testimony any statement of exculpatory value to accused. It is evident evident that Grady on the stand attempted to tell the truth of his relationship to accused and admitted that his prior statements were false and fradulent, but a careful study of Grady's testimony fails to reveal a single line of evidence beneficial to accused. Oppositely it possessed some inculpatory affect and the accused were relieved of its influence by the action of the law member. His ruling made it clear to the court (R63) that accuseds' rights were not to be prejudiced by either Grady's court testimony or his prior statements. The error was, insofar as accused are concerned, clearly one that was non-prejudicial to them under the 37th Article of War. However, the Board of Review has made extended comment on the action of the law member in order to register its emphatic disapproval of the practice followed by him in the instant case.

b. With respect to the admission in evidence of the extra judicial statements of accused the following quotation is relevant and cogent:

> "The ultimate question for determination by the court was whether accused voluntarily gave the statement. This was one of law and fact and its determination was peculiarly within the function of the court. Upon appellate review the questions are whether there was substantial evidence before the court that accused did not act under force and compulsion when he gave the statement and whether the court abused its judicial discretion in determining the first

> of these two questions. A careful analysis of the evidences convinces the Board of Review that the first question must be answered in the affirmative. With respect to the exercise of judicial discretion by the court in reaching the conclusion that the statement was voluntary it should be remembered '* * * it is peculiarly the province of the trial, as distinguished from the appellate, court to pass on the preliminary proofs essential to the admission of certain kinds of evidence, such as * * * confessions * * *' (17 CJ sec.3582, p.242 (CM ETO 11075, Chesak)).

The foregoing principles have been consistently applied by the the Board of Review (CM ETO 2007, Harris; CM ETO 2926, Norman and Greenwalt; CM ETO 3469, Green; CM ETO 3499, Bender et al; CM ETO 4055, Ackerman; CM ETO 5137, Baldwin; CM ETO 5747, Harrison; CM ETO 7518, Bailey et al).

There is substantial evidence that both accused acted freely and voluntarily when they gave their pre-trial statements and were under no threats or compulsion nor did either of them hope to be rewarded as a result of their acts. The mere fact that each accused was informed that the other had made a statement implicating the accused then being interviewed did not render the confessions involuntary (Brown et al v. United States (CCA.DC.1926) 13 F (2nd) 298). With respect to the murder and burglary charges the proof in each instance of the corpus delicti of the crime is so obvious that comment is unnecessary. The admissions of the confessions in support of said charges was free from error.

6. Prosecution in presenting its evidence followed the theory that accused's acts constituted what is designated as "felony-murder", viz a homicide committed during the commission of a felony. In this instance the concommittant felony was the burglarizing of the Floritz dwelling house. In the opinion of the Board of Review no such refinement of the evidence is necessary. The facts exhibited both by the testimony of eye witnesses and the confessions of accused show that the deceased was first knocked to the floor by Hough, who upon returning from the second floor kicked him. Notwithstanding Jones' assertion otherwise, the evidence is clear that the prostrate victim was thereafter kicked and stamped upon by one or both of the accused. The injuries to his skull and face speak in conclusive terms the malignity of the battery. His death is directly traceable to a basal fracture of the skull, resultant upon this assault. There is not the shadow of a doubt as to the cause of the man's death and the evidence conclusively brands both of the accused as murderers. Neither the evidence of eye witness nor the statements of accused themselves offer a single reason or excuse for the vicious, cold blooded and deliberate killing of the deceased. The record fully justifies the conclusion of the court that deceased was murdered and the the accused were the murderers (CM ETO 1922, Forester et al; CM ETO 2007, Harris Jr.; CM ETO 3042, Guy Jr; CM ETO 15787, Parker and Bennerman). Each accused aided and abetted the other in the commission of the crime and both were chargeable as principals

(CM ETO 1453, Fowler et al; CM ETO 1922, Forester et al).

7. "Burglary is the breaking and entering, in the night, of another's house with the intent to commit a felony therein. The term 'felony' includes, among other offenses so designated at common law, murder * * * robbery and larceny * * * It is immaterial whether the felony be committed or even attempted, and where a felony is actually intended it is no defense that its commission was impossible * * * the house must be in the status of being occupied at the time of the breaking and entering * * *" (MCM, 1928, par.149d p.168).

The evidence, corroborated by the statements of accused proved that they stopped their peep or it was driven into the front of the house and that its door was broken in and a window smashed. Accused entered the house. When the old man, Floritz, came downstairs, Hough knocked him down after accused had demanded schnapps and were told he had none. Hough went upstairs still in search of schnapps and assaulted and terrorized two of the women in the house and smashed furniture. On his return downstairs Floritz either failed to understand accused's demands or was unable to assist them in moving their car. One or both of them kicked and stamped on the old man (Floritz), resulting in injuries causing his death.

Proof of accused's breaking and entering the Floritz dwelling house in the night time while it was occupied is substantial and in truth it stands uncontradicted. It was charged that accused broke and entered for the purpose of committing robbery. The intent must be proved as alleged. While the evidence on this issue is not as explicit as could be wished, there is substantial evidence that accused sought alcoholic beverages. Their inquiries and demands and the action of Hough after entering the house permits the definite inference that the two accused intended to take and carry away such intoxicating liquor as they might discover in the place, using such force and compulsion as might be necessary

> "An intent to rob rather than to commit a simple larcency, may be inferred from the fact that the defendant broke and entered the house noisily * * *" (9C.J,sec.138,p.1080).

The record of trial is legally sufficient to support the findings of guilty of burglary (CM ETO 78, Watts; CM ETO 3754, Gillenwaters).

8. The only testimony covering Charge III and its Specification was that of Private First Class John P. Grady. His testimony in court, as well as his previous written statements were all withdrawn from consideration by

the court through the ruling of the law member leaving nothing to support the court's findings of guilty thereto. Even though a wrongful misuse by accused of the Government vehicle might be tortured from their extra-judicial statements, the striking of Grady's testimony effectively removed all proof of the corpus delicti of the crime and thereby rendered the confessions inadmissible in proof of such charge.

9. The charge sheet shows accused Hough to be 23 years and seven months of age and without prior service. He was inducted 28 October 1942 at Camp Shelby, Mississippi; that accused Jones is 23 years and four months of age and without prior service was inducted 29 October 1942 at Fort McPherson, Georgia.

10. The court was legally constituted and had jurisdiction of the persons and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty as to Charge III and its Specification, legally sufficient to support the findings of guilty as to Charges I and II and their specifications and the sentences.

11. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and by sections 275 and 330, Federal Criminal Code (18 USCA 454,567) and for burglary by Article of War 42 and section 22-1801 (6:55), District of Columbia Code. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, is proper (Cir. 229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2

22 SEP 1945

CM ETO 16006

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| U N I T E D S T A T E S | ) | BREMEN PORT COMMAND |
| | ) | |
| v. | ) | Trial by GCM, convened at Bremen, Germany, 30 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| | ) | |
| Private LEONARD CROWDER (37404271), 3867th Quartermaster Truck Company (Transportation Corps) | ) | |

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HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HEPBURN and MILLER, 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 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: In that Private Leonard Crowder, 3867th Quartermaster Truck Company, did, at Bremen, Germany, on or about 14 June 1945, forcibly and feloniously, against her will, have carnal knowledge of Anne Marie Kulicke.

CHARGE II: Violation of the 93rd Article of War. (Finding of not guilty).

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

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

Specification 1: In that * * * did, at Bremen, Germany, on or about 14 June 1945, without authority, wrongfully take and carry away one two and one-half ton General Motor Corporation Cargo Truck value about $2,500.00, property of the United States.

Specification 2: In that * * * did, at Bremen, Germany, on or about 15 June 1945, wilfully maim himself in the chest by shooting himself with a .45 Colt revolver, thereby unfitting himself for the full performance of military service.

He pleaded not guilty and, three-fourths of the court present when the vote was taken concurring, was found not guilty of Specifications 1 and 2 of Charge I and of Charge II and its specifications, and guilty of Specification 3, Charge I, and of Charge I, and of Charge III and its specifications, except the word "revolver" in Specification 2, substituting therefor the word "pistol". Evidence was introduced of two previous convictions, one by a summary court-martial for transporting civilians in an army vehicle in violation of Article of War 96, and one by a special court-martial for absence without leave for 19 days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be 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 in support of the findings of guilty shows that about 0330 or 0430 hours on 14 June 1945, accused drove a government truck away from his company area in Bremen, Germany (R65, 66,78). The vehicle was a 2-1/2 ton, 6x6 GMC standard cargo truck, valued when new at approximately $2,955.00 (R66,70). Although the accused displayed an apparently proper trip ticket to the guard at the exit gate, he was using a trip ticket which had been issued for an earlier trip to the dispensary (R66-68,80,81). After he returned from the dispensary he had no authority to take the vehicle from the area and should have turned in the trip ticket (R80,81). His later use of the vehicle on the morning of 14 June 1945 was without authority or permission (R69,75). At 0600 hours this truck was discovered to be missing, and the next day it was found abandoned in a ditch on the outskirts of town, near a damaged house (R75,82).

About 0430 hours, 14 June 1945, Frau Anne Marie Kulicke, a resident of Bremen, Germany, left her home on a bicycle to go to the

railroad station (R51,61). The accused, driving a vehicle, stopped her. He gave her to understand that he was from the police, and indicated that she should enter the truck. She complied. The accused then started the vehicle and drove along the street. In making a turn, the vehicle was driven into a ditch and forced to stop (R51). Frau Kulicke dismounted from the truck and asked the accused for her bicycle. Instead of complying with the request, he pointed his pistol at the woman and indicated that she should accompany him to a nearby ruined house. She did not want to go and called loudly for help. Accused hit her on the head with his fist, causing her to collapse and become semi-conscious (R52). He then carried her into the house, pulled off her pants, and had sexual intercourse with her, penetrating her vagina with his sexual organ (R52,53).

Although she did not consent, she did not offer further resistance because she feared his pistol (R52,53). Thereafter, during the episode, he struck her on the head and body with his fist, threatened her with his weapons, and had intercourse with her twice more (R54,55). He finally left her and departed from the place on foot, abandoning the truck (R59). Frau Kulicke's testimony as to the circumstances of the attack upon her was corroborated by a neighbor woman who saw the truck go into the ditch, heard loud cries of fear and intermittent screams and saw a colored soldier armed with a weapon leave the bomb-damaged house. She also observed the injuries suffered by Frau Kulicke (R59,60). The latter was thereafter hospitalized for two days (R63,65).

At about 2030 hours 15 June 1945, a shot was heard fired in the region of a bombed building in accused's company area, shortly after he had been seen there, shaking and acting nervous (R70,83,84,86). Witnesses who immediately investigated, found him bleeding from a wound in his left side (R71,84). He had his pistol in his hand and stated to the men from his company who picked him up, that he had shot himself (R88,92). When asked why, he said "I heard they were going to kill me so I thought I would kill myself" (R90). Examination revealed a bullet wound in his left breast which passed through his body and emerged through the left shoulder, causing a fracture of the left scapula and a laceration of the lung (R71,98). He was confined to the hospital for over a month (R74).

4. The accused after his rights as a witness were fully explained to him elected to remain silent and no evidence touching upon the offenses of which he was convicted was introduced in his behalf (R98A).

5. a. Rape is defined as the "unlawful carnal knowledge of a woman by force and without her consent" (MCM 1928, par.148c, p.165). The undisputed evidence in the instant case establishes the commission of that offense as found by the court (CM ETO 3933, Ferguson et al; CM ETO 9083, Berger et al), and accused was clearly identified as the perpetrator thereof.

b. He was also found guilty of having wrongfully taken and carried away a 2½-ton government truck, value about $2,500, without authority. The unlawful taking was proved by the prosecution's evidence, which also established that the value of the property taken was in excess of $50.00 (CM ETO 7000, Skinner).

c. The court's finding that accused wilfully maimed himself thereby preventing his full performance of military duty was clearly justified by the evidence adduced (CM ETO 1161, Waters).

6. The charge sheet shows that accused is 24 years and three months of age. Without prior service he was inducted 17 December 1942 at Jefferson Barracks, Missouri.

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

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

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

16001

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

BOARD OF REVIEW NO. 3

6 OCT 1945

CM ETO 16018

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| U N I T E D S T A T E S | SEVENTH UNITED STATES ARMY |
| v. | Trial by GCM, convened at Gutersloh, Germany, 19 June 1945. Sentence: Dishonorable discharge, total forfeiture and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania |
| Private JOSEPH AUGUSTINE (38411981), 3246th Quartermaster Service Company | |

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

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

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

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

Specification: In that Pvt. Joseph Augustine (Col.), 3246th Quartermaster Service Company, did, at Senden, Germany, on or about 14 April 1945, forcibly and feloniously, against her will have carnal knowledge of Adelheid Walterbusch and Gerda Richlowsky.

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

Specification 1: In that * * *, did, at Senden, Germany, on or about 14 April 1945, wrongfully commit an assault upon the person of Franz Walterbusch by threatening him with a dangerous weapon, to wit, a carbine.

Specification 2: (Disapproved by reviewing authority)

He pleaded not guilty to and was found guilty of, both charges and their specifications. Evidence was introduced of two previous convictions by summary court for absence without leave for two days and ten hours respectively in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit

all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority disapproved the findings of guilty of Specification 2 of Charge II, approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's Evidence:

Accused and Private Charles Forehand, both of 3246th Quartermaster Service Company, were on guard duty on 14 April 1945 in Senden, Germany, when at about 1900 hours two civilians came along on bicycles. One of them did not have a pass, alleging that it was at his home. With the permission of the corporal of the guard, the two soldiers accompanied the civilian to his home to examine his pass. Accused entered the house with the civilian. Forehand waited outside for five or ten minutes, then called to accused "What are you doing?" He replied "I am waiting for the guy to find his pass". Forehand left saying "I am going on and you bring him on in if he don't have his pass" (R5-6,13). On this occasion accused was wearing the corporal of the guard's helmet, marked in front with corporal's stripes under which was written the name "M. Wallace" (R7-8,11; Pros. Ex. 1). Forehand returned to his post (R9).

At this time the occupants of the house consisted of the following persons: Franz Walterbusch; his mother; his sister "Mrs. Huesmann" and her two children (R11,14,17); his niece Adelhaid Walterbusch, 15 years of age (R13,15,19), and her little brother, George (R17); Gerda Richlowsky (R11,17), age 17, who was helper in the house (R18,25); and a Belgian civilian (R17). Upon accused's request, Herr Walterbusch brought him a cup of water which he drank. Accused "said he wants to promenade with Madam", but Walterbush told him it was quite dark already. Accused then "became quite outspoken" and pointed to Adelhaid. Although it was made clear to him she was only a child of 14, he

> "didn't give in and he kept on pointing to Adelhaid and when he saw that we didn't want to he took his rifle and handled it as if he were loading it. He threatened us with the rifle then" (R13,20,23,26).

He pointed his rifle at all of them, holding it waist high and making a semi-circular movement around the room (R13), and also pointed it directly at Walterbusch. He then grabbed Adelhaid and pushed her upstairs in front of him, taking her into Walterbusch's bedroom. She was heard to yell, "Ow, ow, ow" (R14,17,26). Adelaid testified, identified accused in court (R19) and described in detail the manner in which he hit her in the face, dragged her upstairs, "undressed the bottom part of me",

touched her sexual organs with his fingers and used "his fingers in pushing his sexual parts in me". He had sexual intercourse with her two or three times (R21). His rifle was leaning against the wall (R23). She remained with him from 2100 until 2245 hours, thereafter returning downstairs to join the others. She looked pale and "completely exhausted" with the "top part of her clothing down" (R14, 22, 26)

Accused followed her downstairs (R26) and indicated that he next wanted Mrs. Huesmann, the sister of Walterbusch, to come along with him, but she "was in front of him lying on her knees and begged him not to". She suggested to Gerda "that she should go along because she was not married yet". Gerda was hiding behind a chair and when accused pointed at her she started to cry and yell for help. But accused "simply grabbed her and took her along", while the other occupants of the house hastily fled because "we were so afraid" (R15, 26). He dragged Gerda upstairs to the same room, placed her on Walterbusch's bed and commenced disrobing her. When her girdle presented an obstacle he was going to open it with his bayonet had she not opened it herself. He then completely undressed her, threw her on the floor and tied her right hand to a chair with a white string (R26-28). He placed himself on top of her "pushed his finger into my vagina and then he used his organ". She was "sure that it was the organ" that penetrated her (R26). She tried to push him away and resisted "with my legs" when he "again put me down on the floor", took her "to the couch" and sat her on his lap (R29-30). She was afraid all the time, "had pains, and it really hurt, * * *" (R26). She never had had intercourse with a man before (R30). She remained with him until 0030 hours the following morning when she came downstairs, cried for help and heard a car outside. It was a white officer and several colored men including Forehand. They searched the house for accused but he could not be found (R6,8,26,27). However, they discovered the corporal of the guard's helmet which accused had worn at the house upon his arrival (R7,8,11; Pros. Ex.I). They returned to accused's post where they found him (R7).

Adelhaid Walterbusch and Gerda Richlowsky were both examined on 15 April by a German doctor, whose examination disclosed evidence of recent sexual intercourse by each of them (R31, Pros. Ex. II).

4. For the defense, Forehand testified that the house where the incident occurred was about a mile from accused's post (33). Accused was armed with a carbine on 14 April and Forehand did not see that he had any bayonet with him. The bayonet is not issued with a carbine (R32,33). He identified Gerda as a girl he saw at the house in question (R35). He found a helmet in a bedroom upstairs in the house when he returned looking for accused (R36).

5. After his rights were explained (R37), accused made an unsworn statement. After the corporal of the guard sent him and Forehand with a civilian to the latter's house for identification papers, the civilian gave them some cognac to drink. Forehand left then, but accused was "pretty well feeling bad with the stuff I drank". He got back to his post after 15 or 20 minutes and "when I got there they were gone". It was while he was on his way back to his post that some shooting started. He ducked down to the curb and dropped his helmet when bullets whistled

close to him. He didn't look for it and ran on back to his post (R37).

6. Accused was charged under Charge I and Specification with the rape of two women. It is improper to allege two offenses in one specification (MCM, 1928, par. 29b p.19). However, this is not a fatal defect. Accused was definitely apprised of the offenses alleged and no objection was raised to the inclusion of two offenses in one specification.

7.a Charge I and Specification: The court's findings of guilty are supported by substantial evidence, showing that both of accused's victims resisted his advances, that they were placed in fear and that he achieved carnal knowledge of each of them by force and without their consent. The evidence in each instance contains all the elements of the crime of rape, and the court's findings of guilty are final and binding upon appellate review (CM ETO 4661, Ducote, and authorities therein cited; CM ETO 11621, Trujillo, et al; CM ETO 3933, Ferguson, et al).

b.Charge II, Specification 1. The assault upon Franz Walterbusch as alleged was clearly established (MCM, 1928, par.149l pp.177-178).

8.The charge sheet shows that accused is 29 years one month of age and was inducted 11 January 1943, at Houston, Texas. 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 as approved and the sentence.

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

B R Cooper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. L. Levy Jr. Judge Advocate

16918

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

BOARD OF REVIEW NO. 3

13 SEP 1945

CM ETO 16022

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| U N I T E D S T A T E S | THIRD INFANTRY DIVISION |
| v. | Trial by GCM, convened at Salzburg, Austria, 21 May 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 20 years. Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France. |
| Private TOMMIE L. BARFIELD (34822772), Company H, 15th Infantry | |

OPINION by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

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

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

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

Specification 1: In that Private Tommie L. Barfield, Company "H", 15th Infantry (then Company "M", 15th Infantry) did, at Naples, Italy, on or about 19 July 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: An amphibious operation against the enemy, and did remain absent in desertion until he was returned to military control at Rome, Italy on or about 18 September 1944.

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Specification 2: (Finding of not guilty).

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

Specification 1: In that * * * did without proper leave, absent himself from his organization at Remiremont, France from about 10 October 1944 to about 22 October 1944.

Specification 2: In that * * * did, without proper leave, absent himself from his organization at Nompatelize, France from about 4 November 1944 to about 5 November 1944.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found not guilty of Specification 2 of Charge I and guilty of the other charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 40 years. The reviewing authority approved only so much of the "findings of Specification 1 of Charge I" as "involves a finding of accused guilty of desertion by deserting the service of the United States to avoid hazardous duty, at the time, place and in the manner alleged, and remaining in desertion until he returned to military control at a time and place unknown", approved the sentence but reduced the period of confinement to 20 years, ordered the sentence as thus modified executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France as the place of confinement. The proceedings were published in General Court-Martial Orders No. 260, Headquarters Third Infantry Division, APO 3, U. S. Army, 2 August 1945.

3. The evidence supports the findings of guilty of Charge II and its specifications and no discussion of them is necessary. The only evidence for the prosecution relating to Specification 1 of Charge I is as follows:

A duly authenticated extract copy of the morning report of Company M, 15th Infantry, for 20 July 1944, introduced in evidence without objection, shows accused from duty to absent without leave as of 19 July (R7; Pros.Ex.A).

A section sergeant of Company M testified that about 19 July 1944 the company was located "around Naples" taking amphibious training consisting of boat landings and drills, hikes, and gun drills and training. He thought the training had been in progress about two weeks but was not sure of the dates. It was common knowledge in his section that "we were going to make an amphibious landing someplace * * * in enemy territory". Accused was not in his section or platoon and witness could not say how long accused had been with the organization, whether he had participated in the amphibious training, or whether he had the "common knowledge" possessed by members of witness' section. Subsequently, about 15 August, the company made a landing and engaged the enemy, encountering mortar fire and sustaining casualties (R11-15).

4. After his rights were explained to him, accused elected to read an unsworn statement, and to testify as to Specification 2 of Charge I (R42,45). In the unsworn statement, after detailing combat experiences at Anzio and in the Rome push, he stated:

> "Then we got into Rome and stayed about two weeks and came back to Pozzouli to take training. I got a letter from my wife that my baby was sick. I got to worrying about her and started drinking about three days later. I got a letter from my mother saying she was sick and needed money and I knew she did because I have five brothers and sisters, my father is dead and my mother only got a $60.00 check a month from the government so I was worried all the worse. * * * As far as ever trying to desert the service I never will and I have seen plenty of tough fighting and many a good soldier die in battle" (R43,44).

A staff sergeant, a private first class and accused's platoon leader each testified that accused's reputation as a combat soldier was good (R30,31,36). Other portions of accused's statement and testimony and other testimony for the defense are not relevant to Specification 1 of Charge I.

5. The morning report entry establishes absence without leave of accused on 19 July 1944. The only question for consideration is whether the evidence is sufficient to show that accused had knowledge of an impending, imminent amphibious operation against the enemy and that he absented himself with a then existing intent to avoid it (see CM ETO 8300, Paxson; CM ETO 6751, Burns et al).

The only circumstances appearing in the record from which knowledge of the alleged amphibious operation could be inferred are that the company was taking some amphibious training "around Naples"

and that it was common knowledge in a company section, of which accused was not a member, that an amphibious landing would be made in enemy territory. It does not appear that accused was present with the company prior to 19 July, that he had taken any part in the preceding two weeks of training, or that his platoon or section or he as an individual was at any time aware of the "common knowledge". There was nothing inherent in the tactical situation of his organization, so far as is shown, to charge him with such knowledge. It is therefore extremely doubtful if such meagre and vague evidence is legally sufficient to charge him with knowledge, on 19 July, of any future amphibious operations by his organization (CM ETO 1921 King; CM ETO 8700 Straub).

Moreover, even if accused were present with the company and possessed the "common knowledge", it does not appear when, according to such knowledge, the operation, which actually occurred nearly a month later, was to have been undertaken. Mere knowledge that his organization might engage in an amphibious operation at some indefinite time in the future does not, without more, furnish the necessary probative basis from which the ultimate fact of intent to avoid the operation may be inferred (CM ETO 5958 Perry et al; CM ETO 7397 De Carlo, Jr.; CM ETO 2396, Pennington). There is nothing in accused's unsworn statement to support such an inference.

Assuming accused was absent from his company on 15 August, which fact does not affirmatively appear, mere proof that the operation was carried out during his absence does not discharge the burden of proof which rested on the prosecution (CM ETO 7532 Ramirez). There is no substantial evidence supporting the finding of guilty of Specification 1 of Charge I.

6. The charge sheet shows that accused is 23 years of age and was inducted 11 June 1943 at Fort McPherson, Georgia. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offense. Except as noted herein, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge I, as approved, as involves a finding that accused did, at Naples, Italy, absent himself without leave from his organization from on or about 19 July 1944 to a time unknown, and only so much of the finding of guilty of Charge I as involves a finding of guilty of a violation of the 61st Article of War, and legally sufficient to support the remaining findings of guilty and the sentence.

Judge Advocate

Judge Advocate

Judge Advocate

(187)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 13 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main) APO 757, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by Act 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and as further amended by Act 1 August 1942 (56 Stat. 732; 10 U.S.C. 1522), is the record of trial in the case of Private TOMMIE L. BARFIELD (34822772), Company H, 15th Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of Specification 1 of Charge I and Charge I, except so much thereof as involves findings of guilty of absence without leave in violation of Article of War 61, be vacated, and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings, viz: conviction of desertion in time of war, so vacated, be restored.

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

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

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(Findings of Guilty of Specification 1 of Charge I and Charge I, except so much as involves findings of guilty of absence with out leave in violation of Article of War 61, vacated. GCMO 476, USFET, 28 Sept 1945).



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

BOARD OF REVIEW NO. 2 22 OCT 1945

CM ETO 16044

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| U N I T E D S T A T E S | SEINE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER |
| v. | Trial by GCM, convened at Paris, France, 27 July 1945. Sentence: Dishonorable discharge (suspended), confinement at hard labor for five years. Loire Disciplinary Training Center, LeMans, Sarthe, France. |
| Private HUBBY L. JAMERSON (34677041), 3739th Quartermaster Truck Company | |

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OPINION by BOARD OF REVIEW NO. 2
HEPBURN, MILLER and COLLINS, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Hubby L. Jamerson, 3739th Quartermaster Truck Company, United States Forces, European Theater, having taken an oath in a trial by general court-martial of Private Paul J. Thomas, before Captain Leland J. Smith, a competent officer that he would testify truly, did in general court-martial at Paris, France on or about 14 May 1945, willfully, corruptly, and contrary to such oath testify in substance that he had seen Private Paul Thomas at 2:30 am 17 March 1945 in his room at the 399th Quartermaster Truck Company, United States Forces, European Theater, then stationed at Le Havre, France, which testimony was a material matter which he did not then believe to be true.

He pleaded not guilty 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 auch place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, directed its execution but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, Sarthe, France, as the place of confinement. The proceedings were published by General Court-Martial Orders Number 1010, Headquarters, Seine Section, Theater Service Forces, European Theater, dated 14 August 1945.

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

On about 16 May 1945, accused, a member of 3739th Quartermaster Truck Company (R20), was called by the prosecution as a witness in the trial by general court-martial of Private Paul J. Thomas (R7), charged with murder of Albert Govan and Gilbert N. Couch on or about 15 March 1945 (R16-17; Pros.Ex.D). The oath was administered to the accused by Captain Leland J. Smith who was Trial Judge Advocate of the general court-martial before which Private Thomas was brought for trial (R5,6,7; Pros. Ex.A). The evidence in the Thomas case showed that Couch and Govan were shot outside a cafe at St. Denis, Seine, France, at about 2230 hours, 16 March 1945 (R8). Accused testified that he saw Thomas on 17 March 1945; that at about 0200 or 0230 Thomas came into his room, woke him up and said, "Govan is dead" and to accused's inquiry as to how he got killed, "He got killed by an MP and I got away","Bo, I know, I'll show you that Govan is dead" (R10, pp.160-161 of Pros.Ex.B). On 17 May 1945 a continuance in the Thomas trial was granted until 4 June 1945 (R7), at which time accused was recalled and sworn (R25-26) as a witness for the defence (R11, p.222 of Pros.Ex.C). On this occasion accused testified that Thomas did not wake him up on the morning of 17 March at about 0200 hours or 0230 hours; that his former statement in court that Thomas woke him up at 0200 or 0230 was not true (R11,p.224 of Pros.Ex.C); that he so testified because he read it on a statement he had signed but that part was not on the statement when he signed it, and that Paul Thomas did not come into his room (p.228 of Pros.Ex.C).

4. The accused was advised of his rights by the law member and elected to be sworn (R20) and testified on his own behalf, substantially as follows:

He is 23 years old and went to the eighth grade in school. He was called as a witness in the trial of Private Paul Thomas. The testimony he gave or or about 14 May 1945 was true. Prior to his testimony on 4 June 1945, he had a conversation with Captain Rhodie, the defense counsel for Thomas, who told him he wanted to question him and asked him what kind of a statement he made. Accused told him it was true and Captain Rhodie said "what are you trying to do, are you trying to get this boy life" (R21). Accused told him "No" and that he wanted to help him to which the Captain replied "it sure does not look like it" and told him he could help Thomas by changing some of the minor things in this

statement. When accused asked him about his oath he was taking, he said "you won't have to worry about that". By changing some of the "minor" things he was supposed to change, he didn't change it like he was supposed to and "that is where the perjury part was brought in on me". He was asked to change that part of his testimony about Thomas coming into the room around two o'clock. The counsel gave him an examination on what he asked him to do and went over it with him before he took the stand (R22). The testimony he gave on 4 June is false (R25).

5. "Perjury is the willful and corrupt giving, upon a lawful oath, or in any form allowed by law to be substituted for an oath, in a judicial proceeding or course of justice, false testimony material to the issue or matter of inquiry * * * 'Judicial proceedings or course of Justice' includes trial by courts-martial * * *" (MCM, 1928, par.149i, p.174).

The evidence here presented is clear and undisputed that the accused was under oath and was testifying at the time and place before a general courts-martial as alleged. Likewise, it is undisputed that he testified before that court-martial in the manner alleged. To sustain this conviction there must be sufficient evidence that the testimony set forth in the Specification was false and material to the issue or matter of inquiry. (MCM, 1928, par.149i, p.175). Assuming, but not deciding, that his testimony was material, the Board of Review will consider only whether a person may be convicted of perjury solely by evidence of contradictory testimony given by him in the same trial with his assertion during that trial that the testimony, with which he is now charged as having falsely given, was false. The record discloses no other evidence introduced by the prosecution to show that the alleged false testimony was in act false. Accused in his own trial steadfastly maintained that the testimony, with which he is charged as having given falsely, was not given falsely and was true. It is obvious that he gave some false testimony at the trial but it must be noted that he is charged with perjury only as to his testimony of about 14 May 1945 which is not contradictory in itself. The Board has carefully considered the problem presented and, is of the opinion that the conviction may not legally be sustained. The Board is of the further opinion that the analysis made by the original examiner in the Branch Office of The Judge Advocate General with the European Theater was both thorough and accurate and adopts his citation of authorities. Pertinent excerpts therefrom read as follows:

"In Wharton's Criminal Law (12th Ed.) par.1583 it is stated that where a defendant has made two distinct statements under oath, one directly the reverse of the other, it is not enough to produce the one in evidence to prove the other to be false. Several English and American cases are cited for this proposition. A case directly in point in State v. Burns, 113 S.E. 351, 25 ALR 414 (So. Car. 1922) in which the defendant at a preliminary hearing testified he saw RJ hit X with a blackjack and kick him into the river. On the trial of RJ he testified that his previous testimony was false, that RJ did not hit X and did not kick him into the river. There was no other evidence presented except the two statements. The court said:

> "It is well settled that a conviction for perjury cannot be sustained merely on the contradictory sworn statements of the defendant. The state must prove which of the two statements is false, and must show the statement which is made the basis of the perjury charge to be false by other evidence than the contradictory statement": (citing cases).

The annotation which follows this case at 25 ALR 416 reads as follows:

> "As is stated in 25 RCL 270, it is now well established that a conviction of perjury cannot be had upon proof alone that accused made contradictory statements; but in a few instances, and with contrary results, an attempt has been made to avoid the rule by proof of admission by the accused in addition to the second contra-- ictory statement".

No Federal case precisely in point has been found. In Phair v. United States, 60 Fed (2d) 953 (CCA 3rd, 1932), defendant made an affidavit stating that he was not connected with the saloon business since such a date, on which date he conveyed his saloon business to JM. There was evidence by three witnesses that he later admitted owning the saloon. The court said that is was necessary to be more than oath against oath; there must be two witnesses against the defendant or one witness plus witten documents or strong corroborating circumstances. But if the perjury consists in the defendant having sworn contrary to what he had sworn to before, one witness only swearing to the contrary fact is sufficient. It was held that all that the testimony of the three witnesses amounts to is the establishment of a denial by Phair of his affidavit and the mere denial of the truth of the affidavit is not sufficient to sustain the charge of perjury.

In Clayton v. United States, 284 Fed 537 (CCA 4th, 1922) the only evidence of falsity is what was told to two witnesses sometime before the alleged false testimony was given before the grand jury. It was held insufficient.

In United States v. Ruckner, 118 Fed (2d) 468 (CCA 2d, 1941) the defendant was indicted for perjury in a statemtnt before a grand jury. At the trial in that matter she stated that her statement before the grand jury was false. At this trial she took the stand and admitted the grand jury testimony was false. Held, it may be that at the close of the government's case the proof was insufficient for the reason that her admission of guilty was given in another action but when she took the stand here and asserted the falsity of her prior testimony any further proof was unnecessary. It was equivalent to plea of guilty.

The defendant in Hammer v. United States, 271 US 620, 70 Law Ed 1118 (1926) was indicted for subornation of perjury. The only evidence against him was one witness who testified that at defendant's request he had testified to certain facts in a bankruptcy proceeding, that such testimony was false. It was held that this was not sufficient to establish the falsity of the oath alleged as perjury. The court said it was a question of law whether the unsupported oath of the witness is sufficient to justify a finding that the testimony given by him before the referee was false.

> "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury. The application of this rule in Federal and State courts is well nigh universal (citing cases). The rule has long prevailed and no enactment in derogation of it has come to our attention" (Page 626 of 271 US).

In the instant case the prosecution attempted to prove the falsity of the testimony which is the basis of the perjury charge by proof of accused's contradictory testimony as a witness for the defense in the same case wherein the alleged perjured testimony was given. With the introduction of such proof, it stopped. Under the settled principle of law above set forth, the proof was wholly inadequate and will not support the findings of guilty.

6. The charge sheet shows that accused is 23 years of age and was inducted 30 July 1943 at Fort Bragg, North Carolina. No prior service is shown.

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

EARLE HEPBURN _____ Judge Advocate

RONALD D. MILLER _____ Judge Advocate

(ON LEAVE) _____ Judge Advocate

(194) 1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½, as amended by the Act of 20 August 1937 (50 Stat.724; 10 USC 1522), and as further amended by the Act of 1 August 1942 (56 Stat.732; 10 USC 1522), is the record of trial in the case of Private HUBBY L. JAMERSON (34677041), 3739th Quartermaster Truck Company.

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

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

B. FRANKLIN RITER
Colonel, JAGD
Acting Assistant Judge Advocate General

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

~~(Findings and sentence vacated. GCMO 618, USFET, 7 Dec 1945~~

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

BOARD OF REVIEW NO. 5

7 SEP 1945

CM ETO 16078

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| U N I T E D S T A T E S | ) | 45TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at APO 45, U. S. Army, 7 August 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |
| Private DON C. MARTENS (35542539), Company B, 180th Infantry | ) | |

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

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1. The record of trial in the case of the soldier named above has 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 Don C. Martens, Company B, 180th Infantry, did, at Detachment Number 3, Ground Force Reinforcement Command, APO 776, at or near Phalsbourg, France, on or about 9 February 1945 desert the service of the United States and did remain in desertion until he returned to Military Control on or about 9 February 1945 desert the service of the United States and did remain in desertion until he returned to Military Control on or about 9 May 1945.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for eight days in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the 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. Evidence introduced by the prosecution shows that accused was a member of Company B, 180th Infantry (R4,5). On 9 February 1945, he was attached to Detachment 3, Ground Force Reinforcement Command, and on 10 February, he was entered absent without leave as of 9 February on the morning report of the organization (R4; Pros.Ex.A). He was returned to his company in the 180th Infantry about 11 May 1945 (R5). On or about 31 July accused voluntarily made and signed a written statement to the officer who was investigating this charge. In the statement, accused said that he had been assigned to Company B in October 1944 as a rifleman, that 3 November he received a piece of shrapnel in his right thigh and was hospitalized for about two and one-half months. He was then discharged from the hospital - too early, he intimated - and sent to the "Reinforcement Depot near Phalsbourg, France, around the 7th or 8th of February 1945 and went AWOL from there the following day". Accused explained: "I was scared because they were going to send me back to the lines". He also said that he was "picked up" near Paris around 25 April 1945 (R6-9; Pros.Ex.B).

4. Advised of his rights as a witness, accused elected to remain silent.

The defense called the commanding officer of Company B as a witness and he testified that after accused was returned to his company he was not placed in confinement, but was available for duty; and that his conduct was proper and caused no complaints (R10,11). On cross-examination, accused's platoon leader, a prosecution witness, said that from 11 May, when accused returned to his company, he had been a good soldier, doing guard duty (R4,6).

5. The morning report entry (Pros.Ex.A) made out a prima facie case of absence without leave on 9 February, and this absence may be presumed to have continued until termination is factually shown (MCM, 1928, par.130a, p.143). Accused's voluntary statement (Pros.Ex.B) substantiates this initial absence in every particular,

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places the occurrence at Phalsbourg, France and shows that it continued until 25 April. It also states that accused's reason for absenting himself was due to fear of (more) front line duty. The issue thus raised as to whether this absence continued only to 25 April or until 9 May 1945, as alleged, is immaterial in view of the fact that the shorter period amounts to about two and one half months.

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

On this period of unauthorized absence, two and one-half months, terminated by apprehension, and on accused's fear of returning to hazardous duty, the court was justified in imputing to accused an intention not to return to military control and in finding him guilty of desertion as charged.

6. The charge sheet shows that accused is 21 years, 11 months of age, and that he was inducted on 18 January 1943. There is no record of previous service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 5

14 SEP 1945

CM ETO 16080

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| U N I T E D S T A T E S | ) | 83RD INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at Vilshofen, Germany, 7 August 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |
| Private NORMAN E. FISHER (33624803), Company C, 330th Infantry | ) | |

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Norman E. Fisher, Company C, 330th Infantry, did at or near Bihain, Belgium, on or about 12 January 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and did remain absent in desertion until he was apprehended at Liege, Belgium, on or about, 13 June 1945.

pleaded not guilty to the Charge and Specification, but guilty absence without leave from his organization at or near Bihain,

Belgium, from on or about 12 January 1945, to on or about 13 June 1945, in violation of Article of War 61. He was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution showed that accused was a member of Company C, 330th Infantry, which was committed against the enemy on 12 January 1945 at Bihain, Belgium (R6,7, 15). On that date he was present with the organization, having been brought up that morning by the supply sergeant to the company command post from Hebronval, Belgium (R7). The enemy was then about 300 or 400 yards in front of the company, which was being subjected to mortar, artillery and small arms fire (R7,8,12). The preceeding day the company had suffered heavy casualties (R8,12). Accused absented himself without leave on 12 January, and was not seen by his first sergeant or company commander until returned to his unit in Germany on 3 July 1945 (R9,12). It was stipulated that accused was apprehended and returned to military control at or near Liege, Belgium, on or about 13 June 1945 (R8,12; Pros.Ex.1,2).

Upon his return he was questioned by the company commander, who first explained to him the seriousness of his offense, advising him that he did not have to say anything and that anything he said might be used against him (R9,10). Accused related that when brought back to the line, the sergeant left him and that he decided to "take off" to the rear because he was scared. He managed to reach Verviers and then went to Liege, Belgium. He made his living by gambling, and ate with civilians and at rest camps. He was having a good time and it never occurred to him to turn in (R10,1114).

4. Accused, after being fully advised of his rights as a witness, elected to remain silent.

5. Competent uncontradicted evidence established that accused absented himself without leave from his organization on 12 January 1945 and that he remained in unauthorized absence until apprehended 13 June 1945. At the time of his initial absence, Company C was engaged in combat with the enemy and was being subjected to enemy artillery, mortar and small arms fire. He left the company to avoid the hazards of combat. This fact he admitted on his return when he stated he "took off" because

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he was "scared". The court was justified in finding that accused absented himself without leave with intent to avoid hazardous duty, and that he was therefore, guilty of desertion as such offense is defined by Articles of War 28 and 58 (CM ETO 7230, Magnanti; CM ETO 7413, Gogel).

6. The charge sheet shows that accused is 19 years and 10 months of age and was inducted 3 May 1944 at Allentown, Pennsylvania. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate



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

BOARD OF REVIEW NO. 3

12 SEP 1945

CM ETO 16104

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| U N I T E D  S T A T E S | 6TH ARMORED DIVISION |
| v. | Trial by GCM, convened at Gross Ostheim, Bavaria, Germany, 10 August 1945. Sentence: Dishonorable discharge (suspended), total forfeitures, and confinement at hard labor for 20 years. Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France. |
| Private First Class RENE J. BLANCHETTE (31341174), Troop D, 86th Cavalry Reconnaissance Squadron Mechanized | |

OPINION by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

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

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

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

Specification: In that Private First Class, Rene J. Blanchette, Troop D, 86th Cavalry Reconnaissance Squadron Mechanized, did, at Kahla, Stadtroda, Thuringia, Germany, on or about 21 June 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Micheroux, Belgium, on or about 26 June 1945.

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

Specification: In that * * * did, at Kahla, Stadtroda, Thuringia, Germany, on or about 21 June 1945, feloniously take, steal and drive away a 1/4 ton truck of the value of about $1407.00, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that * * * did, at Micheroux, Belgium, on or about 26 June 1945, wrongfully and unlawfully attempt to sell a 1/4 ton truck of the value of about $1407.00, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by summary court for wrongfully altering a pass 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 30 years. The reviewing authority approved the sentence but reduced the period of confinement to 20 years, ordered the sentence as thus modified executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as the place of confinement. The proceedings were published by General Court-Martial Orders No. 56, Headquarters 6th Armored Division, 16 August 1945.

3. The evidence for the prosecution showed that on the evening of 21 June 1945, accused absented himself without authority from his organization in company with another soldier from his unit. In absenting themselves, the men took with them, without authority, a vehicle of the type described in the specifications of Charges II and III. On 26 June they entered into negotiations with certain Belgian civilians looking toward the sale of this vehicle. While accused's companion apparently was the moving spirit in these negotiations, accused also participated in them to some extent. These transactions led to their apprehension and arrest that same day by American military police. The record contains substantial evidence to support the findings that accused was guilty of Charges II and III and their respective specifications. However, it will be noted that the absence without leave upon the basis of which accused was found guilty of desertion under Charge I, although terminated by apprehension and accompanied by other illegal activities, was of five days' duration only. In a pretrial statement, accused asserted that at the time of his initial absence his companion told him

that he was going to a nearby Polish camp in a jeep to pick up some laundry and was going to return to the area immediately thereafter. On the basis of those representations he decided to go along "for the ride". Thereafter, his companion refused to return and also prevented him from doing so. It is thus seen that accused's absence was neither prolonged nor unexplained and there is accordingly little basis for the inference that accused's absence was accompanied by the requisite intent to constitute his offense that of desertion. Further, the fact that his absence took place after the cessation of hostilities in this Theater makes it unlikely that he entertained the intent to remain permanently away from the service. In general, it may be said that Americans are not now deserting in Europe. It is concluded that the evidence of record in support of Charge I and its Specification is legally sufficient to support a conviction of absence without leave only (CM ETO 15442, Bifano; CM ETO 1567, Spicocchi).

4. The charge sheet shows that accused is 22 years of age and was inducted 22 March 1943 at Hartford, Connecticut. No prior service is shown.

5. The court was legally constituted and had jurisdiction of the person and offenses. 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 only so much of the finding of guilty of Charge I and its Specification as involves a finding that accused did, on or about 26 June 1945, in violation of Article of War 61, and legally sufficient to support the remaining findings of guilty and the sentence.

6. The designation of Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as the place of confinement is authorized (Ltr. Hq. ETO AG 252, Op. PM, 25 May 1945, par.2b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. C. Hewey Jr. Judge Advocate

(206)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 12 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by Act 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and as further amended by Act 1 August 1942 (56 Stat. 732; 10 U.S.C. 1522), is the record of trial in the case of Private First Class RENE J. BLANCHETTE (31341174), Troop D, 86th Cavalry Reconnaissance Squadron Mechanized.

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

3. In view of the reduction of the conviction of desertion to the lesser included offense of absence without leave for five days, the staff judge advocate's statement that accused is "not bright", and the fact that accused, a comparatively young soldier, was apparently somewhat under the domination of his companion, I recommend reduction of the confinement imposed to a period not exceeding ten years.

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

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

(Findings vacated in part and confinement reduced to ten years in accordance with recommendation of The Assistant Judge Advocate General, GCMO 496, USFET, 20 Oct 1945).

Branch Office of The Judge Advocate General
with the
European Theater
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BOARD OF REVIEW NO. 5

15 SEP 1945

CM ETO 16108

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| U N I T E D S T A T E S | ) 3RD ARMORED DIVISION |
| | ) |
| v. | ) Trial by GCM, convened at |
| | ) Darmstadt, Germany, 21 July 1945. |
| Privates CHARLES E. KEETON (37010960), | ) Sentence as to each accused: |
| and NICHOLAS M. LEMLE (42091525), both | ) Dishonorable discharge, total |
| of Company A, 83rd Armored Reconnaissance | ) forfeitures and confinement at |
| Battalion | ) hard labor for life. Eastern |
| | ) Branch, United States Disciplinary |
| | ) Barracks, Greenhaven, New York. |

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

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

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

KEETON

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

Specification: In that Private Charles E. Keeton, Company "A", 83rd Armored Reconnaissance Battalion, did, at or near Erezee, Belgium, on or about 29 December 1944, desert the service of the United States, and did remain absent in desertion until he surrendered himself at New York City, on or about 4 April 1945.

CHARGE II: Violation of the 75th Article of War.

Specification: In that Private Charles E. Keeton, Company "A", 83rd Armored Reconnaissance Battalion, did, at or near Erezee, Belgium, on or about 27 December 1944, misbehave himself before the enemy, by refusing to advance with his



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squad, which had been ordered foward by Sergeant Joseph Zerbny, Company "A", 83rd Armored Reconnaissance Battalion to engage with elements of the German Army, which forces, the said squad was then opposing.

LEMME

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

Specification: In that Private Nicholas M. Lemme, Company "A", 83rd Armored Reconnaissance Battalion, did, at or near Erezee, Belgium, on or about 29 December 1944, desert the service of the United States, and did remain absent in desertion until he was apprehended at Sandusky, Ohio, on or about 12 April 1945.

CHARGE II: Violation of the 75th Article of War.

Specification: In that Private Nicholas M. Lemme, Company "A", 83rd Armored Reconnaissance Battalion, did, at or near Erezee, Belgium, on or about 27 December 1944, misbehave himself before the enemy, by refusing to advance with his squad, which had then been ordered forward by Sergeant Joseph Zerbny, Company "A", 83rd Armored Reconnaissance Battalion to engage with elements of the German Army, which forces the said squad was then opposing.

Each accused pleaded, with respect to the charges and specifications against him, guilty to the Specification of Charge I, except the words "desert" and "in desertion", substituting therefor respectively the words "absent himself without leave from" and "without leave", to the Charge NOT GUILTY but GUILTY OF VIOLATION OF THE 61ST ARTICLE OF WAR, and NOT GUILTY to the Specification and Charge II. All of the members of the court present at the time the vote was taken concurring, each was found guilty of the charges and specifications preferred against him. No evidence of previous convictions was introduced as to either accused. All of the members of the court present when the vote was taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentences, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution shows that on 24 December 1944, both accused were members of Company A, 83rd Armored Reconnaissance Battalion, which organization was located near Lierneux, Belgium (R7,8,9). On this date and as a result of the breakthrough during the "Battle of the Bulge", Company A was surrounded by the enemy (R9,14). However, the men



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excaped from this encirclement by walking out during the night and leaving behind their vehicles and certain pieces of equipment. They carried their arms and ammunition with them (R9,10,13). After withdrawing from Lierneux to an assembly area near Erezee, Belgium, a distance of about 10 miles, they were issued some guns and hand grenades and on 27 December ordered to advance and clear a designated area of woods of German soldiers (R7,8,11,13,15). American paratroopers had been dropped nearby these woods into which enemy troops had infiltrated (R7,11,15). The right flank of Company A was also supported by other American troops (R11,12). Following the command from higher authority to move forward in attack, which order was passed on to accused by their squad leader, the two accused complained of being improperly equipped and indicated that they "did not want to go out" (R8,15). They were not present with their unit when the company moved forward in attack in regular combat formation (R8). Although the weather was cold and snowy and morale was low, contact with the German enemy was made after a march of about 10 miles forward (R10,15). Accused did not accompany their unit and took no part in this attack. Their absence was unauthorized (R8). Extract copies of the morning report of Company A, 83rd Armored Reconnaissance Battalion were received in evidence, without objection by defense, showing both accused absent without leave on 29 December 1944 (R6, Pros.Exs. A and B). It was stipulated between counsel for prosecution and defense that Private Keeton surrendered himself to military control at New York City, New York, on 4 April 1945, and that Private Lemme was returned to military control at Sandusky, Ohio, on 12 April 1945 (R6,7).

4. After being advised of their rights as witnesses, both accused elected to remain silent. The following statement signed by the Transport Commander of United States Army Transport No. 1433 was read by defense counsel on behalf of accused Lemme:

> "Private Nicholas Lemme came aboard this ship a prisoner, was released from confinement after twenty four hours at sea and was again confined twenty four hours before arrival in ETO. Prisoner volunteered for duty and conducted himself in a good soldierly manner" (R17).

5. Competent uncontradicted evidence establishes the fact that both accused absented themselves without proper leave from their place of duty near Erezee, Belgium, on or about 29 December 1944, and that they remained absent until Keeton surrendered himself to the military authorities in New York City on 4 April and until Lemme was returned to military control at Sandusky, Ohio on 12 April 1945. Their initial absence began when their organization was in the line during the Battle of the Bulge, from which situation they departed and completely abandoned the field of combat by managing to transport themselves outside the Theater of Operations and escaping to the United States where they were returned to mili-

tary control after an absence of more than three months. It is difficult to conceive of a state of facts more clearly suited to show an intention to desert the military service than those here presented. The offense of desertion, as to each accused, is fully established (MCM, 1928, Par.130a, pp.142,143; CM ETO 6840, Stolte).

Concerning the offense of alleged misbehavior before the enemy, competent substantial evidence shows that accused' organization was before the enemy and that they were ordered to advance and attack; that such an attack was made but that accused, although present when the order was given, were missing from their unit when the advance was made and that they failed to participate in this assault against the enemy. Failure to advance in attack when ordered or called upon to do so has been condemned as, and held to constitute, an act of misbehavior before the enemy of the most grave and serious character (Winthrop's Military Law and Precedents, (Reprint, 1920), p.622; CM ETO 6177, Transeau and authorities cited therein). Although the record contains some evidence that as a result of the German breakthrough accused's company had abandoned certain of its equipment and that the men were not as fully equipped as desired, such facts do not constitute a defense to the Charge as other men of the company advanced and fought as courageous soldiers of gallant armies have done throughout history. Military necessity demanded performance of duty on this occasion. The breakthrough was stopped while accused cowardly escaped and sought safety in the rear. The offense of misbehavior before the enemy in violation of Article of War 75 is fully established (CM ETO 4820, Skovan; CM ETO 5004, Scheck; CM ETO 5114, Acers; CM ETO 6177, Transeau, supra).

6. The charge sheets show that accused Keeton is 28 years and six months of age and was inducted 1 July 1941, at Fort Leavenworth, Kansas, and that accused Lemme is 23 years and nine months of age and was inducted 28 December 1943, at Buffalo, New York. Neither accused had prior service.

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

8. The penalty for desertion in time of war and misbehavior before the enemy in violation of Articles of War 58 and 75 respectively is death or such other punishment as a court-martial may direct (AW 58,75). 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 Sept.1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate



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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 3

21 SEP 1945

CM ETO 16122

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| U N I T E D S T A T E S | ) | 75TH INFANTRY DIVISION |
| | ) | |
| v | ) | Trial by GCM, convened at Mailly-le Camp, France, 18 July 1945. |
| Technician Fourth Grade DARL F. BARTON (39107099), Company C, 275th Combat Engineer Battalion | ) | Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. United States Penitentiary, Lewisburg, Pennsylvania. |

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

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

2. Accused was tried upon the following Charge and Specification (as amended immediately following arraignment):

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician 4th Grade Darl F. Barton, Company "C", 275th Combat Engineer Battalion, and Private Lester (NMI) Campbell, Company "C", 275th Combat Engineer Battalion, acting jointly, and in pursuance of a common intent, did, at "Les Halles", Ste. Marie-aux-Mines, France, on or about 29 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Ali Ben Mohmoud, a human being, by the said Technician 4th Grade Darl F. Barton shooting him with a carbine and the said Private Lester (NMI) Campbell shooting him with a pistol.

On motion of the prosecution the Specification was amended to read as follows, the defense stating there were no objections:



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Specification: In that Technician 4th Grade Darl F. Barton, Company "C", 275th Combat Engineer Battalion, did at "Les Halles", Ste Marie-aux-Mines, France, on or about 29 January 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Ali Ben Mohmoud, a human being, by the said Technician 4th Grade Darl F. Barton shooting him with a carbine (R5).

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, but reduced the period of confinement to ten years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence:

Early on the morning of 29 January 1945 accused was drinking with members of his company, including Private First Class Albert L. Hurst and Private Lester Campbell, at a cafe in Ste. Marie-aux-Mines, France. They were still there drinking in the afternoon when the barmaid recounted to one of them a story, which he translated to the others, of her rape the night before by a certain French Moroccan soldier, seen earlier that day in the cafe. She "feared the man and said he might try it again". The group "discussed the matter and decided it was pretty bad" (R11,15,18,24). Although "everyone was drunk" (R19), accused "was the drunkest man in the cafe" (R13,16,18,26). Campbell said he was going to see this French Moroccan and at about 1800 hours asked accused and Hurst to go along with him "to look for the Arab" (R12,13,24,27). Accompanied by the barmaid and "the interpreter", Campbell, Hurst and accused who was very drunk (R27) proceeded to a billet where the barmaid nodded her head to show it was the right door (R24). Hurst testified that Campbell was armed with a pistol and he believed accused had a carbine (R14). As Campbell knocked on the door, Hurst left (R12,24). At that moment "some line company" was forming on the street (R33). The "Arab" came to the door and Campbell, while "everyone was behind me" and with accused "behind me all the time", never took his eyes off the man as he "backed him into the room with my hand" (R24,28).

Campbell, who on the day before the instant trial had been convicted by a general court-martial of the murder of Ali Ben Mohmoud, the "Arab" in question, was the only witness to testify regarding the



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the events that then immediately followed. His testimony is brief:

> "I backed him into the room with my hand. It was just a small affair and he went back toward the corner. There was a small table in the room. He stood between the table and some stoves and I was facing him. I had taken my gun out of my jacket pocket. He made a pass at me with a knife. I brought my gun up and squeezed it off" (R24).

The succeeding questions and answers disclose accused's part in the homicide:

> "Q. What happened then?
> A. Just as he was falling there was another shot.
>
> Q. Who fired the other shot?
> A. Barton, sir.
>
> Q. What happened then?
> A. I picked up his billfold from the table and a wristwatch and brought it back to the tavern. I asked the girl if that was him, showing her his picture.
>
> Q. Did you observe the corpse after the second shot?
> A. No sir.
>
> Q. What type of weapon did Barton use?
> A. A carbine, sir.
>
> Q. What was the condition of your sobriety at this time?
> A. I was sober, sir.
>
> Q. What did Sergeant Barton do next?
> A. He just tagged along, sir and came back to the bar with me" (R24-25).

Campbell did not see accused fire (R28). The two shots were "almost like one report. It was just enough to make me flinch". Asked "How did you know Barton fired the shot?" he answered, "I don't know, sir" (R30). It was something that

> "happened so fast that everything was over and done before you could snap your fingers. I turned and saw Barton and told him lets get the hell out of here" (R31).

Asked if accused was holding a weapon in his hand, he replied, "Yes sir, a carbine" and asked if it was "in his hands", he replied, "I cannot truthfully answer that, sir". This colloquy then follows:

"Q. I would like to refer to your earlier statement to the court. You stated that Barton fired the second shot. Is that correct?
A. No sir, I didn't say that.

Q. The question was who fired the second shot?
A. My answer was 'I think Barton', sir.

Q. You think Barton fired it?
A. Yes sir.

Q. After you came out of the building you saw that Barton tagged along?
A. Yes sir.

Q. Was there anyone else outside the building?
A. The entire company, sir.

Q. You mean they were all watching you?
A. I mean there was the entire convoy waiting to move out" (R31-32).

When Campbell fired accused was "to the rear and left of me", the "Arab" was standing in the corner of the room and "if anyone else was there he was behind me" (R33). Campbell fired towards the deceased's stomach and "He seemed to buckle; bent in the middle, and he went down. I would say the other shot hit him before he hit the floor" (R25).

An officer of accused's company examined the body of the French Moroccan soldier at about 2300 hours the same day, and observed that he was dead with wounds in the left temple (R20-21). The next morning the body was examined by an agent of the Criminal Investigation Division, who identified it as that of "Ali Ben Mohamed", a member of the French Colonial Army (R6-7). Captain Milton Rosenthal, M.C. 51st Evacuation Hospital, performed an autopsy. His certificate thereof, which was received in evidence without objection, further identified the deceased and describes the cause of death as follows:

"I hereby certify that I performed an autopsy on the body of Ali Ben Mahmoud, French Army, ASN A-359; Tunis 38, Orgn. 63rd Arty Regt. 2nd Group, 5th Bn, and found the following to be the cause of death:

I. GSW, pen, left temporal bone, with
A. Wd lac left temporal lobe and cerebellum
II. Fracture, comminuted, occipital bone, with
A. Separation of entire parietal bone at suture line
B. Fracture, linear, radiating, of both temporal and



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both frontal bones.

C. Maceration of Cerebellum, posterior portion of both Occipital lobes, left temporal lobe.

Note: II, in my opinion, was due to impact of back of head against flat unyielding surface with great force, as by falling backwards. The flattened distorted bullet was found lying among the cerebellar tissue fragments in the posterior fossa.

Incidental findings were:

III. GSW, pen, entry at left anterior axillary line, through the costal cartilage of the 10th rib, with missile tract through transverse mesocolon, jejunum, through left psoas muscle, erector spinae, at level of Lumbar vertebra 2, through transverse and spinous processes to rest under the skin just to right of midline.

A. Hemoperitoneum, ca 300 cc.

B. Retroperitoneal haemorrhage, moderate" (R35-36; (Pros.Ex.1).

4. For the defense:

Accused's condition at the cafe in Ste. Marie-aux-Mines on the afternoon of 29 January 1945 was variously described by members of his company who were drinking with him as "drunk" (R40) "pretty drunk" (R38, 44), "he staggered" and he was "staggering around the bar" (R44).

Captain Leo Walker, 275th Combat Engineer Battalion, testified that he had observed accused's conduct over a period of approximately 14 months (R40), that he is a very good soldier with a good reputation for truth and veracity (R41) and that he served with the battalion through the Ardennes campaign (R42).

Captain Stewart D. King, M. C., 76th Ordnance Battalion Medical Detachment, testified that a person sustaining the injuries described as Number I in the autopsy report (Pros.Ex.1) would have instantaneous death, that the injuries described in Number III thereof would not cause instantaneous death and that many so wounded survive if operated upon within twelve hours (R45-46).

Agent John S. Cole, Criminal Investigation Division, testified that, on questioning, accused stated that the "only carbine that was his custom to borrow" belonged to the mess sergeant. A ballistics test was made with a .30 caliber carbine No. 236486 "obtained from the mess sergeant" and the result was a negative report as to the comparisons of the bullet and cartridge case found on the scene (R46-47).

Stipulated testimony as to this test showed carbine No. 236486 did not fire the ".30 caliber bullet found in the victim's head" (R47).

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5. After his rights were explained (R47-48) accused testified and described the manner in which he started drinking wine about 0800 on 29 January 1945 at a cafe in Ste. Marie-aux-Mines, continued to drink, heard a story about the raping of a French girl and became drunk about 1500 hours. In the morning after breakfast he had borrowed the mess sergeant's carbine but returned it. He carried a rifle in combat, but around the mess truck he borrowed the mess sergeant's carbine and never borrowed any others. He had no weapon with him at the cafe. After getting drunk the next thing he remembered was waking up at 0400 hours the next morning on a table in "our mess hall" (R48-51).

6. At the request of the court further evidence was introduced showing that at least 40 men were in the cafe each armed with some weapon at the time Campbell, Hurst and accused were on their way to the "Arab's quarters" (R56) and that when the trio arrived at his doorway "There were trucks along the street with soldiers around them but at the quarters there were just the three (3) of us" (R58). Campbell reiterated his former testimony that he turned around after firing at deceased, saw accused in possession of a carbine and observed the weapon in his hands when they both left the "Arab's quarters" (R61).

7. From the evidence outlined above it is clear that accused fired at deceased with a carbine from a distance of a few feet, the bullet entering his brain and causing almost instantaneous death. The question arises, under all the circumstances of this unlawful homicide, whether the offense was murder or merely that of manslaughter. Although it was here shown that accused used a deadly weapon, it was also shown that he was extremely drunk at the time. While intoxication is no defense to homicide, it may be operative to reduce murder to manslaughter if sufficiently extreme to render accused incapable of entertaining malice aforethought (MCM, 1928, par.126a, pp.135-136; Winthrop's Military Law and Precedents (Reprint, 1920), p.293; 1 Wharton's Criminal Law (12th Ed., 1932), sec.407, p.599; 26 Am.Jur.sec.116-119, pp.233-238; 12 ALR 861; 79 ALR 897). All the evidence in the instant case points to the fact that accused's drunkenness was well advanced. In the cafe where there were at least 40 men at about 1800 hours on 29 January 1945 (R56), "everyone was drunk" (R19) and accused "was the drunkest man in the cafe" (R13,16,18,26). There was no evidence that accused prior to the shooting expressed any intention as regards deceased or entertained any other purpose or inclination than that of drinking from the time on the morning of 29 January when he told the mess sergeant that "the captain said he could take the day off for drinking" (R52). The record is replete with the testimony of many witnesses as to the advanced state of drunkenness he achieved before 1800 hour on that day (R13,16,19,21,22,26,27,38,39, 40,41,43,44,48-50,52,57). Accused admitted that he heard the story of the raping of a French girl but denied that he discussed it and testified that he had no recollection of the events of that day after 1500 hours (R50). However, it was clearly established that accused, armed with a carbine, did voluntarily accompany Campbell and Hurst, both of whom were also armed, to the billet of the deceased. He entered the billet behind Campbell. As soon as Campbell fired upon the deceased, accused immediately



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fired with such accuracy as to strike deceased in the head.

The Manual expressly provides that malice is presumed from the use of a deadly weapon (MCM, 1928, par.112a, p.110; and see CM 237641, Brackins, 24 BR 71). However, this is a presumption of fact, not of law, and the inference of malice to be drawn from the use of a deadly weapon is obviously weaker in a case where a homicide is committed by a combat infantryman to whom the use of a carbine is commonplace than it is where a homicide is committed in a settled, peaceful community where the very possession and use of firearms is extraordinary. In any event, the use of a deadly weapon is only one piece of evidence bearing upon the question of malice and the presumption or inference arising from this fact may be rebutted by the other facts and circumstances surrounding the homicide. In other words, it is a more accurate statement of the rule to say that malice, if it exists, is to be inferred from all the facts and circumstances of the case, of which the method by which the homicide was committed is only one (United States v. King (C.C, EDNY, 1888), 34 F 302; 40 CJS, sec.25, p.874). The court resolved against accused the question whether his intoxication was of such degree as to deprive him of the mental capacity to possess malice aforethought. This was a question of fact within the peculiar province of the court for determination. Upon all the evidence the court was warranted in finding that accused's intoxication at the time of the shooting was not of such severity as to deprive him of his powers of deliberation. Such finding is binding on the Board of Review upon appellate review (CM ETO 3180, Porter; CM ETO 3932, Kluxdal; CM ETO 7815, Gutierrez).

8. The action of the approving authority in reducing the period of confinement from life to ten years was appropriate under all the circumstances and was legal (SPJGK, CM 241226, Gray, 26 B.R. 239, II Bull. JAG 379). While the evidence is legally sufficient to sustain the findings of guilty of murder, the facts and circumstances surrounding accused's part in the homicide create a pattern closely resembling that found in cases of voluntary manslaughter accompanied by extreme intoxication (see CM ETO 9365, Mendoza).

9. The charge sheet shows that accused is 43 years of age and was inducted 26 September 1942. He had no prior service.

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

11. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 567). The designation of the

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

B R Weeks Judge Advocate

Malcolm C. Sherman Judge Advocate

B H Avery Jr Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
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BOARD OF REVIEW NO. 3

21 SEP 1945

CM ETO 16123

| | | |
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| U N I T E D S T A T E S | ) | 75TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at |
| | ) | Mailly le Camp, France, 16, |
| Private LESTER CAMPBELL | ) | 17 July 1945. Sentence: |
| (36589616), Company C, | ) | Dishonorable discharge, total |
| 275th Combat Engineer | ) | forfeitures and confinement |
| Battalion | ) | at hard labor for life. |
| | ) | United States Penitentiary, |
| | ) | Lewisburg, Pennsylvania. |

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

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

2. Accused Campbell and accused Technician Fourth Grade Darl F. Barton of the same organization, were arraigned upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician 4th Grade Darl F. Barton, Company "C", 275th Combat Engineer Battalion, and Private Lester Campbell, Company "C", 275th Combat Engineer Battalion, acting jointly, and in pursuance of a common intent, did, at "Les Halles", Ste. Marie-aux-Mines, France, on or about 29 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Ali Ben Mohmoud, a human being, by the said Technician 4th Grade Darl F. Barton shooting him with a carbine and the said Private Lester Campbell shooting him with a pistol.

A motion of the defense for severance was granted on behalf of Barton who then withdrew and the court proceeded with the trial of Campbell (R5-6).

Without objection by defense, the Charge and Specification were amended as follows:

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

Specification: In that Private Lester Campbell, Company 'C', 275th Combat Engineer Battalion, did, at "Les Halles", Ste. Marie-aux-Mines, France, on or about 29 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Ali Ben Mohmoud, a human being, by the said Private Lester Campbell shooting him with a pistol" (R6).

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. Evidence was introduced of two previous convictions, one by special court-martial for willfully disobeying the lawful order of a non-commissioned officer and for speaking disrespectfully to a commissioned officer in violation of Articles of War 65 and 63 respectively and one by summary court for operating a motor vehicle at excessive speed and for wrongfully taking a government vehicle for private use, both 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. Prosecution's evidence:

On 29 January 1945, Company C, 275th Engineer Combat Battalion, was bivouacked in the town of Ste. Marie-aux-Mines, France. The company orderly room was in a cafe in the town (R52). At about 1800 hours accused armed with a pistol was seen to enter a nearby billet in which shortly thereafter was found the body of a French soldier who had recently been shot (R8-9, 53-54).

In the investigation that followed immediately, the "Arab" soldier was found to be dead. He was identified as Ali Ben Mohmoud (R9,10,39-40,64). An autopsy disclosed a .30 caliber bullet in the base of the skull and a 7.65 caliber bullet in the base of the spine (R39-40).

Accused's confession to an agent of the Criminal Investigation Division, dated 3 February 1945, which was received in evidence over objection of the defense, describes how he spent the afternoon of 29 January in this cafe drinking wine and conversing with other members

of the company, including Technician Fourth Grade Darl F. Barton and Private First Class Albert L. Hurst. A sergeant in the company called accused over to him at one time and said, "Here's a job for you to take care of", proceeding then to relate a story told by the bar maid that she had been "raped the night before by an Arab with a black moustache"(R37-38; Pros.Ex.I). This narrative was repeated to others in the cafe and "everyone talked a little about it" (R53). Accused had seen "this Arab in G.I. uniform in the cafe" and knew to whom they referred. The proprietor of the cafe and his wife said they were afraid of this "Arab soldier", because he had threatened them with a knife and had warned the bar maid that if she had anything to do with American soldiers he would come back and kill them (R37,38,52,56,58-59, 69; Pros.Ex.I). Accused said he "was going to see this fellow about it" (R53). His condition at this time was variously described as "drunk" (R61), "didn't appear to be very drunk or drunk at all" (R56), "had been drinking" (R63-64), but he himself did not think he was in any way intoxicated (R38; Pros.Ex.I).

Between 1700 and 1800 hours accused asked Barton and Hurst to accompany him. While the bar maid stood at the door of the cafe, the trio walked down the street a short distance to a doorway indicated by the bar maid's nod as the place where the "Arab" lived. As accused knocked at the door, Hurst asked what he was going to do. Accused said "that he was going to get this fellow or see him or something to that effect ***". Hurst left (R38,53; Pros.Ex.I). The succeeding events are described in accused's confession as follows:

> "I got no answer, so kicked on the door. At this time it was opened by the Arab with the handle-bar moustache. I asked him if any American soldiers slept here. He didn't understand me so I made motions. I kept walking into the hallway, the door on the left just inside the front door was open. I pushed him with my hand until we both entered his room * * *.
>
> I was standing very close to the Arab, at this time I had my Walther pistol which I carry in a shoulder holster but had removed it from the shoulder holster and placed it in my right field jacket pocket before I entered the building. The Arab either picked up a knife or had a knife in his hand. I can't describe the knife. I shot the Arab some place in the stomach. He reeled about and fell to the floor. Shortly after Barton stepped to my left and pointed his carbine toward the Arab on the floor. Barton shot him again with the carbine. I saw the hole in his head where Barton shot" (R37-38; Pros.Ex.I).

Accused and Barton then returned to the cafe where accused reported to an officer of his company that "he had to shoot some French soldier around there" (R63) and told Hurst that "he had shot this fellow" (R55).

4. For the defense, Private Raymond St. John of accused's company saw him at the cafe in the afternoon of 29 January 1945 and observed that he "was more drunk than anything else" (R68).

Second Lieutenant Ernest Gallowicz of accused's company testified regarding the good qualities of accused as a combat soldier (R69).

The defense offered the autopsy report, which was received in evidence without objection (R80; Def.Ex.A).

5. After his rights were explained (R73), accused testified and described events in connection with the shooting substantially in accordance with his confession (R73-78). He emphasized that when he started for deceased's billet, he had no intention of killing him. He "just thought something should be done to him" (R77).

6. All the elements of the crime of murder were shown beyond any reasonable doubt by substantial evidence. The court's findings of guilty were fully warranted (CM ETO 6159, Lewis and authorities therein cited). Regarding the evidence in the light most favorable to accused, the court was justified in concluding that he was not acting in self defense at the time he fired at deceased (CM ETO 1941, Battles; CM ETO 2007, Harris, Jr.). It was immaterial whether the bullet fired by accused or whether the bullet fired by Barton caused the death of deceased. Accused was legally responsible for the acts of Barton and himself in their inexcusable attack (CM ETO 1922, Forester).

7. The charge sheet shows that accused is 29 years of age and was inducted 25 March 1943.

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

9. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and Sections 275 and 330, Federal Criminal Code (18 USCA 454,567). The

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

Judge Advocate

Judge Advocate

Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
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BOARD OF REVIEW NO. 1

25 AUG 1945

CM ETO 16149

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| UNITED STATES | 36TH INFANTRY DIVISION |
| v. | |
| Private DAVID B. BAGLEY (6933432), Company G, 141st Infantry | Trial by GCM, convened at Geislingen, Germany, 19 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York |

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the sentence.

2. The instrument executed by the company commander (Pros.Ex.1) was competent evidence of absence without leave because it was "An official statement in writing * * * /made by an officer who/ * * * had the duty to know the matter so stated and to record it" (MCM, 1928, par.117a, p.121), but even if it were to be considered not an official statement, it was then, under the evidence, clearly an entry in the regular course of business of the company and thus admissible under the principles set forth in the Knorr case (CM ETO 4691, Knorr). The Knorr case has not been overruled (CM ETO 6107, Cottam and Johnson; CM ETO 7686, Maggie and Lewandowski).

Wm. F. Burrow Judge Advocate

Edward L. Stevens Jr. Judge Advocate

Donald D. Carroll Judge Advocate

AGPO 2-45/19M/C504ABCD

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Branch Office of The Judge Advocate General
with the
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BOARD OF REVIEW NO. 3

CM ETO 16151

8 OCT 1945

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| U N I T E D S T A T E S | 75TH INFANTRY DIVISION |
| v. | Trial by GCM, convened at Mourmelon le Grand, France, 24-26 July 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| Private CHARLES E. INGREAM (20324274), Company C, 54th Signal Battalion. | |

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

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

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

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

Specification 1: In that Private First Class Charles E. Ingream, Company C, 54th Signal Battalion, did, acting in conjunction with Private First Class Henry L. Ahrens, Company C, 54th Signal Battalion, at La Cave, Oeuilly, Marne, France, on or about 6 June 1945, wrongfully commit an assault upon Gaston Roulot by pointing a pistol at him.

Specification 2: In that * * * did, acting in conjunction with Private First Class Henry L. Ahrens, Company C, 54th Signal Battalion, at La Cave, Oeuilly, Marne, France, on or about 6 June 1945, wrongfully commit an assault upon M. Albert Masson by pointing a pistol at him.

CHARGE II: Violation of the 96th Article of War
(Finding of not guilty)
Specification: (Finding of not guilty)

CHARGE III: Violation of the 92d Article of War

Specification 1: In that * * *, did, acting in conjunction with Private First Class Henry L. Ahrens, Company C, 54th Signal Battalion, at La Cave, Oeuilly, Marne, France, on about 6 June 1945, forcibly and feloniously, against her will, have carnal knowledge of Mlle. Lucienne Roulot, to wit: while the said Private First Class Charles E. Ingream had the carnal knowledge as aforesaid, the said Private First Class Henry L. Ahrens stood guard over the other members of the household then present.

Specification 2: In that * * *, did, acting in conjunction with Private First Class Henry L. Ahrens, Company C, 54th Signal Battalion, at La Cave, Oeuilly, Marne, France, on about 6 June 1945, forcibly and feloniously, against her will, have carnal knowledge of Mme. Germaine Masson, to wit, while the said Private First Class Henry L. Ahrens had the carnal knowledge as aforesaid, the said Private First Class Charles E. Ingream stood guard over the other members of the household then present.

At the arraignment, defense counsel stated that on "the advice of counsel, the accused, Private Ingream, stands mute before the court". The court thereupon entered a plea of not guilty on his behalf. He was found not guilty of Charge II and its specification and guilty of the remaining charges and specifications. Evidence was introduced of one previous conviction by summary court for absence without leave for 2 days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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:

At about 0300 hours on the morning of 6 June 1945, the family of M. Gaston Roulot was awakened by a knocking and kicking on the door of their home in the small village of La Cave, France (R29,30,36,50,59). Present in the house at the time, in addition to M. Roulot, were Mme. Georgette Roulot, his wife, Mme Germaine Masson and M. Albert Masson, his

daughter and son-in-law, respectively, Lucienne Roulot, a younger daughter 17 years of age, and an infant daughter, then only two days old, named Clodine. The house was a small one and had only two upstairs bedrooms, which were separated by a small hall or landing. Due to the fact that his wife had recently given birth to Clodine, M. Roulot was sleeping in one of the rooms on the ground floor. The larger of the upstairs bedrooms was occupied by his wife, his younger daughter Lucienne and the infant daughter while the other bedroom was occupied by M. and Mme. Masson (R31,40,42,51,52).

Upon hearing the noise at the door, M. Roulot arose and, although he at first hesitated to open the door because of the condition of his wife, he ultimately did so when a shot was fired outside and the knocking and kicking continued (R30,34). An American soldier later identified as the accused, accompanied by a larger American soldier, then entered the house. Both were drunk and both were armed with pistols (R30,36,43). After the men entered, the larger soldier threatened M. Roulot with his pistol and forced him to go upstairs (R30,31,59). Accused and his companion followed and, upon reaching the first floor, herded all the occupants of the house into the larger of the two bedrooms (R51,52,58,60). An argument then ensued between the two men and M. Roulot which ended when the larger soldier said "I take Madame" (R31). With this, he forced Mme. Masson "under the menace of his revolver" to accompany him into the smaller of the two bedrooms (R41,52,67). In the meantime, accused remained in the larger bedroom with the remaining occupants of the house, where according to M. Masson, he "played" with his pistol and "directed it at us to keep us from leaving" (R47,58).

Mme. Masson testified that when she entered the bedroom with the larger soldier he pushed her violently on a bed, pushed her back down when she attempted to arise, got on top of her immediately after he pushed her the second time, and had sexual intercourse with her (R60, 63). She attempted to push him from her but was unable to do so because of his superior strength and because, "being in the family way, I have not my movements free as I would like, and I was still under the menace of his revolver" (R60,63). When he finished he permitted Mme. Masson to return to the other bedroom (R60). M. Roulot testified that when she came into this room she was "very nervous, excited and she was weeping - a pitiful state" (R42). A medical examination of this prosecutrix by a French doctor later that morning was inconclusive since "four hours after sexual relation of a woman who has had children before and who is awaiting with child, it was impossible to declare if she had sexual relation" (R27). However, she exhibited nervousness, anxiety and fear at the time of the examination (R27).

The evidence for the prosecution further shows that after the accused's companion and Mme. Masson returned to the large bedroom, accused forced Lucienne to accompany him into the other bedroom by placing "his revolver in my neck", while his companion remained in the small bedroom with the other occupants of the house "holding us under the control of his pistol" (R60,68). After being taken into the bedroom, Lucienne wanted to leave but accused "didn't want me to and he always had a revolver". He then laid on the bed with her, and had intercourse with her, with the revolver lying on the bed "just alongside" (R67-69). She was

crying continuously and her uninterrupted weeping, together with the acts of the accused, caused her to vomit (R67). The other members of the family heard her crying and her father heard her call for a container into which she could throw up (R32,33,57). According to Lucienne, this was the first time she had intercourse but, although unfamiliar with the sexual act, she was certain that accused effected penetration (R69-71). Some time later, she returned to the other bedroom with the accused. M. Masson testified that at this time she was crying and said, "Oh, he hurted me, he hurted me" (R57). When Lucienne was given a medical examination later that morning, she was nervous and excited. It was determined that there was some swelling of the vagina and that the hymen was not intact. The examining physician was unable to state with certainty whether or not the hymen had been torn within the previous six hours (R28,29).

After Lucienne and accused returned to the larger bedroom, certain further activities not necessary to relate here took place after which, at about daybreak, the two men forced the members of the household to return to their respective rooms. Accused's companion then went downstairs while accused remained on the stair landing with his revolver in his hand to see that the Roulot family remained in the rooms into which they had been directed to go. Shortly thereafter the sound of a motor was heard, accused's companion called to him, and both men left the house (R54,56,62,68).

An enlisted man, who was on guard at accused's organization on the morning of 6 June 1945, testified that at about 0500 or 0530 hours accused and "another fellow * * * Ahrens" drove into camp in a three-quarter ton truck. He noticed that both of them were "pretty drunk" and advised them to go into the camp and go to bed (R75). On cross-examination, the witness testified that accused was still "pretty groggy" later in the day. He also testified that he had known the accused for six or seven months and that he bore an excellent reputation in the company (R76).

4. For the defense, M. Colnet, a resident of the village of La Cave who had known M. Roulot and his family for about 30 years, testified that the reputation of Lucienne Roulot in the community both for truth and veracity and for chastity was bad. He stated that he had once come upon her and a German soldier under circumstances indicating that they had just "made love" and that, during the occupation, she was seen with German soldiers "every day" (R79-81). On cross-examination, it was developed that the relations between the Roulot family and the witness had not been friendly for some time (R82). Another resident of La Cave, Mme. Laura Beaudoin, who had known the Roulot family for about eight months, also testified that the reputation of Lucienne Roulot in the community both for truth and veracity and for chastity was "very bad". At least one basis for her unenviable reputation was her reputed propensity for "going with German soldiers in the vicinity of the railroad bridge" (R85).

Technician Fifth Grade Frank Abbott testified that on the evening of 5 June, he, a Sergeant Brien, a Corporal Pfeffer, Ahrens and the accused left their camp at about 2030 hours and went to a house in a nearby village where they purchased and drank five quarts of wine, a quart of cognac and a quart of calvados. He left the party at about 2300 hours because he was "afraid the boys were drinking too much" (R86,87). He stated that accused was a "very good" soldier and bore a "very good" reputation in the company (R88)

Pfeffer confirmed Abbott's testimony and added that two bottles of wine were consumed that evening prior to leaving camp in addition to that consumed later so that all together the group had drunk seven bottles of wine, one bottle of cognac and one bottle of calvados on the evening in question (R89,91,92). Ahrens and accused drank more heavily than the rest of the men (R89). The witness, Brien, Ahrens and accused left the house where they drank the wine at about 2300 hours and got into a truck to return to camp. At this time, accused was staggering and was very drunk, so much so that, he fell on the floor boards of the rear of the truck after climbing over the tail gate and had to be picked up and placed on the seat. Ahrens, who was driving, also was very drunk, but the group got back to camp at about 2345 hours without accident (R89,90). Accused had always been an excellent soldier and bore an excellent reputation in the company (R90).

Brien testified similarly and in addition stated that when he saw accused about noon on 6 June the latter looked "like a man who had been on a terrible drunk and had not gotten over it yet" (R93,94). He also testified to accused's excellent reputation and his excellence as a soldier (R94,95)

There also was testimony by two non-commissioned officers of accused's company and stipulated testimony by his company commander that accused had performed his duties in an excellent manner and bore an excellent reputation as a soldier (R104, 106,108).

Ahrens testified that he, accused and others drank wine at their billet on the evening of 5 June and later went to a nearby village where they continued to drink. He had "no idea" when they left the village, nor did he know what happened after they left. He had a pistol with him on the night in question but accused was not armed (R95-97).

Accused, after being advised of his rights as a witness, elected to testify on his own behalf. He also testified as to the drinking which took place on the evening of 5 June and stated that during the course of the evening "things started to get a little hazy" (R111). He remembered leaving the house in the village and his next recollection was of getting up the following morning and drinking a cup of coffee (R112,116). When asked whether he believed that the events described by the witnesses who testified at the trial had taken place, he replied, "Well, Sir, it might have happened, and it might not have happened" (R116).

5. The testimony of the prosecuting witnesses shows that Ahrens had carnal knowledge of Mme Germaine Masson and that accused had carnal knowledge of Mlle. Lucienne Roulot under circumstances clearly constituting such carnal knowledge rape. Their testimony was corroborated as to surrounding circumstances by that of the other members of the family, and in effect was not controvered by accused. There also was testimony showing that accused pointed a revolver at M. Roulot and M. Masson while Ahrens was in the bedroom with Mme. Masson and at various other times during the course of the evening. Hence, there is abundant evidence to support the court's finding that accused raped Lucienne Roulot, aided and abetted Ahrens in his rape of Mme Masson, for which he may properly be held guilty as a principal, and also committed the assaults alleged (CM ETO 15619, Capps and Erikson; CM ETO 9083, Berger and Bamford; CM ETO 3740, Sanders; MCM, 1928, par. 149l p.177,178). The fact that Lucienne Roulot may have had a bad reputation for chastity went only to the issue of consent. There was ample evidence from which the court could find that she did not consent in the instant case and the mere fact that she may have been previously unchaste does not constitute a defense. Even a prostitute has the right to preserve the sanctity of her person when she so elects (CM ETO 4589, Powell et al; cf. CM ETO 14875, Swain). Whether or not accused was too drunk to be responsible for his acts was essentially a question of fact for the court. In this connection, it will be noted that all the actions of the accused while at the Roulot home evidenced an awareness of his surroundings and an ability consciously to achieve the purpose for which he and Ahrens obviously entered. This being true, the court did not abuse its discretion in resolving the question whether he was responsible for his acts adversely to the accused (CM ETO 6207, Carter; CM ETO 4303, Houston). It is concluded that the evidence not only substantially but compellingly supports the findings of the court.

Certain questions both of procedure and substance were raised by defense counsel at the trial. These questions as well as certain other questions raised by the record are ably discussed in the review of the staff judge advocate of the reviewing authority and have received careful consideration here. It is sufficient to say with respect thereto that, after consideration of the questions presented, the Board has concluded that no errors injuriously affecting the substantial rights of the accused within the meaning of Article of War 37 were committed during the trial.

6. The charge sheet shows that accused is 35 years eleven months of age and was inducted 3 February 1941 at Harrisburg, Pennsylvania. 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 rape is death or life imprisonment as the court-martial may direct (Article of War 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B L Levy Jr Judge Advocate



RESTRICTED

Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 5

5 OCT 1945

CM ETO 16187

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| U N I T E D S T A T E S | OISE INTERMEDIATE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER |
| v. | |
| Private WILLIE ROLLINS (34227608), 4406th Quartermaster Service Company. | Trial by GCM, convened at Dijon, France, 13 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

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HOLDING by BOARD OF REVIEW NO. 5
HILL, JULIAN and BURNS, 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 92nd Article of War.

Specification: In that Private Willie Rollins, 4406th Quartermaster Service Company, did, at Val D'Ajol (Vosges), France, on or about 2 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Madame Jeanne Schmith (French Civilian), a human being by striking her on the head with a .45 calibre automatic pistol.

He pleaded not guilty and two-thirds of the members of



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the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 3 days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution shows that on the evening of 2 May 1945 about six o'clock accused and Private Samuel Phillips, both colored soldiers and members of the 4406th Quartermaster Service Company were in their quarters at Epinal, France, with two French women, Jeannette Schmith and Germaine Tisserand (R8,20,40). They decided to take the women to a cafe and then home. Private Solomon Simmons came in the quarters and agreed to drive the group in a weapons carrier. They commenced the journey and, on arriving at a town, stopped and obtained a drink at a cafe and then drove on to another town where they again stopped and where accused and Phillips each purchased a bottle of cognac (R40,41). They returned to the truck, and the party continued on toward Val D'Ajol, drinking from the bottle from time to time (R36,41). As they passed Remiremont accused fired his gun out the side of the vehicle into the wood (R32,35). On reaching Val D'Ajol, they stopped at the house of Germaine Marinoni as they wanted a place to sleep. She was not able to accommodate them but agreed to take them to a place where they might stay. After they had a couple of drinks, they went out and entered the weapons carrier, Germaine Marinoni in front with Simmons, Germaine Tisserand and Phillips in the rear on the left side, and Jeanette Schmith and accused in the rear on the right side (R19,20,32,41). They proceeded on their way, but after travelling a very short distance stopped at Mlle. Tisserand's home so that she could secure some more clothes as she was cold. While they were waiting, accused pointed his gun at Simmon's back and said, "Take me to the camp, take me right now" (R14,41,42). Simmons started the truck whereupon

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Jeannette Schmith said "Let me go" and tried to climb into the front seat (R20). Accused "tore on her clothes to get her in the back of the car" and then struck her heavily two to five times on the head with the gun which then "went off" (R14,20,22). Jeannette Schmith fell on her back (R49). Simmons immediately said "Man, you shot this girl" (R41). Phillips, who had been looking out the back of the truck, turned around, struck a match and saw that she had a hole in her head larger than a dime. It was bloody. Someone suggested they take her to a hospital (R41,49). They thereupon started for the 23rd Station Hospital at Epinal arriving about two a.m. after a 45 minute trip. Here accused took Jeannette Schmith out of the truck, and Simmons and Phillips returned to their billets (R15,50). On the way to the hospital she could not sit up and kept sliding off. She was placed on the seat next to the driver but she slipped off to the floor. When they arrived at the hospital she was on the floor of the truck with her head on the seat. Accused remarked, "You know, we got a dead man in this wagon" (R45). A pool of blood was found on the right front corner inside the bed of the vehicle the day after she was taken to the hospital (R25).

At 0800 hours 3 May, Pierre La Flotte, surgeon of the hospital in Epinal, examined a Jeanne Schmith, who was in a coma. She had lost consciousness from a wound in her head, part of her brains "were coming out", and she was paralyzed on the whole right side. Dr. La Flotte saw her twice a day until she died about 11 May as a result of the destruction of the greater part of her brain (R9).

James P. Quinn, Jr., CID Agent, went to the St. Moritz Hospital, a civilian hospital in Epinal, on 5 May, after having talked to Dr. La Flotte and asked to see Madame Schmith (R37). He was taken to a woman lying in bed with her head bandaged, who was unable to talk, or give any sign of comprehending questions put to her. He was shown a French identification card which hospital personnel represented had been found on her person when she came to the hospital. The card bore the name Jeannette Chalon Schmith and a photograph, which was a perfect likeness of the woman in the bed (R37,38).

The accused drank repeatedly during the evening, stumbled on the stairs as he left Germaine Marinoni's house, and talked loudly. The women present stated he was

drunk (R21,34,36). Simmons and Phillips testified that accused was not drunk but not wholly sober (R44,51).

4. Accused, after being fully advised of his rights as a witness, elected to remain silent.

5. The first element of the corpus delicti in homicide cases is proof that the person alleged to have been murdered is dead. It is not essential that this be done by direct and positive evidence.

> "Like any other fact the subject of judicial investigation, the corpus delicti may be proved by evidence which is probable and presumptive, -- that is, circumstantial, -- as well as by direct evidence, if satisfactory to the understanding and conscience of the jury beyond a reasonable doubt; but such evidence, where relied upon, must be strong and cogent, and leave no room for a reasonable doubt" (1 Wharton's Criminal Law (12th Ed., 1932), sec. 352, p.456).

The accused is charged with the murder of Madame Jeanne Schmith. The evidence introduced showed that at 0800 hours 3 May, a Mme. Jeanne Schmith was examined by Dr. La Flotte, surgeon of the hospital in Epinal, and found to have a wound in her head and "part of her brains coming out" and that she died about 11 May due to her brain injury. Further, it was proved that on the evening of 2 May accused struck Jeannette Schmith on the head several times with his gun which went off and that she was taken to the 23rd Station Hospital in Epinal about 0200 hours 3 May. On 4 May Quinn, a CID agent saw Dr. La Flotte. The following day Quinn went to the Hospital St. Moritz and upon asking to see Madame Schmith, was taken to a ward and shown a woman whose head was bandaged and who was unable to talk. At the same time he was shown an identification card which it was asserted by the hospital attendants was found among the effects of this woman when admitted to the hospital. The testimony of the agent that he was thus informed that the card was found on the person of the woman when she was brought to the hospital was simply hearsay and should be disregarded (Hopt v. People 110 US. 574, 28L. Ed.262). However, the card bore the name of Jeannette Charlon Schmith and a photograph which was a perfect resemblance of the patient whose head was bandaged. The testimony of the agent as to the resemblance of the picture to the injured woman was, of

course, relevant and competent evidence. The fact that the card was presented to the agent in the same hospital where he found the woman who resembled the picture on the identification card was evidence that permitted the court to infer that the card belonged to the woman. This fact leads to the conclusion that the injured woman was Jeannette Chalon Schmith.

That the woman Quinn saw in the civilian hospital on 5 May was the same person who was struck on the head by accused on the night of 2 May is aided by the presumption that identity of names carries a presumption of identity of person (MCM, 1928, par.112a, p.110). This presumption is strengthened by the fact that the woman in the hospital had her head bandaged and was unable to talk, the normal result of a serious injury to the head. The evidence shows that the victim of accused's assault was taken to a military hospital in Epinal about 0200 hours, 3 May, and that the woman seen by Quinn was in a civilian hospital in the same town. The reasonable inference is that being a French civilian she was transferred there rather than being kept in the United States Army Hospital. Dr. La Flotte testified that Jeanne Schmith died as a result of head injuries. The only reasonable inference is that Jeanne Schmith and Jeannette Schmith were one and the same person. The time, place, and type of injuries found by the Doctor on his examination of Jeanne Schmith excludes any fair and reasonable hypothesis except that this woman, who died shortly thereafter, was the one struck by the accused. The court had sufficient evidence before it to determine beyond a reasonable doubt that the woman alleged to have been murdered did in fact die and that she was the person whom accused killed.

6. Murder is the killing of a human being with malice aforethought and without legal justification or excuse (MCM, 1928, par.148a, p.162).

> "An unintended homicide, committed by one who at the time is engaged in the commission of some other felony, is murder both at common law and under the statutes * * * * However, the homicide must be an ordinary and probable effect of the felony in which he is engaged . * * *" (29 C.J. Sec.70,p.1097)
>
> "* * * * It must appear that there was such actual legal relation between the killing and the crime committed or attempted, that the killing can be said to have occurred as a part of the perpetration of the crime or in furtherance of an attempt or purpose to

> commit it. In the usual terse legal phraseology, death must have been the probable consequence of the unlawful act" (13 R.C.L. Sec.148, p.845)

The Manual for Courts Martial in defining murder has adopted the foregoing principle:

> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: * * * * * intent to commit a felony" (MCM, 1928, par. 148a, pp 163,164) (Underscoring supplied).

(Cf CM ETO 559 Monsalve; CM ETO 1453, Fowler; CM ETO 4949, Robbins. See also CM ETO 3614 Davis where it was held that death unintentionally resulting from a mere assault is manslaughter, because an assault is not a felony).

The definition of the word "felony" as used in the Manual for Courts Martial must be sought in federal law (CM 202359, Turner, 6BR 87,91).

> "Under the laws of the United States the following crimes are felonies: Those declared expressly or impliedly by statute to be such, those punished under their common law name and which are felonies at common law, and those made a felony by a state law which are adopted by congress, United States v. Coppersmith, 4F. 198. Felonies are defined as follows by federal statute:
>
> > 'All offenses which may be punished by death, or imprisonment for a term exceeding one year shall be deemed felonies'. Sec. 335, Federal Penal Code, USC 18: 541' " (CM 202359, Turner, supra)

The crime of assault with intent to do bodily harm with a dangerous weapon, instrument or thing is denounced by the 92nd Article of War and Sec. 276, Federal Criminal Code (18 USCA 455). By the latter statute the maximum punishment of a fine of $1000.00 or imprisonment of not more than five years, or both, is prescribed. The offense is therefore a felony under the Federal law. (Cf: Hickey v. United States (CCA, 9th 1909) 168 F.536)

In the instant case the evidence is clear and

decisive that accused beat the deceased on the head with his loaded gun during which action it was discharged and a bullet entered the deceased's head causing her death.

> "Weapons * * * * are dangerous when they are used in such manner as they are likely to produce death or great bodily harm" (MCM, 1928, par. 149m, p.180).

The gun was used as a club and it was likely to produce death or great bodily harm. As thus used and applied it was manifestly a dangerous instrument (CM ETO 3366, Kennedy). Accused was in the commission of a felony at the time the gun was discharged. The homicide was therefore clearly murder under the authorities above cited.

7. There was evidence presented that accused had been drinking considerably during the evening, and he was described as drunk by two members of the party. However, two other persons present testified he was not drunk, although he was not quite sober. Further evidence showed that he was able to get in and out of the truck several times during the evening, talk articulately, and on arrival at the hospital he carried deceased off the truck. The question whether accused was too intoxicated to have entertained the requisite malice to constitute the homicide murder instead of manslaughter was one of fact for the determination of the court and in view of the evidence, its findings will not be disturbed by the Board of Review (CM ETO 1901 Miranda; CM ETO 6265 Thurman et al).

8. The charge sheet shows that accused is 37 years and 11 months of age and was inducted 30 July 1942 at Fort Benning, Georgia. He had no prior service.

9. 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.

10. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon

conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO 3

10 OCT 1945

CM ETO 16188

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| U N I T E D S T A T E S | ) | OISE INTERMEDIATE SECTION, COMMUNICATIONS ZONE, UNITED STATES |
| v | ) | FORCES, EUROPEAN THEATER |
| Private OSIE T BROWN (36253669), 3777th Quartermaster Truck Company | ) | Trail by GCM, convened at Reims, France 12 July 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania |

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private, then Sergeant, Osie T. Brown, 3777th Quartermaster Truck Company, did, at Reims, France, on or about 19 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Private Bert J Moyer, a human being by shooting him with a Carbine.

He pleaded not guilty to, and was found guilty of, the Specification and 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 dishonorable discharged the service, to forfeit all pay and allowances due or to become due and to be

confined at hard laborfor the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence of the prosecution shows that, at about 2300 hours 19 April 1945, deceased and two other soldiers while guests at a paratroopers' dance at the Printinia Club, Reims, France, walked across the club courtyard to a corridor affording access to the courtyard from the street, and there encountered accused, a colored sergeant who was at that moment entering the courtyard (R7,11,17, Pros. Ex. A). Deceased told accused, "This is a private party, leave", precipitating a short argument, during the course of which one of deceased's companions undertook to persuade accused to depart, and had actually succeeded in getting him into the corridor when accused told deceased to "Come on out, I'll fight you", whereupon deceased stepped up to accused and struck him a "pretty hard blow" on the chin, knocking off his helmet liner (R7, 12-13,15,17-18, 20-21). Accused "went back against the side of the wall and * * * part-way down and then he ran out (13). The others followed him down the corridor to the street entrance. When they reached it, he was gone (R7,16,18). One of them returned to the club (R18). The other - Private Wilson - remained with accused outside the entrance where they were joined in a very few minutes by a paratrooper, who had hardly arrived when accused was seen approaching at a "fast trot" about 100 feet away, carrying a carbine and accompanied by a Polish "MP"-- "one of those foreign soldiers we use for guard duty" (R8,24,31). The three at the entrance ran backinto the corridor where the paratrooper hid behind the street door, while the other two continued toward the courtyard, where Wilson took refuge in a latrine, just as accused fired into the corridor and deceased cried out, "I'm hit" (R8,25,31). Immediately thereafter he was found in the courtyard near the entrance to the corridor with a gunshot wound in his stomach, from, the effects of which he died 18 days later (R8,35,38, 44; Pros. Ex. H). A few minutes after the shooting, accused was apprehendedon the street near the entrance to the corridor, while pointing his carbine at the paratrooper whom he had discovered behind the door (R18,25,31). He was then demanding an officer and readily surrendered his carbine when two officers approached (R19,33,39,41). The following day, after due warning, accused made a voluntary statement to a CID agent, reciting that while returning from delivering supplies in Reims,

"I stopped my truck when I got to our maintenance shop which is across the street from a dance hall and cafe that our boys go to * * * I was going into the dance hall to see if any of our men were therefor they quite often would stop there on the way home. I left my truck running and walked into the hallway of the dance hall- the door being open. I went to the end of the hallway to another door and there was a group of troopers waiting there drinking and talking rather loud * * * the troopers asked me where I was going. I said I had come to see if any of my men were in the dance so that I could take them home. They said this is a private dance and there are no niggers here tonight. I said OK, hunched my shoulders and turned around or started to when I was struck in the mouth by one of the group. I started to fall down when I was hit a glancing blow on the back of my helmet liner with a champagne bottle * * * I went down at least partially and my liner was knocked off. I got up swinging for dear life trying the best I could to defend myself. Somebody yelled 'kill him' a few times and 'kill that nigger' while another said 'Why don't you stop beating that poor Joe - - your'e drunk, stop it * * * Then I started to run and I got outside the hallway gate into the street and they caught me again. We started fighting again and then I broke away again and ran across the street. I ran up to our maintenance shop to the Polish guard in front of it. I tried to get him to come and help me and he didn't understand me. So I beckoned to him and pointed to him and with gestures and tugs I got him to walk down with me. About halfway * * * I asked for the gun but he didn't understand me. It was slung over his arm so I just slipped it off his arm and we both crossed the street together. We went to the door of the hallway of the dance hall and the crowd of soldiers there dispersed. Before I knew what happened I pulled the trigger. I didn't aim at anybody. I just tried to scare the mob there out of the way so I could make it to my truck which was across the street between the dance hall and the shop, on the dance hall

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> side of the street. I pointed my gun at the mob of soldiers there who were coming for me. Then with the gun pointed at themI backed away with the guard beside me. I then asked the soldiers to see one of the officers. Two officers appeared and I handed the gun to one of the officers. The gun was a carbine and I knew it was automatic. The officers said * * * you better pray tonight that he lives. This was the first time I knew I shot somebody * * *" (R29; Pros.Ex. E).

4. For the defense, it was stipulated that if accused's commanding officer were present he would testify that accused's character was excellent, and his efficiency rating as a soldier, satisfactory. After his rights were explained to him, accused elected to remain silent (R46).

5. Accused was convicted of murder. Whether he deliberately aimed at deceased, as may well be inferred from the testimony of the prosecution's witnesses, or whether he "didn't aim at anybody" but "just tried to scare the mob by shooting at them", as he asserted in his pre-trial statement, the record is legally sufficient to support the conviction of murder for

> "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".

is one of the states of mind which, preceding or coexisting with the act or omission by which deathis caused, is comprehended within the term "malice aforethought" (MCM 1928 par. 148a, pp. 163-164). True, accused had been provoked by the deceased, and

> "The law recognizes the fact thata man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from malice, he

> may strike a blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if he were guilty of a deliberate homicide".

In such a case

> "The killing may be manslaughter only even if intentional; but where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists".

The evidence shows that after he was struck by deceased, accused left the spot and proceeded upon a course of co-ordinated action which consumed at least several minutes and which involved procuring a weapon and returning to where he had reason to believe he would find the deceased, finding him there and killing him. Under the circumstances

> "whether or not accused's intent to kill was formed suddenly, under the influence of an uncontrollable passionor emotion aroused by adequate provocation, whether or not a sufficient' cooling period' had elapsed * * * or whether the formation of the intent was a result of mere anger, were questions of fact peculiarly within the province of the court, whose determination thereof against the accused in finding him guilty of murder rather than manslaughter is supported by substantial evidence and will not be disturbed upon appellate review" (CM ETO 3042, Guy, Jr.).

6. The charge sheet shows that accused is 23 years eight months of age and was inducted, with no prior service, at Milwaukee, Wisconsin, 29 July 1942.

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

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8. The penalty for murder is death or life imprisonment as a court martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and 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. IV, pars.1b (4),3b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B K Seavey Jr Judge Advocate

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

BOARD OF REVIEW NO 2.

6 OCT 1945

CM ETO 16191

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| UNITED STATES | ) 65TH INFANTRY DIVISION |
| v | ) Trial by GCM, convened at Linz, Austria, 21 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| Private First Class LYLER RETHMEIER (20749615), Cannon Company, 259th Infantry | ) |

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

Specification: In that Private First Class Lyle R. Rethmeier, Cannon Company, 259th Infantry, did, in the vicinity of Urfahr, Austria, on or about 6 July 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Ladislow Skrobnlski, a human being by shooting him with a pistol.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convitions, one by summary court for wrongfully appearing at Camp Maxey, Texas in improper uniform, in violation of Article of War 96 and one by special court-martial for absence without leave for 28 days and breach of restriction, in violation of Articles of War 61 and 96 respectively. Three-forths of the members of the court present at the time the vote was taken concurring, he was



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sentenced to be dishonorably discharged the service, t forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing aurhority 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. Accused is a member of Cannon Company, 259th Infantry, Linz (R4, 11). On the evening of 6 July 1945, this organization sponsored a party at which wine, champagne and cognac were served (R5). Accused attended the party, which began about 1900 hours, and drank some of the liquor (R5,11). About 2100 hours he and Private First Class W. C. Davis left the party and went to the Polish Auhaf, a camp for displaced persons, (referred to throughout the record as a "lager"). which was approximately one mile and a half from Urfahr, the place the party was held (R5). Davis was carrying a carbine and accused an MI rifle. The latter also carried a foreign make pistol in a hip holster, beneath his field jacket. Before they left for the Polish Auhaf accused told Davis that he had one cartridge for the pistol (R11,12,13). Private First Class Lewis was on guard duty at the entrance to the lager, which is about 20 feet off the road and consists of an office building on each side of the road going into the lager. These buildings are connected by a shelter, which completely covers the entrance road at this point (R5,13,22). Davis deposited his carbine and accused his MI rifle at the office of the guard, with whom they spoke for a moment, and then they proceeded down the main entrance of the lager, where Davis met the girl he had come to visit. She was accompanied by her sister, and the four went to the girls room, which was in the first building on the left as they proceeded down the road from the entrance to the lager (R12,13,20). When they entered the room they found Sergeant Albert T Rogers and Private First Cla s George S Bacvinskas seated therein, drinking cognac with two other girls (R6,14). In about five minutes Davis, accused and the two girls accompanying them left the barracks. Accused was walking immediately behind Davis and when he (accused) reached the doorway of the barracks he called to Davis and said " he thought he might as well go home because he did not think he could do any good here this evening." Accused had come to see one of the girls who was with Rogers and Bacvinskas but Davis told him he knew some others in the lager. Davis took accused to a window in the same barracks and "pointed out another friend inside". Inside this room was a girl and "some DP men" and after Davis pointed them out to accused he and his two girl companions left the lager (R14,15,18).

Accused climbed through this window into a room where Anna Kotesovcova, two other girls and two men were present. The men were DPs -- Polocks" (R44,77). After a short while accused "pulled

out his pistol", the girls were frightened and Miss Kotesovcoa and her girl friend went out and reported the incident to the guard on duty (R78). Accused and one of the male displaced persons, who was present in Miss Kotesovcova's room, were seen leaving the back door of the barracks shortly therafter (R78). They proceeded to the entrance of the lager and went outside, passing within eight to ten yards of the guard on duty at the entrance (R21) and two male displaced persons who who were sitting there with the guard. One of these persons was a boy of about 13 years of age and the other a man about 35 years of age (R22). At a point under the roof that covers the entrance to the lager, the displaced man accompanying accused stopped and said "One minute". Accused said something to him and he followed accused out of the lager for a distance of about ten meters, where they stopped and engaged in conversation(R26,27,48). After they stood there for a short time ( estimated at from 5 to 15 minutes) accused pulled out a pistol and shot the man with whom he was talking, who was identified as Zdzislaw Skrobulski (R27,32,45,48,55). The man who was shot weaved slightly and fell to the ground (R23,45).

Accused ran to the guard post and put a belt, which contained a pistol on Tadensz Maberkiewicz, one of the displaced persons who was talking to the guard (R43,46). Accused told him to keep the pistol and belt but Maberkiewicz put it on a desk in the office of the entrance guard post. Accused went in the office, removed the pistol from the belt and put it in his pocket (R47). Sergeant James J Fahey found a belt and holster on the desk in this office about 2115 hours on the day in question and he also found a cartridge case (estimated caliber - P38) next to the body. The next morning he turned them over to Private First Class Thomas A Powell, a Criminal Investigation Division agent, and the latter gave them to Lieutenant Colonel Fred N Whitney, who made an investigation of the shooting (R33,68,69,76). During the course of this investigation accused admitted that the belt and holster were his property (R36).

Shortly after accused left the room in the barracks where Sergeant Rogers was visiting with some girls, Rogers heard a shot and went out to investigate. He found a man "laying nearly in the road, right in front of the gate there" (R6,7). A crowd had gathered and he tried to disperse them and to get an ambulance (R7,10). There was sufficient light so that one could see "pretty clearly" (R10). Accused was seen in the crowd, at this time, acting as an interpreter for Sergeant Rogers. Rogers asked accused to inquire of the crowd as to who shot the man. Accused spoke to someone in the crowd and then told Sergeant Rogers, "D.P's say soldier shot this displaced person and ran away" (R24). Accused asked Miss Kotesovcova, who was in the crowd, "where is the Polack that shot this Polack?" and she replied "You did". Accused

then told her "that if I said that the soldier done the shooting, he was going to shoot me" (R79).

Sometime later Private First Class George S. Bacvinskas approached accused in the crowd at the scene of the shooting and suggested that they go to Camp Dornach and "pick up the guard truck and go home" R63). Before they left for Camp Dornach, accused asked Bacvinskas to go and pick a pistol up for him. When Bacvinskas refused to do this, accused left for a few minutes and then returned and caught up with Bacvinskas. They walked to Camp Darnach, arriving there about 2200 hours, and entered a little shack where Private Clarence L Snow was on guard duty (R65,71). Accused had a P-35 automatic pistol in the pocket of his field jacket and he ask Snow to take the gun apart and throw it away. Snow broke the gun down into three parts and deposited them in a latrine about 200 yards down the road. Snow testified there was no clip in the gun and that he did not observe any bullet in the chamber (R72,73). Snow further testified he originally found this gun, he put it together and gave it to one of the soldiers in his section, and later loaned accused money to enable him to purchase the gun from this soldier. He subsequently saw the gun in accused's possession and on one or two occasions tore the gundown and oiled it for him (R73,74). Snow identified the belt and holster (R76,Pros. Ex 1) as the property of the accused (R75).

Private First Class Louis E. Fideli testified that for a little over two years he has been assigned to the Medical Corps and that during his training he received some instruction with reference to determining if a person is dead (R38-41). About 2200 hours on 6 July 1945, he took an ambulance to a displaced persons' camp on the outskirts of Urfahr and found a body of a man lying on the pavement about 25 feet from the entrance to the lager located there. He examined the body and found no pulse, heart beat or breathing. There was a hole in the center of his stomach, right above the naval. In Snow's opinion this hole in the body was the result of a gunshot wound. The body was beginning to get cold and clammy and by the time he got it to a funeral home, it was stiff. In his opinion the man was dead (R39,40,41).

Sergeant James J Fahey, 65th Infantry Division, Military Police Platoon testified thatabout 2115 hours on 6 July 1945 he was dispatched to the lager on the outskirts of Urfahr to conduct a certain investigation. He found the body of a man lying in the driveway between the road and the gate house. In his work in the military police he had occasion to examine dead bodies and while examining this body he found a clean bullet hole "right above the naval button". When the body was put on

a stretcher the arms were already stiffened out and the body was lifeless (R67,68,70).

With reference to accused's state of intoxication on the night in question witnesses testified that when he reached the Auhaf Lager "he'd been drinking pretty heavily * * * his face -- was extremely red" (R8); "he had become slightly boisterous, but not over-intoxicated" (R16); he did not appear to have control over himself physically, he became incoherent and grew progressively worse (16); when Private Davis showed him to thewindow of the displaced persons' barracks he had to assist him (R18); he was "very drunk", could not stand up straight without weaving, his words were "slurred", but he could always be plainly understood (R25), and after he and Private Bacvinskas reached camp Dornach, accused "passed out cold on the floor" and had to be loaded into a truck and brought back to his company (R67,75).

4. Captain Calvin Polivy, after being sworn as a defense witness, testified he was defense councel in the case and that he had been given no prior warning that the prosecution intended to call Anna Kotesovcova and Stanislaw Kujawinski as witnesses (R82).

Sergeant Rogers, accused's section sergeant, Technical Sergeant Howard P Henderson, accused's platoon sergeant and Second Lieutenant Robert G. Dammann, one of his company officers, testified that accused was a very good soldier (R84), whose character and general reputation were excellent (R84,86) and that they would like to have him back in the company(R86).

Accused after his rights as a witness were fully explained to him (R87), elected to remain silent.

5. That accused shot the deceased at the time and place alleged is clearly established by the testimony of several eye-witnesses. While there was no medical or other expert testimony offered as to the cause of death none was necessary. Death followed immediately after an abdominal gunshot wound and two soldiers, who had previous experience examining dead persons, testified convincingly as to deceased's condition. Under the circumstances the court was fully warranted in finding that Mr. Skrobulski met his death as a result of the gunshot wound inflicted by accused (CM ETO 7518, Bailey et al). There remains for consideration by the Board of Review the question of whether there is competent and substantial evidence to support the court's finding that the homicide constituted murder.

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



RESTRICTED

If the homicide herein described was committed with malice aforethought and without legal justification, the crime of murder is complete.

> "Malice is presumed from the use of a deadly weapon" (MCM, 1928, par.112a, p 110).
>
> "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, etc." (MCM, 1928, par. 148a p.163).

There is substantial evidence to support the court's conclusion that accused acted with malice aforethought in perpetrating this homicide. Eye-witnesses testified he deliberately drew a pistol from its holster and shot the unarmed and defenseless victim without provocation of any description. The use of a deadly weapon under such circumstances is sufficient alone to warrant an inference that the killing was deliberate and with malice aforethought. Since the court's determination in this regard is sustained by substantial evidence, it will not be disturbed upon appellate review (CM ETO 9410, LORAN).

The question of the effect of intoxication upon accused's deliberative faculties was one of fact for the court and there is substantial evidence to support their conclusions therein. While there is considerable evidence that accused was highly intoxicated, his actions in attempting to give the gun to an eyewitness to the shooting, in threatening Miss Kotesovcova, in assisting Sergeant Rogers question witnesses and his deliberate efforts to dispose of his pistol clearly indicated he was aware of the situation he was in. The findings of the court on this question are clearly sustained by the evidence (CM ETO 6229, Creech).

6. The charge sheet shows that accused is 26 years of age and was inducted 6 January 1941 at Oliva, Minnesota. Prior service is shown as "Btry F, 125th Field Artillery from 4-19-38 to 6-1-40; Btry D,215th Coast Artillery from 7-1-40 to 1-5-41".

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

8. The penalty for murder is death or life imprisonment as the court Martial may direct (AW92). Confinement in a penitentiary is

authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

Earle Asphun Judge Advocate

Ronald Smith Judge Advocate

John J. Collins, Jr. Judge Advocate



RESTRICTED

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

BOARD OF REVIEW NO. 3

16 OCT 1945

CM ETO 16196

| | |
|---|---|
| U N I T E D S T A T E S | 84TH INFANTRY DIVISION |
| v. | Trial by GCM, convened at Weinheim, Germany, 7 August 1945. Sentence as to each accused: Dishonorable discharge (suspended), total forfeitures, and confinement at hard labor for 20 years. Delta Disciplinary Training Center, Les Milles, Bouches duRhone, France. |
| Privates First Class SALVATORE LEONE (31257356), and JAMES P. LA BRAKE (32948856), both of Company F, 335th Infantry | |

OPINION by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

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

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

LA BRAKE

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class James P. La Brake, Company "F", 335th Infantry, did, at or near Krefeld, Rhine Province, Germany, on or about 17 March 1945, desert the service of the United States and did remain absent in desertion until 6 April 1945.

LEONE

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Salvatore Leone, Company "F", 335th Infantry, did, at or

near Valkenburg, Holland, on or about 19 March 1945, desert the service of the United States and did remain absent in desertion until 8 June 1945.

Each pleaded not guilty and, two-thirds of the members of the court present at the time the votes were taken concurring, each was found guilty of the Charge and Specification preferred against him. Three-fourths of the members of the court present at the time the votes were taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for 20 years. As to each, the reviewing authority approved the sentence, ordered it executed but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as the place of confinement.

The proceedings were published by General Court-Martial Orders No. 113 and 114, Headquarters, 84th Infantry Division, APO 84, U. S. Army, 14 August 1945.

3. Evidence for prosecution:

On 17 March 1945, La Brake absented without leave from his company at Krefeld, Germany (R7-8,13; Pros.Ex.A). On the 18th, Leone was sent on detail to Valkenburg, Holland. On the 19th he was absent without leave and failed to return with the detail to the company which was still at Krefeld, Germany (R8-10,13; Pros.Ex.A,B). The company had been at Krefeld, Germany for approximately four or five days in a rest area (R12) which was approximately three miles from the front lines "on the banks of the Rhine River". While "primarily back for a rest", the company was doing some training (R8,12) -"more or less platoon tactics, reorganization and regrouping" and "preparation for a move upon completion of our assignment" (R12).

La Brake was returned to military control by apprehension at Munchen-Gladbach, Germany, on 6 April 1945 (R10-11; Pros.Ex.C).

A stipulation showing Leone's return to military control was admitted in evidence (R11; Pros.Ex.B). Concerning this stipulation, the following colloquy appears in the record of trial:

"Prosecution: * * * It is stipulated by and between the prosecution, the defense, and the accused, Salvatore Leone, that said accused returned to military control on 8 June 1945.

President: Pfc Leone, do you have any objection to that stipulation?

Pfc Leone: No sir.

President: Is that stipulation correct?

Pfc Leone: It wasn't exactly that way, sir. I was under military control before June. I was put under control by the MP's and brought to Brussells, they kept me there for a while and then they took me to Paris. I was on the move all the way through.

President: (to prosecution) Did the accused understand what he was signing when the signed that stipulation?

Prosecution: I believe so, sir.

Defense: He understood what he was signing, sir. I signed that stipulation and I understood what I was signing. There is no way to prove where he was located when he first returned to military control other than his own testimony, and he does not desire to take the stand and testify" (R10).

4. No evidence was presented by defense. After his rights as a witness were explained, each accused elected to remain silent.

5. a. Substantial competent evidence established La Brake's unauthorized absence at the place and time and for the duration alleged and found; likewise, Leone's unauthorized absence at the place and time alleged and found. The question, therefore, is whether the record contains substantial competent evidence from which intents to desert may be inferred.

Under a "straight" desertion specification, the prosecution could prove "short" (AW 28) desertion (CM 245568, III Bull. JAG 142; CM ETO 5117, DeFrank). To prove "short" desertion it was

> "incumbent on the prosecution to present substantial evidence to establish that /each/ accused at the time of his initial absence (a) knew that present or imminent hazardous duty was required of him and (b) that he intended to avoid its performance (CM ETO 7532, Ramirez; CM ETO 8104, Shearer, CM ETO 5958, Perry, et al)" (CM ETO 8708, Lee).

Accused absented themselves from a rest area where their company had been for four or five days undergoing training and "preparation for a move upon completion of our assignment". The record contains not the slightest evidence of when or where the company was to move or did move - to say nothing of accused's knowledge thereof. Training of a combat unit imports ultimate combat, but is not proof of its imminency and is insufficient alone to support an inference of an intent to avoid hazardous duty (CM ETO 5958, Perry, et al); otherwise, all absences without leave from combat units would support findings of an intent to avoid hazardous duty.

Though accused absented themselves from a rest area which was some three miles from the front lines, the instant case varies materially from CM ETO 6079, Marchetti. There Marchetti had first absented himself without leave to avoid hazardous duty and had

> "remained absent until he was 'picked up' approximately one month later. * * * Shortly [there]after * * * he again absented himself * * *. Although his unit was in a 'rest area' at this time, it appears that such area was a rest area more in name than in fact. The area was on Anzio beachhead, was subjected to occasional shelling and was separated from the enemy lines by a distance of only a mile and a half at the closest point, and the enemy lines were nowhere more than ten miles distance * * * [About 3½ months later he surrendered himself] 'only after his unit had broken out of the beachhead and had gone on to participate in the campaign of France'" (CM ETO 6079, Marchetti, Dig. Op. ETO, p.57-58).

Neither accused's unauthorized absence followed hard upon a previous unauthorized absence to avoid hazardous duty, as did Marchetti's. Moreover, the rest area from which accused absented themselves was not, insofar as the record discloses, being subjected to shelling, occasional or otherwise, as was the area from which Marchetti absented himself. The Board of Review is of the opinion that the court could not properly infer from the circumstances shown that either accused was aware of the existence of imminence of hazardous duty and absented himself to avoid such duty (CM ETO 8708, Lee; CM ETO 13103, Israel; CM ETO 8300, Paxson).

There remains for consideration whether the court could have properly inferred that accused absented themselves with intents not to return.

b. As to La Brake: La Brake's unauthorized absence of 20 days did not, of itself alone, constitute a substantial basis for inferring an intent not to return (CM ETO 6497, Gary, Jr., Dig Op ETO, p.232) even though it was terminated by apprehension (CM ETO 8631, Hamilton, Dig Op ETO, p.234-235) many miles away. Since La Brake was not shown to have absented himself to avoid hazardous duty, the circumstances under which he absented himself cease to have particular significance. The Board of Review is of the opinion that the court could not properly infer that he absented himself with, or sometime during his absence formed, the intent not to return. A number of cases have been found where unauthorized absences of comparable durations were held, in conjunction with other circumstances, to constitute desertion. Each is readily distinguishable from the instant case. In the instant case, La Brake was neither shown to have absented himself to avoid hazardous duty as in CM ETO 4490, Brothers, Dig Op ETO p.224, nor to have absented himself for a second time as in CM ETO 7379, Keiser, Dig Op ETO 237-8; CM ETO 9333, Odom, Dig Op ETO 238-239; and CM ETO 9957, Robinson,

Dig Op ETO 239. To hold that the record of trial supports a finding of desertion as to La Brake would be, in effect, to extend the doctrine of CM ETO 1629, O'Donnell, Dig Op ETO 219-220. The Board is not disposed so to do.

c. As to Leone: The stipulation showing Leone's return to military control should not have been accepted. It affirmatively appears that Leone claimed to have returned to military control prior to 8 June 1945, the time he was stipulated to have returned (see CM ETO 4564, Woods). With the stipulation eliminated there only remains the proof that Leone absented himself without leave on 19 March 1945 under the shown circumstances.

One of the items of proof for desertion listed in MCM, 1921, par.409, p.344, and MCM, 1928, par. 130a, p.143 is "(c) that his /accused's/ absence was of a duration and was terminated as alleged". With the stipulation eliminated, neither the time, place nor manner of Leone's return to military control was proved. The place of termination is not an essential element of the offense of desertion (CM 233688, 20 B.R. 49,58); nor the manner of termination (CM 159950, Dig Op JAG 1912-40 par.416(7), p.267; CM 230278, 17 B.R. 349; CM 236914, 23 B.R./II Bull JAG 270). What of the time of termination where, as here, the intent to desert may be inferred, in part at least, from the duration of the unathorized absence?

In so-called "short" (AW 28) desertions proof of either the duration of the absence (CM ETO 2473, Cantwell) or the time of its termination (CM NATO 2044, III Bull JAG 232) is not necessary because the offense is complete when the person absents himself without authority from his place of service with intent to avoid hazardous duty or shirk important service (Cantwell, supra). The offense of "straight" desertion is complete when a person absents himself "with intent not to return" (MCM, 1928, par.130a, p.142). In the light of the foregoing authorities cited in this and the preceding paragraphs, the Board concludes that once an unauthorized initial absence is shown, to sustain a conviction of "straight" desertion only such further allegations need be proved as will support an inference of an intent not to return.

It was proved that Leone absented himself without leave on 19 March 1945.

> "The condition of absence without leave with respect to an enlistment having once been shown to exist may be presumed to have continued, in the absence of evidence to the contrary, until accused's return to military control under such enlistment" (MCM, 1928, par.130a, p.143).

Leone could be presumed to have continued absent without leave only "until his return" which, as evidenced by his presence in court to say nothing of his statement to the court, was sometime subsequent to his initial absence and prior to his arraignment. It, therefore, follows that he may have re-

turned, as he stated he did, prior to 8 June 1945, when he was alleged and found, but not proved, to have returned. The Board concludes that the evidence shows no more than that Leone absented himself without leave on 19 March 1945 and remained absent without leave until his return to military control at a time not shown. To hold otherwise would be to enable the prosecution to throw upon an accused the burden of proving his return, for, without knowledge of or regard for the actual duration of an unauthorized absence, the prosecution could allege it to have been of a duration sufficient to support an inference of an intent to desert and thereby cast upon an accused the burden of proving his return at an earlier date than alleged. But implicit in proof of return is proof of an absence prior to return; the former presupposes the latter. To thrust such a burden upon an accused would be to compel him to present evidence against himself, and is, ineffect, violation of Article of War 24 (cf: CM ETO 2297, Johnson and Loper).

A finding of an unauthorized absence on a specified day, commenced by an escape from confinement, has been held insufficient, nothing further being shown, to support an inference of an intent to desert (CM 261112, III Bull JAG 379, cf: CM 281156 (1945) IV Bull JAG 277). By the same token, proof of an unauthorized absence for an undetermined period, commenced under the circumstances as here shown, does not support an inference of an intent to desert.

Leone's offense of absence without leave was committed when he absented himself. Insofar as the offense of absence without leave was concerned, proof of its duration was unnecessary (cf: CM NATO 1087, III Bull JAG 9).

6. Public Law 221, 78th Congress, approved by the President 20 January 1944, amended the statute relating to loss of nationality or citizenship as a result of conviction by court-martial of desertion in time of war (54 Stat. 1168; 8 U.S.C. 801 (g)), so as to limit its application to persons who are dishonorably discharged or dismissed from the service as a result of such conviction. The amendment provides for restoration of nationality or citizenship lost by desertion in time of war to persons restored to active duty in time of war, or re-enlisted or re-inducted in time of war with permission of competent military or naval authority. The amendment, however, does not obviate the necessity of relieving, by appropriate order of restoration, the jeopardy in which the accused's citizenship has been placed by his illegal conviction of desertion and the sentence of dishonorable discharge based thereon, despite its suspension by the reviewing authority.

7. The charge sheets show that accused La Brake is 20 years of age and was inducted, without prior service, 18 December 1943; that Leone is 25 years seven months of age and was inducted, without prior service, 17 December 1942 at Fort Devens, Massachusetts.

8. The court was legally constituted and had jurisdiction of the persons and offenses. Except as hereinbefore stated no errors affecting

the substantial rights of accused were committed during the trial. The Board of Review is of the opinion the record of trial is legally sufficient to support the sentences and, as to La Brake, so much of the findings as involves findings that La Brake did at the time and place alleged absent himself without leave from the service of the United States and did remain absent without leave until the time alleged in violation of Article of War 61, and, as to Leone, so much of the findings as involve findings that Leone did absent himself without leave from the service of the United States and did remain absent without leave until his return to military control at an unshown time in violation of Article of War 61.

9. The penalty for absence without leave is such punishment as a court-martial may direct (AW 61). The designation of the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, was proper (Ltr. Hqs. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 Aug. 1945).

B. R. Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

(TEMPORARY DUTY) Judge Advocate

(264)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 16 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by Act 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by Act 1 August 1942 (56 Stat. 732; 10 USC 1522) is the record of trial in the case of Privates First Class SALVATORE LEONE (31257356) and JAMES P. LaBRAKE (32948856), both of Company F, 335th Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of the Charge and Specification against each accused, except so much thereof as involves findings of guilty that LaBrake did absent himself without leave at the time and place and for the period alleged in violation of Article of War 61, and, as to Leone, so much of the findings of guilty as involve absence without leave at the time and place alleged until his return to military control at a time not shown, in violation of Article of War 61, be vacated, and that all rights privileges and property of which each accused has been deprived by virtue of that portion of the findings, viz: conviction of desertion in time of war, so vacated, be restored.

3. Inclosed are forms of action designed to carry into effect the recommendation hereinbefore made. Also inclosed are draft GCMO for use in promulgating the proposed actions. Please return the record of trial with the required copies of GCMO.

B. FRANKLIN RITER
Colonel, JAGD,
Acting Assistant Judge Advocate General.

( Findings and sentence vacated in part in accordance with the recommendation of Assistant Judge Advocate General. GCMO 559(LaBrake), USFET, 27 Oct 1945. GCMO 560 (Leone), USFET, 27 Oct 1945).

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater [redacted]
APO 887

BOARD OF REVIEW NO. 4

13 SEP 1945

CM ETO 16198

UNITED STATES

v.

Private AMILIO G. RUSSOMANNO (42105895) Company L, 317th Infantry

80TH INFANTRY DIVISION

Trial by GCM, convened at APO 80, U. S. Army, 3 August 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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HOLDING by BOARD OF REVIEW NO. 4
DANIELSON, MEYER and ANDERSON, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support [redacted] so much of the findings of guilty as involves absence without leave at the place alleged from 4 April 1945 to 10 April 1945 and legally sufficient to support the sentence. There being stipulated testimony and accused's unsworn statement showing a return to military control on 10 April 1945, the record of trial is legally insufficient to support so much of the findings of guilty as involves absence without leave after that date ( CM ETO 16240, Christiano).

Peter A. Danielson Judge Advocate

Martin A. Meyer Judge Advocate

John R. Anderson Judge Advocate

AGPO 2-45/19M/C50%ABCD

16198

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

CM ETO 16240

30 AUG 1945

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| UNITED STATES<br>v.<br><br>Private ROCCO J. CHRISTIANO (42104241), Company L, 317th Infantry | 80TH INFANTRY DIVISION<br><br>Trial by GCM, convened at APO 80, U.S. Army, 3 August 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 12 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |

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

The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support so much of the findings of guilty as involves absence without leave at the place alleged from 4 April 1945 to 10 April 1945 and legally sufficient to support the sentence. Assuming that the plea of guilty went to the entire period alleged, which is not clear, it must in any event be deemed a plea of not guilty in view of stipulated testimony and accused's unsworn statement showing a return to military control on 10 April 1945 (MCM, 1928, par.70, pp.54-55; CM ETO 9779, Stanley and Shepherd).

Wm. J. Burrow, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

Donald R. Carroll, Judge Advocate

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

BOARD OF REVIEW NO. 3

CM ETO 16250

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| U N I T E D S T A T E S | OISE INTERMEDIATE SECTION, COMMUNICATION ZONE, UNITED STATES FORCES, EUROPEAN THEATER |
| v. | |
| Private WILLIE W. GREEN (34027264), 453rd Quartermaster Laundry Company | Trial by GCM, convened at Reims, France, 31 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania |

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HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, 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 92nd Article of War.

Specification: In that Private Willie W. Green, 453rd Quartermaster Laundry Company, did, at Verzenay, France, on or about 7 July 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fifth Grade Raymond J. Cully, a human being, by shooting him with a pistol.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for frequenting an off limits hotel in violation of Article of War 96. 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 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 may be summarized as follows:

On 7 July 1945, accused and other members of the 453rd Quartermaster Laundry Company were billeted in a large building located in Verzenay, France (R7-9). At about 0100 hours on the morning of 7 July, accused, who was somewhat drunk at the time, and who was bleeding from a cut over his eye, entered a room in the building and began to point a pistol indiscriminately at several of the men with whom he shared quarters. Technician Fifth Grade Raymond J. Cully (the deceased), after telling him to put the pistol away and go to bed, approached him, and, after a brief struggle, succeeded in disarming him. During the struggle deceased was heard to say to Green, "If you take my pistol I'll kill you" (R9,13).

Shortly after he was disarmed, accused went to Private Arthur L. Harris and asked him whether he had a gun. When Harris produced a pistol, accused took it from him over his protests and despite his warning that the weapon was loaded (R17,18). "Somewhere about" 0400 or 0500 hours a member of accused's company heard a match being struck and, looking up from his bunk, saw accused leaning over a bed with a pistol in his hand. However, nothing further happened at this time (R14,16). When the men arose at about 0630 hours Harris saw the accused and asked him to return the pistol which he had taken the night before. Accused replied, "I'll give it to you", but left the room without doing so (R18,19).

At about 0700 hours, while Cully was in the latrine, accused came to the door, stepped inside, and said to Cully, "Where is my gun" (R22,23,32). At this time, Cully was some twenty feet distant from the accused (R23,25; Pros.Ex.C). When Cully made no response, accused repeated the inquiry, at the same time drawing a pistol, and, when he again received no response he fired toward Cully three times. At the second shot, Cully was heard to say, "You have shot me", and fell to the floor (R23-25,32,34). He died a short time later as the result of shock due to hemorrage caused by a gun shot woumdof the right chest(R27).

Two men who were in the latrine at the time of the shooting stated that they observed Cully made no moves during the time accused was asking Cully about his pistol other than those involved in turning away from a urinal trough and buttoning his pants "like he was figuring to come out". However, in turning away from the urinal he did turn

toward accused (R24,34). After Cully fell, the pistol which he had taken from accused the previous night was found on the floor lying between his outstretched arms (R33-35). Accused was not normally of a quarrelsome disposition and had been friendly with the deceased in the past (R10,13,21,31). He did not appear to be drunk or otherwise abnormal at the time of the shooting (R20,26,31).

4. For the defense, Private First Class Oscar Broussard of accused's company testified that on the evening of 6 July he, a Private Jones and the accused, drank two quarts of cognac as well as some beer and returned to their company area at about midnight. Upon their return accused and Jones "went to the gambling table to gamble" and a short time later "we went to the hospital". While at the hospital accused received treatment for a cut over his eye. They returned to the company at about 0230 or 0300 hours. He did not know the source of accused injury (R37,38). Jones testified similarly but stated that the three men drank wine, champagne and cognac on the evening in question (R41).

Accused, after being advised of his rights as a witness, elected to testify on his own behalf. He stated that he, Broussard, Jones, and a man named Allen, drank cognac on the evening of 6 June and thereafter returned to their billet and began to gamble. Broussard and another man started to fight and he attempted to separate them without success. Following this, he started upstairs and:

> "I no more than get upstairs and opens the door and that's the last that I remember. I had a cut over my eye. The last thing I remember Cully and another soldier had me down on the floor. I don't know who the other soldier was. They had me down. Cully grabbed this arm here (witness indicating his left arm) and twists it. As close as I remember I held the gun with both hands. He twisted my arm around to his shoulder and took the gun in this hand. The other soldier, I don't know who he was. I was bleeding around on my face. Then they had us in a jeep carrying us to a dispensary in a hospital somewhere. I had this cut on my head. I remember somethings but I don't remember everything. I remember laying on a table, the doctor giving me an X-ray of my shoulder and his saying that it was fractured. I remember him sewing up my eye. After that we comes back to the billets. I remember that I had this other pistol in my duffle bag. I had it there before I left for

> the dispensary. I comes back and tries to pull off my clothes but my shoulder was hurting bad so I lies down on my bed until day. I don't know who woke me up but I woke up and goes to the latrine. I stops by the first urinal trough by the door. Cully was standing by the other one and I asked him for my pistol. "Give me my gun", I asked him. He didn't say anything but he had a mean look on his face. I asked him for my gun and I remember him reaching for his pocket. I got scared. I don't know why he wanted the gun last night and he was on one end of the latrine reaching for his pocket. I figured he couldn't give me the gun from that end. He was looking at me and he had a mean look on his face. I figured he was going to shoot me so I comes out with the pistol I had and fired. I fired it twice and he fell".

He had nothing against Cully and regarded him as a friend (R43). He did not remember pointing a pistol at various men in the billet, nor did he remember taking a pistol from Harrison that night in question (R44). When he awoke the next morning he "didn't seem to be drunk * * * just felt crazy - like about the head" (R45). At the time he fired at Cully, Cully had partially withdrawn his pistol from his pocket. When asked if it was not possible that in withdrawing the pistol Cully intended to return the pistol to him in response to his request he replied:

> "He wouldn't give me the gun from that end of the latrine * * * He was just standing there with a mean look on his face and didn't say anything. * * * I thought he was going to shoot me so I shot him" (R45).

5. The evidence showed that accused killed Technician Fifth Grade Raymond J. Cully at the time and place alleged, under the circumstances from which the court clearly could find that he acted with the requisite malice aforethought to constitute his offense that of murder (CM ETO 292, Mickles; CM ETO 3042, Guy; CM ETO 6682 Frazier; CM ETO 8533, Baptiste; CM ETO 15200, Bobo). While accused sought to show that he acted in self-defense, in order for a homicide to be excusable on this ground:

> "The killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or the lives of those

whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist with the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense, the person doing the killing must not have been the aggressor and intentionally provoked the difficulty" (MCM,1928,par.148a,p.163).

Manifestly accused cannot avail himself of the right of self-defense under the circumstances of the instant case. Nor can there be any suggestion here that the death was inflicted in the heat of a sudden passion caused by adequate provocation, thus reducing the offense to voluntary manslaughter. Assuming the provocation to have been adequate in the first instance, a "cooling period" of some five hours elapsed between the time of the provocation and the homicide, and during this interval accused had an opportunity to deliberate upon his actions and to plan a means of revenge (cf: CM ETO 292, Mickles, supra; CM ETO 4497, DeKeyser). There was no showing that accused was not legally responsible for his actions, either because of drunkenness or otherwise. The record of trial amply supports the court's finding that he was guilty of murder, as alleged.

6. The charge sheet shows that accused is 26 years of age, and was inducted 20 March 1941 at Fort Bragg, North Carolina. 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 murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b (4), 3b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

(TEMPORARY DUTY) Judge Advocate

16250

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

BOARD OF REVIEW No. 2

5 DEC 1945

CM ETO 16261

| | |
|---|---|
| UNITED STATES | 75th INFANTRY DIVISION |
| v. | |
| Private First Class HENRY L. AHRENS (36842765), Company C, 54th Signal Battalion | Trial by GCM, convened at Tourmelon-Le-Petite, France, 1 and 2 August 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

HOLDING BY BOARD OF REVIEW No. 2
HEPBURN, HALL and COLLINS, Judge Advocates

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

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

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

Specification 1: In that Private First Class Henry L. Ahrens, Company C, 54th Signal Battalion, did, in conjunction with Private First Class Charles E. Ingream, Company C, 54th Signal Battalion, at La Cave, Oeuilly, Marne, France, on or about 6 June 1945, wrongfully commit an assault upon Gaston Roulot by pointing a pistol at him.

Specification 2: In that * * *, did, in conjunction with Private First Class Charles E. Ingream, Company C, 54th Signal Battalion, at La Cave, Oeuilly, Marne, France, on or about 6 June 1945, wrongfully commit an assault upon M. Albert Masson by pointing a pistol at him.

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

Specification: In that * * *, did, in conjunction with Private First Class Charles E. Ingream, Company C, 54th Signal Battalion, at La Caye, Oeuilly, Marne, France, on or about 6 June 1945, unlawfully enter the dwelling of Gaston Roulot, with intent to commit a criminal offense, to wit: rape, therein.

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

Specification 1: In that * * *, did, in conjunction with Private First Class Charles E. Ingream, Company C, 54th Signal Battalion, at La Cave, Oeuilly, Marne, France, on or about 6 June 1945 forcibly and feloniously against her will, have carnal knowledge of Mlle. Lucienne Roulot, to wit: while the said Private First Class Charles E. Ingream had the carnal knowledge as aforesaid, the said Private First Class Henry L. Ahrens stood guard over the other members of the household then present.

Specification 2: In that * * *, did, in conjunction with Private First Class Charles E. Ingream, Company C, 54th Signal Battalion, at La Cave, Oeuilly, Marne, France, on or about 6 June 1945, forcibly and feloniously against her will, have carnal knowledge of Mme. Germaine Masson, to wit: while the said Private Henry L. Ahrens had the carnal knowledge as aforesaid, the said Private First Class Charles E. Ingream stood guard over the other members of the household then present.

Accused pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

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

On 6 June 1945 (R13), at about 0330 hours (R14), accused, a member of Company C, 54th Signal Battalion (R34) with another soldier,

came to the house of Gaston Roulot, La Cave, Ouilly (R12), France (R22). Roulot was awakened and indicated through the window to the soldiers that he could not open the door. A shot was fired and still Roulot did not open the door. The soldiers knocked "stronger" at the door, Roulot, fearing the door would be broken, opened it. The accused called him "Boche", pointed a revolver at him and told him to take off his shirt "because it was an American shirt". Roulot was greatly "terrorized" and could hardly move. He explained that there was a small baby in the house and that his wife was sick but "they didn't want to understand anything". They "made" him go upstairs following with a revolver pointed at him. For the next half hour, in the room where his wife and baby were, Roulot tried without success to pursuade them to depart (R13). At about this time, Roulot's married daughter, Germaine Masson, and her husband, Albert Masson, were "forced" into the same room (R13, 20). Lucienne Roulot, the eighteen year old unmarried daughter of Gaston Roulot (R29, 14), was also in the room in bed (R30). The accused began to touch and caress Germaine Masson and tried to induce her to leave the room while Albert Masson tried to restrain her (R24-25). Accused held her hand "tightly" so she could not escape, although she tried. He had a revolver in the other hand and she was afraid he would shoot her husband (R25). He took her into another room while the other soldier remained and sat on the wife's bed with a revolver always in his hand (R13). Accused, with revolver in his hand, pushed Germaine Masson on to the bed. She pushed him back and then he violently pulled her on the bed again. He then fell on her to prevent her arising while she cried and shouted (R 25, 15). Accused then "took out his penis and introduced it in /her/". While accused was with Germaine, the other soldier came near the door and fired two shots (R25, 26, 30). Accused allowed her to return to her father's bedroom and he stood on the stair landing menacing "us all" while the other soldier went out with Lucienne Roulot (R25, 30). "Under the menace of the revolver", the other soldier took Lucienne Roulot from the room and "did what he should not have done", he "raped /her/ and /she felt/ there had been a penetration" (R30). She became sick and called for a basin. The soldier "went on /her/ again" under the menace of the revolver (R30, 31). She could not do anything; she was under the "menace" of the revolver and she could not get away (R30). She testified "as I haven't been with a man before, I don't know anything, but the doctor when he came told me I had been with a man. There had been a penetration" (R32). He then took her back to the mother's room to her bed where he sat beside her and kissed her (R31). While the soldier was out with Lucienne, accused again took Germaine, "at the menace of his revolver" to the stair landing, forced her to take off her clothes and again "introduced his penis to /her/". He then allowed her to arise. He told her several things she could not understand, and then took her into the other room and, on the carpet at the foot of the bed, forced her to have intercourse with him a third time while her sister, Lucienne, was on the bed with the other soldier. He then let her go back to her father's room and he remained on the landing with his revolver in his hand (R25). After

the other soldier returned with Lucienne to her mother's room and while he talked to her, accused went out, brought a car to the front door, and called his companion who went out with him about 0530 hours (R14)after shutting the people in the room (R26). The automobile left in the direction of Epernay (R14). At about 0530 hours, 6 June 1945, the accused, driving an automobile, accompanied by Charles Ingream, approached the guard gate of 54th Signal Battalion at a "pretty good rate" of speed, wavering all over the road. He hit the gate with the motor vehicle. They were both drunk and the guard told them to go to bed, whereupon accused parked the vehicle alongside a building about 75 feet inside the gate and with Ingream walked to the chateau where they lived (R36-37).

At about 0900 hours a French doctor examined Mme. Germaine Masson and Mlle. Lucienne Roulot. Mme. Masson had had a few "hygienic cares" and an internal injection. Particularly, she was in a great state of nervousness, agitation and fright. Since she was five months pregnant, and had had another baby, it was impossible to tell whether she had had sexual intercourse within several hours previous to the examination. Lucienne Roulot is no longer a virgin but the doctor could not say precisely whether she had lost her virginity this same morning or on a previous occasion (R11). He found no trace of semen by examination with his finger. He did note a swollen part at the edge of the lips which is a part of the muscles inside at the edge of the vagina the result of friction or a knock. He did not believe that this swelling could be caused by anything other than a penis (R12).

4. a. After being advised of his rights by the President of the court, who was also the law member, accused elected to make an unsworn statement which is summarized as follows:

He, Ingream and three cooks drank intoxicants at the chateau. They had "two or three or four" bottles. They went from there to a family house in the village where they drank until 2400 hours. After that, he did not remember events. Before coming in the army over a year ago, he worked in a copper mine. He was in a tank outfit and volunteered for the paratroopers. He wanted to go overseas. He has a wife, one child and expecting another. He has never been in any trouble before he got in the army (R60-61).

b. Three soldiers who were with accused and Ingream on 5 June 1945 from early in the evening until about 2230 hours testified that they were both very drunk; that the group drank five bottles of wine, one cognac and one "calvadose"; that accused and Ingream drank most of it; that neither accused nor Ingream were armed; and, that both were good or excellent soldiers. One witness saw them next day and they looked like they had been "on a terrible drunk" (R40-47). One of the men left the party early because he was afraid to ride back with accused because of his drunkenness

(R41).

c. An officer of accused's organization testified that all small arms were locked in the supply room and a sergeant was the only person who had access to them; that during the latter part of May he made a personal check for small arms, including accused's bags; and that on 6 June he found no pistols in accused's possession (R53-54).

d. On 7 June 1945, the Roulot home was visited by a soldier and found to be in a state of disorder. Empty wine and champagne bottles were strewn about the house and an unsavory oder was present (R49-50). By agreement of prosecution and consent of accused the former testimony of witnesses at another trial was admitted (R55) as follows: One Colnet, neighbor of the Roulot family said the general reputation of Lucienne Roulot for chastity, truth, and veracity was bad. He had seen her pulling down her skirts after finishing making love with German soldiers. He had seen her kissing and associating with German soldiers every day. Madame Roulot's reputation is also bad; he, the witness, had relations with her and she had lied "plenty" to him concerning many matters (R55-58). Another member of the community, said the general reputation of Lucienne Roulot for truth and veracity was "very bad in all" (R59) and that she didn't like the Roulots' because "they are not a good family" (R60).

e. With consent of accused, and prosecution, defense introduced the stipulated testimony of Captain Koerper, Medical Corps, to the effect that on 6 June 1945 he was called to examine two French women who were allegedly raped six hours previously and found both greatly upset and crying intermittently. The older woman, several months pregnant, told him she was neither bruised torn or scratched and he did not consider vaginal examination necessary. The younger told him she was a virgin prior to the alleged rape. He examined her and found that the vaginal orifice showed slight induration. The hymeneal ring was not intact but there were no indications that it had been recently torn. The vaginal orifice was large enough to admit penetration. These facts can in no way be construed to mean she was or was not a virgin prior to the alleged attack. It was also impossible to state in view of these findings that she had had intercourse lately (R61).

5. After arraignment and before entering pleas to the general issue, defense entered a special plea on the ground that the case was not investigated in compliance with Article of War 70, pointing out that the investigating officer was appointed on 13 June 1945 whereas the charge sheet was dated 20 June 1945 (R5 reverse). The trial judge advocate advised the court that the charges had been redrafted after the investigation (R6). The defense further contended that accused was not present at the investigation and offered to place accused on the stand to testify to the fact. The President of the court, who was also the law member, adjourned the court "for the purpose of permitting the law member to meet with the Division

Judge Advocate" (R7). The court reconvened the next day, 2 August 1945, and admitted, over objection by defense, the charge sheet dated 13 June 1945 for the purpose of showing that an investigation had been made of the crime alleged (R9, Pros. Ex. A). Defense counsel continued to object because accused had not known the nature of the charges, had no "right" (sic) to cross examine and confront witnesses during the investigation in direct violation of Article of War 70. The law member overruled the special plea of defense subject to objection of members of the court; he declared:

> "As to the special plea in abatement, investigation of the records in this case discloses that this set of charges had been investigated four times. Once by Military Police, twice by the authorities of the French Army, and once more by our own military authorities. In the case of the last investigation, the investigating officer certified over his own signature that the accused was present and had full opportunity to cross examine every witness. For that reason it is obvious that the accused has made false statements to his counsel or that counsel has tolerated fraud in the conduct of the case. Because of the fact that the record shows that the accused was present during an investigation and had full opportunity to cross examine the witnesses, the plea in abatement is not sustained" (R9).

6. It is obvious that the law member, trial judge advocate and defense counsel were not familiar with the principle that non compliance with the provisions of the 70th Article of War does not affect the jurisdiction of the court and that the investigation of the charges under said Article is an administrative process intended primarily for the benefit of the appointing authority (CM ETO 229477, Floyd 17 B.R. 149; CM ETO 106, Orbon; 1 BR (ETO)95; CM ETO 4570, Hawkins; CM ETO 5155, Carroll and D'Elia; CM ETO 6694, Warnock). The special plea was bad on its face and should have been summarily denied by the law member. Had he followed this course the irregular and wholly indefensible proceedings which subsequently followed would not have occurred.

7. The Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty and the sentence. The actions of the law member, as narrated above, constituted prejudicial error. While the Board bases its opinion on the law member's conduct as a whole, the matter will be herein discussed in two aspects.

First, The adjournment of court for the purpose of permitting the law member to consult with the Division Staff Judge Advocate and his obvious examination of a file not admitted in evidence was prejudicial to the accused's substantial rights as held by the Board of Review in the

Richter case (CM ETO 15486). As in the Richter trial, the file contained information which was prejudicial to accused. The psychiatric report and the Staff Judge Advocate's instructions to the Trial Judge Advocate disclosed that accused had admitted being in the Roulot house. In the record of trial the identification of accused rests solely on the testimony of the inmates of the house. Accused's admission was not introduced in evidence. Furthermore, such an admission is contradictory of accused's unsworn statement at the trial to the effect that he did not recall occurrences after 2400 hours. The accused offered to testify concerning the investigation but he was denied this right. The law member determined from the file that he was present because

> "the investigation officer certified over his own signature that accused was present".

By this announcement alone, he indicated a disbelief in any of accused's testimony and demonstrated a clear choice in believing information found in the file and not in the evidence. His disregard for his oath as a member of the court required by Article of War 19 "to truly try and determine according to the evidence" (underscoring supplied) is apparent. While the defense presented no evidence expressly contradictory to the prosecutions case, it did present substantial evidence affecting the credibility of prosecution's witnesses-- particularly Lucienne Roulot on whose uncorroborated testimony the findings of guilty of Specification 1 of Charge III must rest as to the element of consent since this alleged act took place in a room away from the other witnesses.

Secondly: The law member's statement

> "it is obvious that the accused has made false statements to his counsel or that counsel has tolerated fraud in the conduct of the case"

not only communicated his conclusions derived from examination of the file to the other members of the court but also in effect, impeached in his own mind and the other members' minds, the credibility of accused as to any testimony he might have elected to give. It also clearly disclosed his own prejudice and his remarks were such as were calculated to influence the minds of the other voting members. In view of the issue raised as to the credibility of prosecutions' witnesses, it is the opinion of the Board of Review that the evidence does not compell findings of guilty as to all of the offenses of which accused stands convicted and that the conduct of the law member not only constituted an error, but also that it was an error which prejudiced the substantial rights of accused and requires that the findings of guilty be set aside (CM ETO 1201, Pheil; CM ETO 2625, Pridgen). It is therefore the opinion of the Board of Review

that accused has been denied a fair trial irrespective of the substantiality of the evidence CM ETO 13222, Howard).

8. This case is a companion case to CM ETO 16151, Ingream wherein a conviction based upon the same incident was sustained by the Board. The error committed during the trial of the case under discussion was not committed during the trial of the Ingream case.

9. The charge sheet shows that accused is 25 years and nine months of age and was inducted on 11 July 1944 at Milwaukee, Wisconsin. He had no prior service.

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

22 SEP 1945

CM ETO 16278

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| U N I T E D S T A T E S | ) | IX AIR FORCE SERVICE COMMAND |
| | ) | |
| v. | ) | Trial by GCM, convened at Tirlemont, |
| | ) | Belgium, 31 July 1945. Sentence: |
| Private First Class DAVID | ) | Dishonorable discharge, total for- |
| J. ADAMCHECK (16029531), | ) | feitures, and confinement at hard |
| 2256th Quartermaster Truck | ) | labor for one year and six months |
| Company, Aviation, 45th Air | ) | (suspended). |
| Depot Group, IX Air Force | ) | |
| Service Command | ) | |

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OPINION by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Pfc David J. Adamcheck, 2256th QM Truck Co, Avn, 45th Air Depot Group, did, at Strip Y-91, on or about 17 June 1945, feloniously and unlawfully kill Tec 5 John L. Pandolfo by shooting him in the chest with a 32-cal.pistol.

He pleaded not guilty to, and was found guilty of, the Specification and the Charge. No evidence of previous convictions was introduced. He was sentenced to be 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 one year and six months. The reviewing authority approved the sentence but suspended the execution thereof.

The result of the trial was promulgated in General Court-Martial Orders No. 136, Headquarters IX Air Force Service Command, dated 14 August 1945.

3. The evidence shows that on the evening of 17 June 1945, four enlisted men--accused, deceased, Corporal Moore and another--were gathered around a bed in accused's barracks discussing Moore's proposed purchase of a .32 caliber automatic pistol belonging to accused (R13,17). When the gun was first produced, Moore removed the clip and pulled the trigger. Thereafter the others each handled it, one of them reinserting the clip and putting the pistol on the bed, whence accused picked it up (R18-20). He was engaged in undertaking to again remove the clip, and thus render the weapon harmless, when it discharged, killing deceased (R8,12,24,28).

There is attached to the record of trial a petition for clemency, signed by each member of the court, reciting, as one basis therefor, the fact that

> "The evidence and circumstances of the case indicate that the killing was effected in a purely accidental manner".

4. "Involuntary manslaughter is homicide caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law * * * Instances of culpable negligence in performing a lawful act are: * * * pointing a pistol in fun at another and pulling the trigger, believing, but not taking reasonable precautions to ascertain, that it would not be discharged; * * * " (MCM, 1928, par.149a, pp.165-166).

> "In general, every unintentional killing of a human being arising from a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evincing a heart devoid of a sense of social duty, is manslaughter. * * *

"It has been said by the United States circuit court that * * * any unlawful and wilful killing of a human being without malice is manslaughter; adding that manslaughter can be predicated on a homicide arising from the negligent use of such dangerous agencies as firearms. United States v. Meagher (Fed.) supra. /37 Fed.880/ * * *

"Where it appeared that one person picked up a revolver which he knew to be out of order and likely to go off unexpectedly, and recklessly pointed it at another, causing his death by its accidental discharge, the court held that a conviction of manslaughter was properly returned. State v. Tippet (Iowa) supra. /94 Iowa 646/ * * *

"In State v. Coble (1919) -- N.C. --, 99 S.E. 339, it appeared that a gun in the hands of the accused had been discharged accidentally, or otherwise, causing the death of another. The accused was convicted of manslaughter, from which conviction he appealed. The court sustained the following instruction: 'Manslaughter may be committed * * * if a person by the careless, negligent use of a firearm, and in the presence of other persons, either through carelessness or recklessness, wanton, reckless disregard of the safety of other persons, points a firearm at them, and handles it in such reckless, negligent manner as that it is exploded and causes the death of another. That would be manslaughter, although no death may have been intended or injury intended.' The court held that this charge was correctly stated. * * * " (Annotation, 5 ALR 610-613).

"Involuntary manslaughter results from the reckless use of firearms which might be termed gross negligence" (Ibid, p.615).

In CM ETO 1414, Elia, the evidence showed that while accused, deceased and another were hunting from a jeep, accused rested his gun across his knees with the muzzle originally pointing away from his companions. The jeep was proceeding across a stubble field at the rate of 15 or 20 miles an hour, when the driver applied his brakes and the gun discharged, killing deceased. In holding the evidence legally insufficient to support a conviction of involuntary manslaughter, the Board of Review characterized it as "falling short of shocking

one's sense of proper action under the circumstances", asserting that " a proper understanding of the meaning of culpable negligence of necessity rests upon the assumption that accused knew the probable consequences, but was intentionally reckless or wantonly indifferent to the results".

In the instant case, accused's picking up the pistol and undertaking to remove the clip indicated a concern for rather than a disregard of the safety of his companions. What caused the gun to fire is not shown. But it is far more consistent than inconsistent with all the facts which are shown, to conclude that it was not any wanton, gross or reckless negligence on the part of the accused. Moreover, the court's unanimous petition for clemency on the basis, inter alia, that "the evidence and the circumstances of the case indicate that the killing was effected in a purely accidental manner", is difficult to reconcile with findings of guilty necessarily bottomed upon an inference of culpable negligence on the part of the accused in handling the gun at the time of the pure accident. If his reckless handling of the gun, in wanton disregard of the safety of his companions, under circumstances charging him with knowledge of the probable consequences, had been regarded as the cause of the killing, it might indeed have been appropriately characterized as accidental but not as purely so. The only rational connotation of the language employed--the connotation practically compelled by the court's inclusion therein of the adverb "purely"--would seem to absolve accused of the type of negligence essential to constitute him guilty of involuntary manslaughter.

However, the language in the court's petition for clemency has relevancy only for purpose of argument; it has no place in the consideration of the question whether there is substantial evidence that accused's acts constituted "wanton", "gross" or "reckless" negligence. In the opinion of the Board of Review, the record of trial does not contain substantial evidence effective beyond reasonable doubt to establish the grade of negligence necessary to support a finding of accused's guilt of involuntary manslaughter (CM ETO 15217, Nolan; CM ETO 15346, Fondrew), and is therefore legally insufficient to sustain the conviction.

5. The charge sheet shows that accused is 19 years of age and that, with no prior service, he enlisted at Selfridge Field, Michigan, 4 March 1943.

6. For the reasons stated, the Board of Review is of the opinion that this record of trial is legally insufficient to support the findings of guilty and the sentence.

B. R. Keefer Judge Advocate

Malcolm C. Sherman Judge Advocate

S. T. Ansell Judge Advocate

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

BOARD OF REVIEW NO. 4

CM ETO 16296

12 NOV 1945

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| UNITED STATES | SEINE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER |
| v. | |
| Private JOHN W. REED (16036245), Medical Detachment, 116th Infantry | Trial by GCM, convened at Paris, France, 27 September 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |

HOLDING by BOARD OF REVIEW NO. 4
DANIELSON, MEYER and ANDERSON, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the sentence.

2. Exhibit "A" was properly received in evidence. In the absence of impeaching evidence it is presumed that the officer who signed the morning report on 6 August 1944 was at that time the commanding officer, or acting commanding officer of the reporting organization. The fact that the same officer later, at an undetermined date, authenticated an extract copy of this morning report as personnel officer does not rebut this presumption (CM ETO 13484, DeVito). This morning report entry and the evidence showing apprehension of the accused on 23 December 1944 under the circumstances disclosed by the record of trial, made out a prima facie case of desertion against him, and consideration of the evidentiary value of Exhibit "B" is not required for a disposition of the case.

Lester A. Daniels Judge Advocate

Judge Advocate

John R. Anderson Judge Advocate

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

BOARD OF REVIEW NO. 5 20 SEP 1945

CM ETO 16307

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|---|---|
| U N I T E D S T A T E S ) | V CORPS |
| ) | |
| v. ) | Trial by GCM, convened at Strakonice, |
| ) | Czechoslovakia, 28 May 1945. Sentence: |
| First Lieutenant BROWN O. ) | To be dismissed the service, to forfeit |
| BRYANT (O-1180134), Battery ) | all pay and allowances due or to become |
| C, 186th Field Artillery ) | due and to be confined at hard labor for |
| Battalion ) | six months. Eastern Branch, United States |
| ) | Disciplinary Barracks, Greenhaven, New York. |

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

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

2. The accused was tried upon the following charges and specifications:

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

Specification: In that 1st Lieutenant Brown O. Bryant, Battery C, 186th Field Artillery Battalion, was, at Lnare, Czechoslovakia, on or about 20 May 1945, grossly drunk and conspicuously disorderly in uniform on a public street in the presence of civilians and military personnel.

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

Specification: In that * * * did, at Lnare, Czechoslovakia, on or about 20 May 1945, with intent to do her bodily harm commit an assault and battery upon Marie Pivnickova by willfully and feloniously choking and grasping her and striking her, the said Marie Pivnickova, about the face with his hands.

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 dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for six months. The reviewing authority, the Commanding General, V Corps, approved the sentence, commented upon its inadequacy 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 shows that on 20 May 1945, accused was a first lieutenant of Field Artillery and serving as executive officer of Battery C, 186th Field Artillery Battalion, stationed at Lnare, Czechoslovakia (R6,12). At about 7:00 o'clock that evening he attended a house party given in a Czech home in which there nine people present, including three American officers and five women (R6, 7,14,18). They played cards, danced and drank wine and Vodka (R7,12, 17). Accused brought four bottles of champagne and a half bottle of Vodka to the party and consumed some of both (R13,14,45). At about 10:30 pm, the members of the party left the house together, with the intention of going to a dance nearby (R7,18). At this time accused was slightly boisterous and his speech was thick (R8,12,14). He and a girl named Marie Pivnickova lagged somewhat behind the rest of the party and while walking arm in arm accused started "squeezing" her and "wrenching"her hands (R18,19,22). She called to Marie Simunkova, who was walking about five or six steps ahead and when her friend came back to help, the accused pushed her away and started choking Miss Pivnickova (R19,20,24). The girl then fainted and upon regaining consciousness observed accused above her (R21). She started to scream whereupon accused helped her to her feet but put his hand over her mouth to stifle her screams (R27,28,30). Several people, including Czech civilians and military personnel of the American army gathered at the scene of the incident, which was on a public road with houses on both sides

(R10,11,27-30). At the time the first person, an American soldier, reached them, he observed the girl in a kneeling or crouching position with accused holding her arms (R28). The lieutenant ordered the soldier to leave and tried to disperse the crowd by telling the civilians to return to their homes while waiving his arms in the air (R29,30). He was under the influence of intoxicants at this time and refused to listen to the soldier, who tried to persuade him to leave because of "what the people were talking about and what the people were thinking" as a result of his conduct and the condition of his intoxication (R31). He went to a nearby house where the girl was taken, cleaned some mud from his uniform and went to the dance (R9,12). It was stipulated between the prosecution and defense that a civilian physican examined Miss Pivnichova at about 11 o'clock that evening and discovered that the girl had sustained bruises on her face and back. One of her knees was lacerated and her neck and chin showed black and blue bruise marks. Her nose was bleeding and she was exceedingly nervous and upset (R39; Pros.Ex.A).

4. Accused, after his rights as a witness were explained to him, elected to remain silent (R48). The defense re-called two of the prosecution's witnesses but inasmuch as their testimony corroborated the evidence previously adduced as to the extent of accused's intoxication it is not repeated here (R45,47).

5. Competent uncontradicted evidence establishes that on the evening in question accused consumed a considerable quantity of intoxicating beverages following which he committed an assault upon Marie Pivnickova by choking her and striking her on the face. The fact that the assault was of a vicious nature is disclosed by the results of the medical examination and the fright which the girl sustained. She fainted and upon regaining consciousness accused was bending over her body and holding her by the arms. Following her outcries a number of Czech civilians and members of the American army congregated at the scene, in a public place, and observed the accused, an American army officer in uniform, drunk and waving his arms in an effort to disperse the crowd. His conduct was manifestly "disorderly", as alleged, and was clearly shown to have been of such a character as to reflect discredit upon himself personally and to seriously compromise his character and standing as an officer and gentleman.

Article of War 95 establishes a standard of discipline and behavior required of officers of the American army and provides that:

> "Any officer * * * who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed the service" (AW 95).

The offenses of being grossly drunk and conspicuously disorderly while in uniform in a public place, as alleged by the Specification of Charge I, and of assaulting the Czech girl, as alleged in the Specification of Charge II, is fully established by substantial evidence. (As to Charge I, see CM ETO 25, Kenney, 1 B.R. (ETO) 13,and CM ETO 4606, Geckler, and as to Charge II,Geckler, supra, and CM ETO 3919, White).

Although accused was under the influence of intoxicants at the time he choked and struck the girl there is no evidence that he was so drunk as to be unable to entertain the required specific intent to do bodily harm. The findings that accused committed both offenses, under the circumstances, are not legally inconsistent and are fully established (CM ETO 3937, Bigrow; CM ETO 4184, Heil; CM ETO 7585, Manning and authorities cited therein).

6. By General Order 64, 26 May 1945, Headquarters V Army Corps, APO 305, Brigadier General C. G. Helmick was appointed Deputy Corps Commander, V Corps and, in the absence of the V Corps Commander on 4 June 1945, was the officer commanding for the time being and therefore the proper reviewing authority in this case (AW 46; MCM, 1928, par.87, p.73; AR 600-20; CM ETO 4054, Carey).

7. The charge sheet shows that accused is 23 years and six months of age and that he served as an enlisted man from 25 November 1940 to 8 April 1943. He attended the Field Artillery Officer Candidate School, Fort Sill, Oklahoma from 14 January 1943 to 8 April 1943 where he was commissioned a Second Lieutenant. The date of his promotion to First Lieutenant is not shown.

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

9. A sentence of dismissal is mandatory upon conviction of Article of War 95 and is authorized for a violation of Article of War 93. Conviction for an offense under Article of War 93 may also be punished as the court-martial may direct (AW 93). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement is proper (AW 42; cir.210, WD, 14 Sept.1943, Sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 20 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of First Lieutenant BROWN O. BRYANT (O-1180134), Battery C, 186th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 16307. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 16307).

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

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( Sentence ordered executed. GCMO 440, USFET, 28 Sept 1945).



RESTRICTED

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16307

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

BOARD OF REVIEW NO. 5 22 SEP 1945

CM ETO 16310

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| U N I T E D S T A T E S | ) | 3RD INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at Salzburg, Austria, 24 May 1945. |
| Private RAYMOND HARDERS, (36688593), Company L, 7th 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. 5
HILL, EVINS and JULIAN, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Raymond Harders, Company "L", 7th Infantry did, near St. Barsson, France, on or about 20 September 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended near Ribeauville, France, on or about 6 February 1945.

Specification 2: In that * * * did, near Utweiler, Germany, on or about 15 March 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion

until he returned to his organization near Bingweilerhol, Germany, on or about 17 March 1945.

Specification 3: In that * * * did, near Althornbach, Germany, on or about 18 March 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he returned to his organization near Wattenheim, Germany, on or about 23 March 1945.

Specification 4: In that * * * did, near Frankenthal, Germany, on or about 25 March 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he returned to his organization near Kicklingen, Germany, on or about 25 April 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and its specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be 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. Evidence introduced by the prosecution shows that at all times mentioned in the specifications accused was a member of Company L, 7th Infantry (R8,12,20,22,23; Pros.Ex.A,B,C). On or about 20 September 1944, accused's company was in combat with the enemy, "meeting enemy opposition" (R9,10). On the 19th of September it was "fighting the enemy not in defense", and on the 23rd the company was also in combat (R11). Accused left his organization without leave, near St. Barsson, France, on 20 September 1944, and remained absent until 6 February 1945 (R7,8,11; Pros.Ex.A,D). On 15 March, Company L was "moving into the attack" from an assembly area near the town of Utweiler, Germany. The enemy was opposing with small arms and artillery, causing casualties. Accused had been present at the assembly area and knew of orders for the impending attack. When the company was moving out, a check made by his staff sergeant revealed that accused "was gone". This absence was unauthorized and was so entered on the company morning report. He returned two days later (R8,12,13,16,20,21; Pros.Ex.B). The next day, 18 March, when his company was "going into the attack on the Siegfried line" and was encountering enemy resistance, a check made by the same



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staff sergeant showed accused again absent without permission. He was gone until 23 March (R8,13,14,21,22; Pros.Ex.B). On 25 March, accused's outfit "was going to cross the Rhine River". Accused knew this, having been "oriented" in the afternoon and having received his orders. This took place in a forward assembly area before "we took off across the Rhine". The men were to have "chow" at 9:30 and to move out at 10:00 that night. When it came time to eat, a check of the squad showed that accused was missing. A search was made for him and he could not be found. The Rhine was subsequently crossed and casualties were sustained. Accused had no permission to be absent, and was away until 25 April (R8,9,14,15,18,19,22,23; Pros.Ex.C).

4. Accused, advised of his rights as a witness, elected to remain silent. The defense called a first lieutenant of Company L, who testified that he had observed accused in combat "prior to the time of the offenses charged in this case" and that (as a result) he had formed an opinion that accused "was a good combat soldier" (R27).

5. The evidence introduced supported each factual allegation as to the absence of accused, the time and the place, as alleged in the four specifications. The combat conditions proven to exist on each of these critical dates support the inference that the court drew, namely: that each of such absences was inspired by accused's intent to avoid hazardous duty. Each such absence constituted desertion, as charged (AW 28; CM ETO 7413, Gogel; CM ETO 7688, Buchanan; CM ETO 11404, Holmes).

6. The charge sheet shows that accused is 19 years, 7 months of age; and that he was inducted at Chicago, Illinois, 31 August 1943, without prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

RESTRICTED

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

BOARD OF REVIEW NO. 3

8 SEP 1945

CM ETO 16318

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 5th ARMORED DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at Gifhorn, Germany, 2 May 1945. Sentence: Dismissal and total forfeitures. |
| | ) | |
| Captain WILLIAM J. HOEFLER (0258833), Service Company, 15th Armored Infantry Battalion. | ) | |

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Captain William J. Hoefler, Service Company, 15th Armored Infantry Battalion was at Bilstain, Belgium, on or about 13 January 1945, found drunk while on duty as Company Commander of Service Company, 15th Armored Infantry Battalion.

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

Specification: In that * * * was, at Jeetze, Germany, on or about 19 April 1945, drunk when reporting for duty at the office of the Adjutant General, 5th Armored Division.

He pleaded not guilty to, and was found guilty of, both charges and their specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. Five members of the court recommended clemency. The reviewing authority, the Commanding General, 5th Armored 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, confirmed the sentence and withheld the order directing execution of the

sentence pursuant to Article of War 50½.

3. The prosecution's evidence was as follows:

a. Charge and Specification. On 13 January 1945 accused was the commanding officer of Service Company, 15th Armored Infantry Battalion, stationed at Bilstain, Belgium (R8,11,16.17). At about 1445 hours on that day accused and his first sergeant attended a meeting of company commanders at the headquarters of Combat Command "B" a mile and a half away. The trip was made in a jeep driven by accused (R8). The meeting was attended by 25 or 30 officers (R15). At about 1630 hours, when accused drove back to his company area, the sergeant noticed he had difficulty in keeping the vehicle on the road, driving on both sides of it. The sergeant attributed his poor driving to liquor. Upon reaching the company area, at the sergeant's suggestion, they had something to eat (R8-9). At about 1700 hours, Major Emerson F. Hurley, 15th Armored Infantry Battalion, saw accused sitting in the kitchen truck, his head resting on his arms, apparently asleep. Major Hurley assisted other officers and enlisted men in taking accused to his quarters, where he threw up what he had eaten. Liquor was smelled on his breath; he did not have control over his speech or muscular action. Major Hurley and another officer put him to bed. Accused was drunk (R10-11,13, 14-15,16-17).

b. Additional Charge and Specification. Shortly before 2000 hours on 19 April 1945, accused arrived at 5th Armored Division Headquarters at Jeetze, Germany (R18,21,23). Lieutenant Colonel Charles C. DeVault, Adjutant General of the Division, seated in his office, observed that accused in leaving the vehicle in which he had arrived "was very unsteady on his feet and apparently under the influence of liquor". A few minutes later, Colonel DeVault opened his office door and saw accused in the hallway. Although the Colonel did not personally know accused he addressed him as "Captain Hoefler," telling accused he assumed that he was that officer as he had "received orders that he was reporting" (R18-20). The colonel asked if there was anything he could do for him. Accused answered, "'Yes,' that he was reporting for duty". The colonel invited him into his office, finding it necessary to take him by the arm and lead him as "his stability on his feet was not good". In his opinion, accused was drunk (R18-19). Two other officers who observed accused at that time expressed the opinion, respectively, that he was under the influence of alcohol and that he was drunk (R21,23). Accused carried with him a full bottle of champagne (R20).

4. For the defense, as to the Charge and Specification, Major Hurley testified that he saw accused at the officers' meeting on 13 January 1945, his condition then as to sobriety "seemed perfectly normal" and he was "in control of his faculties." This was not "strictly a business meeting," the official phase lasting only about 45 minutes, upon completion of which "a bottle of whiskey was passed around." They "had a drink before we went back. It was a cold day" (R14).

As to the Additional Charge and Specification, Chief Warrant Officer Rae Greenlee, 5th Armored Division Band, testified that, on 19 April 1945 at Trains Headquarters Company, he saw accused who requested transportation to "Volcano Rear." Another officer invited accused to come in and have a drink of champagne while transportation was being arranged. Accused had a few drinks of champagne with Greenlee until about 1900 hours when the transportation arrived. Accused had a bottle of champagne when he left but "did not appear to be under the influence of intoxicating liquor" (R26-27). The driver who brought accused from Division Trains testified he spoke in a natural manner. The driver did not see him take a drink, nor did he smell liquor on his breath and "could not tell if a man was drunk" since the road was rough (R28-29).

5. After his rights were explained (R29-30), accused testified in detail regarding his army service. This included a description of his previous promotion to major while giving "Finance Basic Training" at Fort Harrison, Indiana, prior to June 1943 and his transfer thereafter to the 35th Infantry Division and then to the 78th Infantry Division. Because of his lack of training, limited experience and reclassification proceedings, he accepted a reduction in grade to Captain in order to stay with his division. After commanding a company in a separate regiment for several months, training casuals and receiving an "excellent" rating, he was transferred to the 5th Armored Division. At the meeting on 13 January 1945, he had been the commanding officer of the Service Company of that division for about five days, was "nervous and apprehensive" because of his lack of armored training and felt he was not welcome there because of his record (R32-33). "Liquid refreshments" were served. He had a bad cold and an empty stomach when he drank on this occasion. The hot cup of coffee he had later at the kitchen truck "seemed to affect" him (R33).

Instead of trying him by court-martial for the above offense, his Commanding General agreed to accept his resignation (R33), but this was disapproved by the Adjutant General in Washington. When accused received orders to return to the 5th Armored Division to be tried "it aroused in /him/ an acute nervous anxiety neurosis" and while he would have been "happy to be with the outfit and come back and fight", it was "very disturbing" to be returned solely for trial (R33).

For a more detailed statement of facts, reference is made to paragraphs 5 and 6 of the review of the staff judge advocate of the confirming authority, which the board adopts herein.

6. The court's findings of guilty are supported by substantial evidence that accused was drunk on duty, in violation of Article of War 85, as alleged in the Charge and Specification (CM ETO 4339, Kizinski; CM ETO 10360, Gailey) and that he was drunk when reporting for duty at the office of the Adjutant General, 5th Armored Division, in violation of Article of War 96, as alleged in the Additional Charge and Specification (MCM, 1928, par.152a,p.187).

7. Five of the seven members of the court submitted a recommendation for clemency dated the same day as the trial, recommending that accused be permitted to resign his commission for the good of the service, instead of receiving the sentence as adjudged. The reasons therefor are stated as follows:

> "a. Although this officer was a reserve officer for eleven years, he has had neither the training nor the experience necessary for most assignments he has received since coming on active duty in 1940; consequently he has been transferred frequently and has been subject of reclassification proceedings. As a result, this officer apparently has lost confidence and has become a neurotic case and as such has lost his usefulness to the government.
>
> "b. The general conditions described above undoubtedly contributed much to the commission of offenses which resulted in his General Court case.
>
> "c. The long periods of uncertainty and anxiety occasioned by previous reclassification proceedings and by his recent unaccepted resignation already have been humiliating enough to this officer".

8. The charge sheet shows that accused is 36 years of age. He was commissioned a second lieutenant, Officer Reserve Corps, 2 January 1929 and entered on extended active duty 26 December 1940.

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. A sentence of dismissal and total forfeitures is authorized upon conviction of a violation of Articles of War 85 and 96.

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. L. Levy Judge Advocate

1st Ind.

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

1. In the case of Captain WILLIAM J. HOEFLER (0258833), Service Company, 15th Armored Infantry Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16318. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 16318).

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

(Sentence ordered executed. GCMO 409, USFET, 15 Sept 1945)



16318

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

BOARD OF REVIEW NO. 5

22 SEP 1945

CM ETO 16325

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 84TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at |
| | ) | Weinheim, Germany, 13 August |
| Private RALPH C. GRIPPO | ) | 1945. Sentence: Each accused, |
| (32891795) and Private First | ) | Dishonorable discharge, total |
| Class EDWARD A. PIECHALAK | ) | forfeitures and confinement |
| (36973747), both of Company | ) | at hard labor for life. Eastern |
| G, 335th Infantry | ) | Branch, United States Disciplinary Barracks, Greenhaven, New York. |

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

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

2. Accused were tried in a common trial, to which each consented, upon the following charges and specifications:

GRIPPO

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Ralph C. Grippo, Company "G", 335th Infantry, did, at or near Mors, Rhine Province, Germany, on or about 7 March 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: engage the enemy, and did remain absent in desertion until he was apprehended on 27 March 1945.

PIECHALAK

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Edward A. Piechalak, Company "G", 335th Infantry, did, at or near Mors, Rhine

Province, Germany, on or about 7 March 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: engage the enemy, and did remain absent in desertion until he was apprehended on 27 March 1945.

Each pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification preferred against him. Evidence was introduced of one previous conviction of accused Grippo by summary court for absenting himself without leave from his appointed place for duty as night ward man after reporting for duty, in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentences, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence introduced by the prosecution shows that at all times mentioned in the specifications each accused was a member of Company G, 335th Infantry. On the night of 6,7 March 1945, this company was located near Mors, Germany. Both accused were present with their company about 0100 hours, 7 March, when the enemy "threw a few shells in" (R6,7). The company was on a road headed for Mors (R10), and waiting while a unit of tanks (R9) pulled through. The squad leader "hollered back 'disperse and dig in'" (R7,8). When the men dispersed, he saw Piechalak but not Grippo although he had seen the latter previous to that time (R8). After that he saw neither of them, although he made a search for them. The search did not include a barn 200 yards away. He did not see them again until "when they brought them back in". The absence of accused was unauthorized (R8,10-12). Each accused "was returned to military control on or about 27 March 1945 in Antwerp, Belgium" (R12,13). The squad leader who gave the command to "disperse" said that the company crossed the Roer River in February since which time it had been in action, engaged with the enemy, and that both accused had been with the squad during that period (R13,14).

4. Each accused was advised of his rights as a witness, Grippo elected to testify under oath and Piechalak to remain silent (R14,15,18).

Grippo said that when the barrage came in "we all took cover". They saw a barn where they remained until the barrage lifted. Emerging, it was too dark to see anything, so they remained there until morning. They started toward Mors (walked about one-half a mile (R16)), and saw a jeep driver of whom they asked for their company. All he knew was "that they were up ahead *** but *** the outfit was going to pull back for a rest". Accordingly "we" decided to go back to Holland where they went for a rest" the last time. "We got so nervous, ***** it was the first time anything like that had happened, and finally turned in". He had been in combat for about one week prior to this and had never thought of leaving his unit to save himself from danger (R15,16). On cross examination, this accused said that on 6 April, while in a truck being returned to his unit, he left the truck and did not (then) return to his unit (R17). Asked by the court: "Who was this other man that was with you?", this accused replied: "Pvt. Piechalak" (R17).

5. The evidence clearly shows that accused left their squad area without authority during a barrage to which their unit was being subjected and went to a barn 200 yards away to seek cover, when orders were given to "disperse and dig in". Thereafter, (accepting accused Grippo's story) they made a half-hearted attempt to find their unit, which failed because it was not pursued in earnest, and then left for Holland. Later, while being returned to his unit, Grippo left the truck in which he was riding and did not return to his unit at that time. On these facts, the court was justified in believing that the initial absence was for the purpose of avoiding hazardous duty, as charged. It is unnecessary to break down this initial absence to determine whether the alleged intent was formed when they left the squad area and went to the barn or when they departed from the zone of combat and left for Holland. The initial absence and the further absenting of themselves from the zone of combat were both wrongful. Accused's duty was to remain within their squad area as constituted by the order to "disperse and dig in". This order to "dig in" eliminated the barn from the squad area. Failure of these accused to remain with their unit and their subsequent flight from the scene of action (all within the period covered by the Specification) constituted a clear violation of Article of War 58; desertion as defined by Article of War 28, provided such conduct was inspired by the intent to avoid hazardous duty, and of this intent there was substantial evidence (CM ETO 7230, Magnanti 1945; CM ETO 7339 Conklin).

6. The charge sheets show that accused Grippo is 21 years of age and that he was inducted 19 April 1943 at New York, New York, without prior service; and that accused Piechalak is 19 years, two months of age, and was inducted 27 April 1944 at Fort Sheridan, Illinois, without prior service.

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

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

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

Judge Advocate

Judge Advocate

Judge Advocate



16325

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

BOARD OF REVIEW NO. 2

15 OCT 1945

CM ETO 16340

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| U N I T E D S T A T E S | ADVANCE SECTION COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | |
| Corporal MARIO J. DAMASO (32961037), attached unassigned, 234th Replacement Company, 90th Replacement Battalion | Trial by GCM, convened at Marburg, Germany, 7 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania |

HOLDING by BOARD OF REVIEW NO. 2
HEPBURN, MILLER, and COLLINS, Judge Advocates

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

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

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

Specification: In that Corporal Mario J. Damaso, attached-unassigned, 234th Replacement Company, 90th Replacement Battalion, did, at or near Bad Neuenahr, Germany, on or about 29 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Theodore Esser, a human being, by shooting him with a rifle.

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

Specification: In that * * *, did, at or near Bad Neuenahr, Germany, on or about 29 March 1945, unlawfully enter the dwelling of Theodore Esser, with intant to commit a criminal offense, to wit, murder, assault and larceny therein.

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 of Charge I, and of Charge I; guilty of the Specification of Charge II except the words "assault and larceny", substituting therefor respectively, the words, "and assault", of the excepted words not guilty, of the substituted words, guilty, and guilty of Charge II. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding Officer, Advance Section Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Briefly summarized, the evidence for the prosecution is substantially as follows:

On the evening of 29 March 1945, in Bad Neuenahr, Germany, a shot was fired through the front window of the dwelling of Theodore Esser (R9). Then someone knocked at the back door, and when Egon Laue, a resident of the house, asked "the soldiers" what was wanted a shot was fired into the door (R9,10,15). Laue did not open the door but ran upstairs. Esser then went down and talked in English to two soldiers who had entered the house (R10,11,12,15). One soldier went upstairs and motioned for Laue to go back down. As he was complying, he heard a shot and an "awful yell" by Esser, and when he reached the ground floor he saw Esser "crumpled up from a shot which apparently went through his arm" (R11). A few seconds later he saw the other soldier raise his rifle and shoot Esser in the head. Esser fell to the floor (R11,12,14). Laue then ran from the house for help and heard other shots as he did so (R11). When Laue went downstairs as directed by the soldier, he observed that the outside door, which was previously closed and locked, was open with the bottom sections "broken out" (R10). He had not opened the door to

admit the soldiers. No one had been near the door to admit them when they entered. They had not been invited to the house (R12). After the shooting a neighbor heard the name "Damaso" or "Damaseus" used by a soldier in front of the Esser house (R19,23), and she later identified accused as having been in the vicinity at that time (R20,22).

Accused's pre-trial statement was introduced into evidence without objection (R17,18). In it he had stated that after drinking about a quart and a half of wine he and another soldier went out to look around the village "and see what we could find" (Pros.Ex.A). He then stated,

> "We stopped at a house in the village and banged on the door. The door wasn't opened immediately. * * * The door was finally opened and we went inside. I saw one man in the parlor. I ordered him to go into the kitchen and I followed him in. When we got into the kitchen he started to run out on me so I shot him with my M_I rifle. He groaned and I shot him again. He fell to the floor. I came out of the kitchen and Pvt. Stepp and I left the house"(Pros.Ex.A).

After the shooting, Esser was taken to a military hospital and was found to have three perforating gun shot wounds; one through the cheeks which shattered the jawbone, one through the right arm and one through the left chest. He died the following morning of "arteriosclerotic heart disease, then the wounds set into operation a chain of events which precipitated the heart attack" (R7), hastening and having a direct relation to his death (R8,9).

4. The accused, after first being advised of his rights as a witness, elected to be sworn and testify (R24). He stated that before the episode he had drunk a quart and a half, and six or seven canteen cups full of wine (R25). He was then drunk and unsteady on his feet but able to walk in a staggering manner (R25,27). After going to another house in the neighborhood, he and his companion went to the Esser house to find a prostitute. They did not know where one was but he thought he could find a woman who could be easily bribed (R26, 27). His companion "banged" on the back door of a house with a rifle butt, "and it was opened"(R25,29). They entered the house without requesting permission (R25,28). Accused's companion went upstairs (R25).



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Accused saw a man approaching from a stairway (R27). He ordered the man to put his hands above his head, which he did. The man passed him, and after the accused commanded him to halt, he took his hands down and a step forward (R25,26). The accused then shot him, pointing his gun at him and firing it twice, the first time because he did not "stay put" (R26,27), and the second time because the deceased "hollered" and accused just "automatically tightened up on /his/ hand" (R29). While he was in the house accused saw no one except the man he shot (R26), and no one said anything to him (R27). After the shooting accused returned to his company area without help (R28).

5. a. Charge I: Murder is the "unlawful killing of a human being with malice aforethought" (MCM, 1928, par.148a,p.162). Malice "is presumed from the use of a deadly weapon"(MCM,1928,par.112a,p.110). The record of trial established beyond reasonable doubt that the accused did at the time and place alleged in the Specification kill Theodore Esser by shooting him with a rifle. The eye-witness account of the crime was fully corroborated by accused's pre-trial statement and later testimony, and no provocation or excuse for the killing was shown. By all established legal bases the homicide was murder and the accused is a murderer (CM ETO 9810, Johnson: CM ETO 10002, Brewster; CM ETO 14141, Pycko; CM ETO 16581, Atencio).

b. While there is evidence that accused had consumed intoxicants prior to the homicide there is substantial evidence to support the court's implied finding that accused's drunkenness was not of such severe or radical quality as to render him incapable of possessing the requisite malice aforethought, a critical element of the crime of murder. Inasmuch as there is substantial evidence to sustain the findings of the court the Board of Review is without power to disturb same on appellate review (CM ETO 16581, Atencio supra and authorities therein cited).

c. Though there was medical testimony that the immediate cause of death of the decedent was arteriosclerotic heart disease, it is clear that he would not have died when he did had he not been wounded by the accused's assault. Under these circumstances, the act of accelerating the time of death constituted murder (1 Wharton's Criminal Law (12th Ed.,1932), sec.200,p.258;26 Am.Jur., secs.48,49,pp.191,192)).

6. Housebreaking "is unlawfully entering another's building with intent to commit a criminal offense therein"(MCM,1928,par.149a,p.169). The two essential elements of the offense are: (1)Unlawful entry and (2) intent at the time of the entry to commit the alleged criminal offense therein(CM ETO 13255,Gonzales). Undoubtedly the accused's entry into the house was unlawful. The only question deserving consideration is whether he intended at the time of his entry to commit murder and assault.

The evidence showed that when the accused and his companion approached the house occupied by Esser and about 10 other civilians shots were fired into and through the house. A shot was fired through the closed door when someone responded to their knocking. The circumstances show beyond any reasonable doubt that the accused and his companion fired these shots. This conduct demonstrated on the part of the accused an utter disregard for human life and an effort to

terrorize the civilian residents in that house. After battering the door open with their guns the accused and his companion entered. Almost immediately thereafter without any justification or provocation, the accused shot and killed a civilian occupant. The court was justified in concluding that as he entered the house he intended to continue his terrorization of the occupants, one of whom was Theodore Esser, by promiscuously firing his deadly weapon without regard for human life and not caring whether he shot and killed anybody or not. To place another in fear by pointing and firing a deadly weapon constitutes an assault. To fire the weapon in total disregard for human life and thereby cause death of another constitutes murder (CM ETO 15425, Lemons). The finding of the court that accused intended to commit an assault and a murder at the time he broke into the house was therefore supported by substantial evidence (CM ETO 78, Watts; CM ETO 3679 Rochhorn).

7. The charge sheet shows the accused is 21 years and four months of age and was inducted without prior service on 25 May 1943 at New York, New York.

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

9. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454,567), and upon conviction of housebreaking by Article of War 42 and section 22-1801 (6:55) District of Columbia Code. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4),3b).

Judge Advocate

Judge Advocate

(ON LEAVE) Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 13 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Corporal MARIO J. DAMASO (32961037), attached unassigned, 234th Replacement Company, 90th 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 commuted, 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 16340. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16340).

B. FRANKLIN RITER
Colonel, JAGD
Acting Assistant Judge Advocate General

( Sentence as commuted ordered executed. GCMO 557, USFET, 8 Nov 1945).

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

BOARD OF REVIEW NO. 3 24 SEP 1945

CM ETO 16341

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| U N I T E D S T A T E S | DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | |
| Private First Class CHARLIE L. KILCREASE (38080886), Company A, 41st Engineer General Service Regiment | Trial by GCM, convened at Marseille, France, 28 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U. S. Penitentiary, Lewisburg, Pennsylvania. |

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

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private First Class Charlie L. Kilcrease, Company A, 41st Engineer General Service Regiment, did, at Les Milles, France on or about 9 May 1945 offer violence against First Lieutenant Carl H. Larson, 41st Engineer General Service Regiment, his superior officer, who was then in the execution of his office in that he, the said Private First Class Kilcrease, did cut the said First Lieutenant Larson on the chest with a knife.

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

curring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Delta Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that shortly before midnight on 8 May 1945, First Lieutenant Carl H. Larson, an officer of accused's regiment, went to the city of Les Milles, France, with the duty, as regimental officer of the day, of sending all military personnel back to the bivouac area whether or not they had passes (R13-14). Inside a tavern, he saw and took the names of accused and two other soldiers of his regiment, and told them their passes were no good and to return to camp. They did not appear angry and agreed to go back (R17). Seeing a street dance in celebration of "V-Day", Lieutenant Larson went over and took the names of several soldiers of his regiment and instructed them to return to camp (R12,14). While he was talking to some soldiers, he was struck on the right side of the head by a small rock. He turned his head and took a few steps forward, and was struck on the head by a larger and heavier stone, which knocked him to the ground and caused him to lose his senses momentarily (R9-10,14,19-20). As he attempted to get up, accused walked up behind him from the crowd, as though he were going to assist the lieutenant, and lifted him up from the street. About the same time accused took a knife from his pocket with his right hand and struck Lieutenant Larson on the chest with a slashing motion, then droppedhim and walked away (R10-11,13,20-21). Upon regaining consciousness, Lieutenant Larson was taken to a hospital where five stitches were taken in a wound on his chest (R14-15). The wool shirt worn by him, containing blood stains and four diagonal slashes running from the right shoulder tab to the second button, was received in evidence (R16, Pros.Ex.1).

On 16 May, accused signed a voluntary written statement, which was received in evidence without objection (R23-28, Pros.Ex.2). He stated that after he had four drinks of cognac in a bar, Lieutenant Larson, whom he knew and recognized as officer of the day, came in after midnight and told him to go back to camp, and that he agreed to go. After finishing a drink, accused went out of the bar and saw Lieutenant Larson standing near the curb in front of the bar, and heard him say, "Who is that throwing stones"? Then he saw the lieutenant get hit in the face by a large stone and fall to the ground. Accused walked over, took his knife out, and hit the officer with the blade and "drug it". He later threw the knife away as he walked back to camp. He further stated:

"I want to say that I don't know what possessed me to stab the Lieut. I was not mad at him, I never had any trouble with him, I had never even spoken to him before. I guess I just didn't realize what I was doing, altho I wasn't drunk. I am sorry about what happened, and I feel that I owe him an apology. I want a chance to tell the Lieut. I am sorry. 'I can't think of any reason for throwing the knife away, only my mind said if you didn't have this knife you wouldn't have done it'" (Pros.Ex.2).

4. After his rights as a witness were explained to him, accused elected to make, through counsel, the following unsworn statement:

"I have been in the service since January 14, 1942. During this time I have had thirty-six months overseas. The night of May 8th in celebrating Victory Day I visited this bar. I had several cognacs and it was perhaps through the excitement of the celebration and the effect of the cognac that made me lose my self control. I must have gone through a temporary loss of control. I am at a complete loss to explain why, if I did, this incident and can offer no explanation whatsoever beyond that" (R28-30).

5. The evidence clearly and unequivocally shows that accused, at the time and place alleged, without any legal justification or excuse, willfully and deliberately cut his superior officer on the chest with a knife while the latter was in the execution of his duties as officer of the day and already in a helpless and semi-conscious condition. Accused was admittedly aware of the status and duties of the officer, and his reprehensible actions were apparently motivated solely by malice. No question of intoxication of accused is raised by the evidence, although it appears that he had been drinking to some extent. He said in his statement of 16 May, "I just didn't realize what I was doing, altho I wasn't drunk". Assuming such question were raised, its degree and consequent effect was one of fact for the court's determination. The evidence abundantly supports the findings of guilty of the Charge and Specification (CM ETO 2484, Morgan; CM 252812, Scott, 34 BR 197 (1944); MCM, 1928, par.134a, p.148).

6. The charge sheet shows that accused is 31 years one month of age and was inducted 14 January 1942 at Camp Wolters, Texas. No prior service is shown.

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

8. The penalty for a violation of Article of War 64 is death or such other punishment as the court-martial may direct. Confinement in a penitentiary is authorized by Article of War 42 for a sentence by way of commutation of a death sentence. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B R Bleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

[illegible] Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 24 SEP 1945
TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private First Class CHARLIE L. KILCREASE (38080886), Company A, 41st Engineer General Service Department, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of 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 16341. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 16341).

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

(Sentence as commuted ordered executed. GCMO 466, USFET, 7 Oct 1945).

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

BOARD OF REVIEW NO. 5

28 SEP 1945

CM ETO 16342

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| U N I T E D S T A T E S | ) | SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | ) | |
| Private WILLIAM J. WISEMAN (36311373), Detachment of Patients, 48th General Hospital | ) | Trial by GCM, convened at Paris, France, 19 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

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

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

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

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

Specification: In that Private William J. Wiseman Detachment of Patients, 48th General Hospital, Seine Section, Com Z, European Theater of Operations, United States Army, did, at his organization on or about 18 December 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 28 December 1944.

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

16342

Specification: In that * * * having been duly placed in confinement in the Prison Ward of the 48th General Hospital, Seine Section, Com Z, European Theater of Operations, United States Army, on or about 25 November 1944, did, at Paris, France, on or about 18 December 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that * * * did, at Paris, France on or about 27 December 1944, unlawfully enter the dwelling of the 48th General Hospital, Seine Section, Com Z, European Theater of Operations, United States Army, with intent to commit a criminal offense, to wit a larceny therein.

CHARGE IV: Violation of the 94th Article of War. (Finding of Guilty disapproved by Reviewing Authority).

Specification: (Finding of Guilty disapproved by Reviewing Authority).

CHARGE V: Violation of the 96th Article of War. (Finding of Guilty disapproved by Reviewing Authority).

Specification: (Finding of Guilty disapproved by Reviewing Authority).

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 26 days in violation of Article of War 61. All of the members of the court present when the vote was taken concurring, he was sentenced "To be shot to death with a musket". The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, disapproved the findings of guilty of Charges IV and V and their respective specifications, approved the sentence but recommended that it be commuted and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed but, owing to special circumstances in the case and the recommendation for clemency by the reviewing authority, commuted the sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's

natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 18 December 1944, accused was a prisoner patient at the 48th General Hospital, in Paris, France (R5). On this date a report was received by the Officer of the Day at this hospital, that two prisoners had escaped, and upon investigation it was determined that the accused was one of the two prisoner patients missing. The escape was made through an open window in the kitchen of the prison ward. Accused was absent at roll call on this date and was not seen by the hospital detachment commander subsequent to his escape (R6). There was received in evidence, without objection by the defense, an extract copy of the morning report of the Detachment of Patients, 4317th United States Army Plant, showing accused from hospitalized in confinement to absent without leave as of 18 December 1944 (R13; Pros.Ex.H). On the evening of 27 December 1944 the storeroom of the Red Cross unit attached to the hospital in question was broken into and numerous items taken therefrom, including about 30 cartons of cigarettes, several boxes of candy, a wallet and other articles (R7). The following day, 28 December, accused was arrested by Agents of the Criminal Investigation Division in a cafe, Le Bar des Sports, located at 48 Rue Marcadet, Paris, France (R9,14). He was wearing civilian clothes at the time but did not resist arrest or deny his identity (R9,12). He took the agents to a room nearby where he was staying and there they found several cartons of cigarettes, candy bars, a wallet and miscellaneous items of American and Canadian clothing (R11). The wallet in question was positively identified by the supervisor of the hospital Red Cross unit, as property missing from her office (R7; Pros.Ex.A).

Accused made a voluntary sworn statement to the CID agents wherein he admitted escaping from the hospital with another prisoner on 18 December 1944, by "sliding down" sheets lowered through a window. He also confessed to breaking into the hospital Red Cross unit storeroom on the night of 27 December 1944. In his statement he asserted that he intended to leave Paris and to go South and that he never had any idea of going back to the Army because of a dishonorable discharge and ten year prison sentence "hanging" over him. This statement was received in evidence without objection by the defense (R10; Pros.Ex.F).

4. Accused, after his rights as a witness were explained to him, elected to remain silent and no evidence was introduced in his behalf (R17).

5. Competent uncontradicted evidence establishes that while a member of a Detachment of prison patients at the 48th General Hospital accused absented himself without authority from his hospital confinement, and that he remained in unauthorized absence until apprehended in Paris, France, on 28 December 1944. At the time of his apprehension he was wearing civilian clothes and in his confession states that he had no idea of returning to the Army. His confession was voluntarily given, after his rights under the 24th Article of War were explained to him. Such an admission by accused coupled with the circumstances herein shown, clearly establishes that he intended to remain away permanently from the

service of the United States. The offense of desertion is complete (MCM, 1928, par.130a, pp.142,143; CM ETO 16108, Keeton and Lemme).

The offenses of escape from confinement and housebreaking are admitted by accused. Proof of his escape from the hospital is otherwise shown by competent substantial evidence. The fact that the Red Cross storeroom was rifled and that the wallet which was positively identified as property missing therefrom, was found in accused's possession at the time of his arrest, established the corpus delicti of the latter offense and justified the court in admitting in evidence accused's confession that he broke into the hospital on the evening in question. That the unlawful entry was made with intent to commit larceny in the building was proved by the confession and the other facts in evidence. All of the elements of both of these offenses are adequately established (CM ETO 3153,, Van Breeman, CM ETO 2840, Benson, CM ETO 3707, Manning).

The record of trial discloses that at the time accused was tried his status was that of a general prisoner under sentence of dishonorable discharge (suspended) and a ten year term of imprisonment. Although he was not described and identified as a general prisoner in the charge sheet and specifications, there was no question as to his identity, as he pleaded to the general issue and by so doing admitted that he was the person described in the specifications (CM ETO 1704, Renfrow, CM ETO 4995, Vinson; Winthrop's Military Law and Precedents (Reprint 1920) p.276; see as to form, MCM, 1928, appendix 41,p.237). Evidence of previous conviction for offenses committed by accused prior to the time he became a general prisoner was received in evidence. This was error inasmuch as in the case of a general prisoner, evidence of previous convictions admitted should be limited to evidence of offenses committed during an accused's status as a general prisoner (MCM, 1928, par.79c, p.66). The confirming authority was apprised of the nature of this error and the sentence imposed has accordingly been reduced.

6. The charge sheet shows that accused is 20 years of age, and states no data as to service. The record otherwise discloses that he is a native of Manville, Illinois.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized upon conviction of desertion and housebreaking by Article of War 42 and section 22 - 1801 District of Columbia Code. The designation of the United States Penitentiary,

Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, Sec.II, pars.1b(4), 3b).

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

RESTRICTED

(328)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 28 SEP 1945
TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private WILLIAM J. WISEMAN (36311373), Detachment of Patients, 48th General Hospital, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 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 16342. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16342).

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

( sentence as commuted ordered executed. GCMO 504, USFET, 24 Oct 1945).



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RESTRICTED

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

BOARD OF REVIEW NO. 5

3 OCT 1945

CM ETO 16343

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|---|---|
| U N I T E D  S T A T E S | SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | |
| Private LOUIS P. CUCOLO (12157929), Company K, 60th Infantry | Trial by GCM, convened at Paris, France, 19 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

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

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

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

Specification: In that Private Louis P. Cucolo, Company K, 60th Infantry Regiment, 9th Division, European Theater of Operations, United States Army, did, at the 3rd Replacement Depot, European Theater of Operations, United States Army, on or about 15 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 29 November 1944.

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

Specification: In that * * * did, at Paris, France, on or about 29 November 1944, knowingly and willfully and without proper authority, apply to his own use and benefit a Government motor vehicle, a ¼ ton 4X4 20387889-S, of the value of more than fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

He pleaded not guilty,and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of two previous convictions both by special court-martial for absence without leave for 35 days and 58 days, respectively, in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Seine Section, Communications Zone, approved the sentence, recommended that it be commuted, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but, owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the time of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution introduced an extract copy of the morning report of Detachment 69, 3rd Replacement Depot, Ground Forces Reinforcement System, of 15 September 1944 which was admitted in evidence, without objection by the defense, showing that the status of accused on that date changed from duty to absent without leave (R4, Pros.Ex.A). Further evidence showed that about the end of September accused met Miss Alissa Ben Moshe in Paris and that they made two trips together, hitch hiking once to Omaha Beach and making another trip in a jeep driven by accused. Miss Moshe testified that the jeep had been painted, she believed the numbers were changed, either by accused or another boy who was with him. Accused talked on several occasions to her about returning to his organization in a few days (R5,6).

On 29 November 1944 Sergeant James and four military policemen went to the Allied Club, Grand Hotel, Paris, where they found accused sitting in front of the club in a 9th Division jeep (R8,9). They approached, told him he was under arrest, and started to "frisk" him, whereupon he started to run. James yelled "halt"; the military policemen fired and ran after him (R8,9).

It was stipulated that the motor vehicle No. 20387889-S ¼ ton

4X4 vehicle (in which accused was sitting, Ex.B) was and is the property of the United States Army (R4).

Henry Brewer, agent 3rd CID, testified that on 4 December 1944 he saw accused at the 108th General Hospital and obtained from him a signed statement (R10). Before the statement was given he was advised that he had the right to remain silent, that anything he said might be used either for or against him, and he was given no reason to believe that by giving a statement he would receive a lighter sentence or immunity from trial (R10). He was not told that if he gave the information they would try to help him (R11). The statement was introduced into evidence without objection by the defense (R10). In it accused stated that he came to France in July 1944 with his unit, saw combat past the St. Lo area and was wounded by shrapnel on 1 August. He was then hospitalized until 29 August when he was sent to the 3rd Replacement Depot awaiting transfer to his own organization. About 8 September 1944 he absented himself without leave from the 3rd Replacement Depot, went to Paris where he stayed, except for short trips, until apprehended on 29 November 1944. He stayed at various hotels in Paris, bought guns from enlisted men and sold them at a profit, and bought English pounds from sailors which he sold to French civilians. About 10 November, Roccia, another soldier, gave him "peep" No. 20387889-S, after having painted numbers of accused's organization on the front bumper. Accused obtained gas from other soldiers by using dispatch tickets which he forged (Pros.Ex.B).

4. Accused, after being advised of his rights as a witness, elected to make a sworn statement (R11). He testified that when he gave his statement to the CID men he was told that if he told everything he knew they would help him out (R12), but the statement he gave was voluntary "in a way", that he was not threatened, and that it was given of his own free will and was all true (R13). About 28 September he went to Mullens where the 3rd Replacement was when he left, but it was no longer there so he returned to Paris (R12,14). He had an opportunity to fly back to the States with some friends by using papers they had gotten from prisoners of war, but he refused to go as he had no intention to desert (R12). He knew that there were military police in Paris and thought about turning himself in several times but never got up enough nerve (R13).

5. Accused is charged with desertion in violation of the 58th Article of War which offense is defined as "absence without leave accompanied by the intention not to return" (MCM, 1928, par. 130a, p. 142). The unauthorized absence was proved by the introduction of a duly authenticated extract copy of the morning report of the 3rd Replacement Depot. His return to military control was effected by arrest of the accused after an absence of 75 days, the major part of which was spent in Paris where he engaged in unlawful activities. It was proper for the court to infer an intent to remain away permanently from the length of accused's absence, his failure to return voluntarily despite his close proximity to military authorities, his activities and his final apprehension (CM ETO 1577, Le Van;CM ETO 14576, Hargett; CM ETO 5966, Whidbee)

The evidence showed that accused at the time of his arrest was in a government jeep, which he said had been given to him by a friend after the numbers on it had been changed, and that he used the jeep for his own purposes. No evidence was offered as to the value of the vehicle but this was not necessary since the court without such evidence could properly find it had a value in excess of $50 (CM ETO 7000, Skinner; CM ETO 14202, Schmidt and Aranda). The evidence was sufficient to support the court's finding of guilty of unlawfully applying to his own use and benefit a government vehicle in violation of Article of War 96, the Article under which the offense was charged (CM ETO 4701, Minnetto).

The voluntariness of the statement of the accused was a question of fact for the court. In view of the evidence presented, the Board of Review is of the opinion it was properly admitted and will not disturb the findings of the court (CM ETO 4701, Minnetto, supra).

6. The charge sheet shows that accused is 20 years and 6 months of age and was inducted 23 October 1942 at Camp Upton, New York. 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 as commuted.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 3 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private LOUIS P. CUCOLO (12157929), Company K, 60th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, 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 16343. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16343).

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

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( Sentence as commuted ordered executed. GCMO 505, USFET, 24 Oct 1945).

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

BOARD OF REVIEW NO. 3

26 SEP 1945

CM ETO 16344

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| 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, 12 June 1945. |
| Private JACOB J. MARTINI | ) | Sentence: Dishonorable dis- |
| (33560310), Company I, | ) | charge, total forfeitures and |
| 13th Infantry | ) | confinement at hard labor for |
| | ) | life. United States Penitentiary, |
| | ) | Lewisburg, Pennsylvania. |

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

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

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

CHARGE I: Violation of the 75th Article of War.

Specification 1: In that Private Jacob J. Martini, Company I, Thirteenth Infantry, then Private First Class, did, in the vicinity of Sassenroth, Germany, on or about 30 March 1945, fail to advance with the squad which was then ordered forward to clear the enemy out of the town of Sassenroth, Germany, and did not return thereto until after the town had been taken.

Specification 2: In that * * * did, in the vicinity of Klafeld, Germany, on or about 8 April 1945, fail to advance with the squad which was then ordered forward to clear the enemy out of the town of Klafeld, Germany, and did not return thereto until after the town had been taken.

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

Specification: In that * * * having received a lawful command from Second Lieutenant James D. Stewart, his superior officer to "get your equipment and fall out", did in the vicinity of Sassenroth, Germany, on or about 30 March 1945, willfully disobey the same.

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

Specification: In that * * * did in the vicinity of Offhausen, Germany, on or about 1 April 1945, desert the service of the United States by absenting himself without proper leave from his organization with the intent to avoid hazardous duty to wit: combat duty against an armed enemy of the United States, and did remain absent in desertion until he returned to the organization on or about 4 April 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of Charges I and II and their specifications, and guilty of the Specification of Charge III, except the words "desert the service of the United States by absenting" substituting therefore the word "absent", except the words "with intent to avoid hazardous duty to wit: combat duty against an armed enemy of the United States" and except the words "in desertion", of the excepted words, not guilty, of the substituted word, guilty, and not guilty of Charge III, but guilty of violation of the 61st Article of War. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death by musketry. The reviewing authority, the Commanding General, 8th Infantry Division, approved the sentence, recommended that it be commuted and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater, confirmed the sentence, but, owing to special circumstances in this case and the recommendation of the reviewing authority, commuted the sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence was undisputed as follows:

a. Charge I, Specification 1:

On 30 March 1945 accused was a member of the first platoon, Company I, 13th Infantry, which made an attack at about 0500 hours with other platoons of the company upon Sassenroth, Germany (R7-8,16,23).

Prisoners were taken (R8,17,25), "very few shots" were fired (R17) and no enemy fire was received (R25). During the attack accused, a lead scout for his squad (R16,24), fell out of ranks, said to his assistant squad leader, "The hell with it, I'm not going any further" and disappeared. He had no permission to leave his squad (R9,25). He was not present when the town was taken at 0700 or 0800 hours. He rejoined his platoon at about 1000 hours, arriving "on one of the chow trucks" (R9,17).

b. Charge I, Specification 2:

On 8 April 1945, accused was with his squad when it was engaged in the mission of clearing enemy snipers from a hill and establishing a main supply route in the vicinity of Klafeld, Germany (R9-10, 19,25). He entered woods with the squad but was not present when the men emerged therefrom about fifteen minutes later. Klafeld was captured about fifteen minutes later. About 15 or 20 Germans were taken prisoners, but no shots were fired. A search of the woods failed to reveal accused's presence. He had no authority to be absent. He was next seen by his platoon sergeant the following morning (R10,19-20,25-26,27).

c. Charge II and Specification:

At about 1500 hours on 30 March 1945, while his platoon was being assembled in front of a building in Sassenroth, Germany, to proceed to the assistance of another platoon in making an attack, his platoon leader, First Lieutenant James D. Stewart, ordered accused to "get your equipment and fall out immediately". Accused entered a house, where his equipment was located, but did not reappear. A search of the building five minutes later failed to reveal his presence and the platoon left without him. The Lieutenant did not see him again until 0600 hours the next morning when he was returned to the platoon (R11-12,14-15,17-18).

d. Charge III and Specification:

On 1 April 1945 accused was with his platoon when it left its defensive position in Offhausen, Germany, with the mission of taking and holding the town of Kirchen, Germany. He was not present when the platoon, after passing through enemy artillery and small arms fire, arrived at the outskirts of Kirchen and was not again with the platoon until he "was returned" on 4 April 1945. He had no permission to be absent (R12,13-14,18,27).

4. After his rights were explained (R28-29), accused testified that he joined the 8th Division in September 1943 and (R29), was twice wounded, on 13 July and 11 December 1944. He was hospitalized for two and one half months on the second occasion and thereafter became "nervous" when under fire (R30).

5. While the specifications under Charge I do not definitely recite that the misconduct alleged was committed "before the enemy",

the language used, in Specification 1, "fail to advance with the squad which was then ordered forward to clear the enemy out of the town of Sassenroth" and in Specification 2 "fail to advance with the squad which was then ordered forward to clear the enemy out of the town of Klafeld", clearly alleges in each instance a movement directed against the enemy whose immediate presence is thus indicated. The defense did not object to the form of either specification. Both were adequate in this case (CM ETO 4783, Duff; Winthrop's Military Law and Precedents (Reprint, 1920), pp.623-624).

6. The court's findings of guilty under the charges and specifications are supported by substantial evidence that accused failed to advance with his squad against the enemy as alleged on 30 March and 8 April 1945 in violation of Article of War 75 (CM ETO 2471, McDermott; CM ETO 1685, Dixon), willfully disobeyed the lawful command of his superior officer on 30 March 1945 in violation of Article of War 64 (CM ETO 5766, Dominick; CM ETO 5167, Caparatta) and was absent without leave from his organization from 1 to 4 April 1945.

7. The charge sheet shows accused is 22 years four months of age and was inducted 26 February 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 as commuted.

9. The penalty for misbehavior before the enemy and for willfully disobeying the lawful command of his superior officer by a person subject to military law is in each instance death or such other punishment as a court-martial may direct (AW 75, AW 64). Confinement in a penitentiary is authorized in commutation of a death sentence (AW 42; MCM, 1928, par.90a, pp.80-81). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B R Lafer Judge Advocate

Malcolm C. Sherman Judge Advocate

E K Cleary Jr Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 26 SEP 1945

TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private Jacob J. Martini (33560310), Company I, 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, as commuted, 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 endorsement. The file number of the record in this office is CM ETO 16344. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16344).

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

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(Sentence as commuted ordered executed. GCMO 490, USFET, 13 Oct 1945).

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

BOARD OF REVIEW No. 5

9 NOV 1945

CM ETO 16345

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|---|---|
| UNITED STATES | 9TH INFANTRY DIVISION |
| v | Trial by GCM, convened at Kothen, Germany, 8 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| Private JAMES A. QUEEN, (34119125), Company C, 39th Infantry. | |

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HOLDING BY BOARD OF REVIEW NO.5
HILL, JULIAN and BURNS, 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.

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

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

Specification: In that Private James A. Queen, Company "C", 39th Infantry, did, near Linz, Germany, on or about 11 March 1945, desert the military service of the United States by absenting himself without proper leave from his organization located near Linz, Germany, with the intention of avoiding hazardous duty and shirking important service and did remain absent in desertion until he surrendered himself to the 7th Corps Military Police Platoon, APO 307, on or about 17 March 1945, in Bonn, Germany.

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

Specification: In that * * * did, at Ramsbech, Germany, on or about 8 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs Trude Herbst, a German civilian residing in Ramsbech, Germany.

CHARGE III: Violation of the 96th Article of War

Specification 1: In that * * * did, at Ramsbech, Germany, on or about 8 April 1945, wrongfully commit an assault on Staff Sergeant Charles A. Yenser, Company "C", 39th Infantry by pointing at him a dangerous weapon, to wit, a loaded pistol.

Specification 2: (Finding of not guilty)

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found not guilty of Specification2 of Charge III and guilty of all the charges and the remaining specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, 9th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and with held the order directing the execution of the sentence pursuant to Article of War 50½.

3. a. (Charge I, Desertion). On 11 March 1945, Company C, 39th Infantry, of which accused was a member, foot-crossed Remagen Bridge on the Rhine and came to the town of Linz on the right bank (R53,57). Accused was present with the company as a member of the machine gun section when it arrived at Linz (R55). After crossing the bridge it was common knowledge that the company, which was prepared for immediate combat, would soon engage the enemy (R53,58). On the evening of 11 March, after supper, it moved out of Linz and proceeded to the town of Unkel (R53). Accused did notmove out with the company and a search of the area failed to disclose his whereabouts (R53,56-57). His absence, which was unauthorized, lasted six days from the evening of 11 March until 17 March (R54,58; Pros. Ex. 2). From the morning of 12 March, the company was engaged in combat with the enemy (R53).
until 17 March,

Accused testified that after crossing the Rhine to Linz on 11 March, he and several other soldiers were each given a bottle of champagne or cognac by a soldier who was passing out the bottles from the back of a truck (R60). After drinking the champagne or cognac, accused and two other soldiers went to a "beer-joint" about 40 yards away from the platoon area and drank beer mixed with cognac. The laststhing her remembered was sitting at the beer table talking (R60,62). He intended to move with the platoon. He did not intend to "hide from them" or to "mess up" when he went to the beer hall (R63). When he "came to" it was daylight but he did not know what day it was. He looked for his equipment in a house where he thought he had left it, but it was not there. He then went into the basement of this house and found a quantity of "wine or cognac". He began drinking and "went out" again "like a light." When he woke up the first time he was so sick that all he could do was to drink a little more and to keep it up until he passed out again (R67). He remained in the basement until he was ordered out by a member of the military police sent there to guard "all this champagne." He did not remember how many days or nights he had stayed there (R6177). When he woke up he was on the left bank of the Rhine. He did not know how he got across the Rhine from Linz, on the right bank, to the left bank, where Bonn is situated (R78). After he was expelled from the basement he asked another member of the military police where he could find the 9th Infantry Division, but he did not know. Anxious to return to his company he obtained a ride from a driver who thought the 9th Division was close to the 1st, and four hours later reached Bonn. There he sought out the Provost Marshal, told him his story, and was informed he would have to return to his company through channels (R61,62). He surrendered to the military police on or about 17 March (R68). He could not say whether his company was going into combat when it crossed the Remagen Bridge and stopped at Linz. He understood it was going into an assembly area for an indeterminate period. He admitted that while crossing the bridge there were enemy planes overhead and a few rounds of enemy artillery (R66, 67,68).

b. (Charge II, Rape). On 8 April 1945, Fritz Herbst, an engineer and mining director, his wife, Trude Herbst, and her mother were present in their home in Ramsbech, Germany. American troops arrived at this house at noon that day (R19-21). About 1630 hours accused grabbed Mrs Herbst by the arm and pulled her into the kitchen (R20,31). The husband followed them but was ordered out by accused (R21). The mother was not permitted to enter the kitchen (R31). Accused led Mrs Herbst to the stove and made her understand that he wanted some bacon (R31). She went out of the kitchen, told her husband the soldier wanted bacon and asked him to fetch some from the storage room. The husband complied and brought the bacon into the kitchen, remaining the while his wife prepared it. Accused, however, again ordered him out and he left through one of the three doors of the kitchen leaving his wife alone with accused (R22,23). After he left the kitchen, the husband heard the turning of the key in the lock, and soon afterwards heard his wife saying in a "begging tone", "Now leave me alone! I am a mother of three children" He immediately went upstairs and asked Sergeant Sanford for help (R21,12,23).

The sergeant went down with him and tried to open the door but found it locked (R12). He asked accused to open the door but accused, answering from within, told him to go away and leave him alone. The sergeant returned upstairs and explained the situation to Sergeants Yenser and Bartley. All three went down and accused was again asked to open the door, but he refused and said "he had something in there that he didn't want us to see" (R12-14). Two of the sergeants went around to the other door, tried to open it without success, and kicked it several times (R15). The husband urged Sergeant Bartley, who remained at the first door, to do something to open it, and the sergeant taking his pistol said "Step aside! Step aside a minute. I'll try to shoot open the lock on the door" (R23). A shot was fired, and a moment later the door was opened from the inside (R15,24). Mrs Herbst came out "crying and confused" and fell into her husband's arms. Her hair was disheveled and her face "cramped" and "distorted." He asked her what happened and she replied, "I was assaulted by two American soldiers!" At her request she was given a sedative and taken to a doctor who gave her a thorough "cleansing" (R24,36). Accused stood in the room with a poker in his hand. He was taken to the command post and turned over to the captain (R15). When he was at the door of the locked room, Sergeant Sanford heard no woman's voice and no cries (R17,18). Fifteen to twenty minutes elapsed from the time Mrs Herbst was left alone with accused to the time she came out of the room (R25).

Mrs. Herbst was the only person who testified as to what happened in the room after the husband was ordered out of the kitchen the second time. As she stood near the stove preoccupied with the bacon, she heard a noise and noticed that a second soldier, dark-haired, had entered the kitchen. One soldier took her by the arm and led her from the stove toward the kitchen door and locked it. He indicated that she remain silent by placing his finger on his lips. She became frightened and pleaded that they leave her alone. She told them she was sick and old and had a husband and three children. She showed them a four-inch scar at the base of her throat from an operation on her thyroid gland. They took her into the adjoining room containing a sofa and the black-haired soldier locked the door to that room. Accused led her to the sofa and forced her down on it against her protests (R32-34,38). By taking her hands and pushing them down on her mouth her head was placed in a horizontal position (R38). She was fully dressed and had on two or three pairs of pants and an undershirt that "locked" her clothes between her legs. Accused took her pants off all the way, tearing the second pair. She attempted to keep her pants on with her hands (R42,43,45). Accused suppressed her outcries by placing his hand over her mouth. She experienced cramps in her legs and "terrible stitches" in the abdomen (R33). Accused said to her, "You all come done or under," or words having a similar sound which she took to be a threat (R34,43). She also deduced from these words that since there were other soldiers in the back-rooms, they too -

would come in, and she exclaimed, "One is enough. Let me alone. One is enough." (R34,43). From their actions she believed they were going to beat her (R44). She attempted to kick him away to the best of her ability (R40). She thought he pulled her pants down after she was lying down, but at the time he inserted his male organ into her female organ she was in a half-sitting position, and since she was in that position her legs were "automatically spread already." Her legs were spread apart by accused in the process of removing her pants. She did not remain half-sitting throughout the act, but was also lying down, and at the time she was lying down her legs were pressed closely together (R42). Accused lay between her legs for a brief moment and she did not recall whetherit was during that moment that he penetrated her (R41). As far as she believed there was penetration. She was "absolutely" sure accused penetrated her person with his male organ (R45). She struggledto the best of her ability to prevent the act of accused (R45-46). While the latter was engaged in the act of intercourse, the dark-haired soldier was standing by the door (R38,41). In response to a call from accused he went over and held her legs (R35,38-39,44). She admitted that during the intercourse she was holding a lighted cigarette in her hand which she "had to smoke" (R40). It was the same cigarette she had been smoking before she was attacked (R41). She held the cigarette because of the cramp in her legs. She experienced a loss of power to move her arms and legs at that moment. She did not lose her power to move her arms and legs at that moment. "I would not have been able to defend myself against two." It did not enter her mind to use her hands to defend her self. "I pleaded and I cried and, through the cramp and pain in my legs, I was unable to defend myself." She also suffered pains in the abdomen. She has been subjected to these pains recurrently since the operation on her gland (R46). During the intercourse there was knocking on the door and it was being shaken with increasing violence. The dark-haired soldier urged accused to hurry up and finish (R33,34). When accused was done, the other soldier began having intercourse with her but desisted when the knocking and the shaking of the door became continuous, and opening the door leading to the hallway, he disappeared (R34,35). Accused went to the kitchen and unlocked the door (R44). She picked up her pants, put them in her pocket, and ran out through the kitchen toward the wash kitchen (R35,44, Pros. Ex.1). Her husband was standing there and she fell into his arms saying, "It has happened. It is past. It is all finished. I want to go to a Doctor." (R35).

She never indicated consent to the intercourse (R35) and never gave any assistance to accused (R45). She had not been on friendly terms with him prior to this occurrence (R39). She thought that neither of her two assailants was drunk (R40).

Accused testified that he remembered the taking of Ramsbech and another town on 8 April. In Ramsbech they moved into a house about noon (R64) and set up two machine guns to cover the road. Some of the men searched the house

and found cognac and champagne in the basement. The power was still on in the house and there was a radio and an electric heater. He listened to the radio and drank cognac using champagne as a chaser. The man in the house (identified as Mr. Herbst (R68)) pointed to the bottle from which accused was drinking and said that it was "nix good", that it would make him "crazy." Accused tastedit, found it pretty good and drank it. Meantime he went through an artillery barrage. Three tanks went by and fired at the house. About 1300 hours he went down to thekitchen where there was a stove and remembered building a fire in it and frying some kind of sausage while others brought bread. He was trying to prepare some meals for the boys. That was the last he remembered (R63). He woke up in a jeep and was told they were carrying him back to the company kitchen (R63-64). He then "passed out." He did not remember seeing Mrs Herbst in the house. He did not remember what happened from the time he was cooking at the stove to the time he woke up in the jeep (R64,69). As he was drunk, he did not believe he raped the woman. "I have drank a lot of wiskey in my time and I have messed with a lot of women, too. When I get drunk, I get no desire for women. My dick wouldn't get hard, and I wouldn't want any woman when I got that drunk" (R65). "I have had girls to tell me that I am no good to them when I am drunk. When I am drinking I have no desire for women" (R71). "One time I went to bed with one woman and when I woke up, I was on the floor and she wasin bed with another man" (R70). He could not state of his own knowledge that he did not rape anyone, but admitted saying in his pre-trial statement that he "absolutely did not rape any woman" (R71). As to his desire for drink, he testified, "It seems I have to have it, or I'll go nuts" (R70).

Major William T. MacLauchlin, Medical Corps, Division psychiatrist, testified that accused was suffering from chronic alcoholism orpathological intoxication. When he drinks to excess he goes into a "furore" and while in that state he may fight people and even draw a gun. When he recovers he does not remember what happened. During the period covered by his amnesia he knows the difference between right and wrong.

c. (Charge III, [illegible] Assault). On 8 April 1945, at Ramsbech, Germany, Private First Class Klementowski was sitting reading a paper in a building in which 4th Platoon was billeted. He carried a holster on his hip containing a .32 caliber revolver fully loaded with six rounds. Accused grabbed the revolver from the holster and fired a round into the floor and another into the ceiling. He then pointed the weapon around the room. All the men in the room except Klementowski "took off." The latter remained there until accused drove him out and chased him upstairs where Klementowski eluded him by hiding. Accused returned downstairs and pointed the gun at Sergeant Yenser who "looked scared." Klementowski followed accused downstairs and asked him for the gun. Accused gave it to him. The gun was

found to be cocked (R48,49). Klementowski stated accused was drunk and "didn't know what he was doing" (R51). The platoon, First Lieutenant Charles E Wilson testified that after a disturbance, he spoke to accused, who was intoxicated, and took his liquor away from him. He tried to straighten him out and when he left him accused "appeared to be in control of his faculties" (R9,10).

With reference to this offense accused merely testified that he did not remember seeing Lieutenant Wilson or talking with him and that he could not say positively that he did not point a pistol at Sergeant Yenser (R69,72). He becomes belligerent when intoxicated and engages in fights (R71).

4. a. The evidence justified a finding that when accused left his organization without authority he knew that combat with the enemy was imminent. He was a member of a combat unit which was prepared for battle at a moment's notice, and it was common knowledge that the unit would soon enter into an engagement. That very day he had crossed the Remagen Bridge in the direction ofthe enemy and witnessed unmistakable signs of resistance in the form of hostile planes and artillery fire. The company went into combat the morning after his departure. From this evidence the court could properly have inferred that accused quit his organization with intent to avoid hazardous duty and to shirk important service (CM ETO 1432, Good; CM ETO 13023, Leighton). Accused, however, denied that he had any such intent. He claimed that he left his platoon area to drink, and that he became so drunk that he remembered nothing from time he was drinking at a place 40 yards away from the platoon area until he again became aware of his surroundings after an indefinite lapse of time. His testimony contains material inconsistencies. Whether these were due to his confused recollection of events or to his becoming tangled in a fictitious recital, was a question for the court to determine. Even if the court accepted his testimony that hedrank himself into a state of temporary amnesia, it could also have found that in view of his previous similar experiences from excessive drinking, he knowingly resorted to it not only to gratify his inordinate desire for alcohol but also for the purpose of escaping the approaching ordeal of combat through extreme intoxication (Cf. CM ETO 6626, Lipscomb).

b. There was sufficient evidence that accused had carnal knowledge of Mrs. Herbst at the time and place alleged. Considerable confusion and several inconsistencies are found in her testimony concerning the sequence of events, the position of her body on the sofa during the intercourse, the spreading of her legs, and her ability to use her arms and legs. Her admission that during the sexual act she was holding a lighted cigarette in her hand indicates that her resistance was far from vigorous and tends to prove acquiescence on her part without active cooperation. On the other hand, her protests, her attempted outcries suppressed by the accused, the use of her feet to repel him, the holding of her legs by the other soldier while

accused achieved his purpose, and her physical appearance when she emerged from the room, negative the existence of consent. On this evidence the court who heard and saw the witnesses could reject inferences favorable to accused and adopt those favorable to the prosecution. Indeed the time, place and circumstances surrounding the incident militate against the presence of consent. Her home had been taken over by invading forces but a few hours before. It is unlikely that the moment the doors were locked thiswoman, in the midst of her own people and a hostile combat unit, shrewdly appraised her chances of indulging in illicit intercourse without being surprised in the act, and aftwerward concealed her misconduct by pretending she was raped. Such behaviour, in the circumstances disclosed by the evidence, would presuppose a highly improbable combination of lasciviousness, crafty calculation, and recklessness, not intelligently imputable to a normal woman. There is no suggestion in the record that Mrs. Herbst was a woman of loose morals. She was a wife and the mother of three children In the absence of evidence to the contrary her chaste character is presumed (MCM, 1928, par. 112a, p.110). The court not improperly chose to believe that the absence of more violent resistance was due, not to consent, but to her impaired strength and the fear engendered in her by the outrageous conduct of assailants who were bent upon the accomplishment of their design regardless of her protests, struggles or stifled outcries. The record of trial contains substantial evidence which, if believed by court, warranted a finding that accused had carnal knowledge of the victim by force and without her consent (CM ETO 7251, Jackson; CM ETO 12683, McCullough).

The Board of Review confirms the following statement, which has many times been acted upon by the Board of Review in examining records of trial on appellate review where the question here involved was vital in determining the guilt of American soldier accused of rape:

> "The case is of familar pattern to the Board of Review which has consistently asserted in its consideration of like cases that the court with the witnesses before it was in a better position to judge of their credibility and value of their evidence than the Board of Review on appellate review with only the cold typewritten record before it" (CM ETO 8837, Wilson)

c. No discusion is required to show that the guilt of accused of assault with a pistol on Sergeant Yenser was adequately proved.

d. On the evidence before it the court was not required to find that accused's drunkenness affected in any way criminal liability for any of the offenses charge against him. (CM ETO 9611, Prairiechief; CM ETO 12855, Minnick).

5. The charge sheet shows that accused is 29 years seven months of age and was inducted 20 August 1941, at Fort Bragg, North Carolina.

He had no prior service.

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

7. The penalty for desertion in time of war is death or such other punishment as the court-martial may direct (AW 58) and for rape, death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of desertion by Article of War 42 and upon conviction of rape by the same Article and section 278 and 330, Federal Criminal Code (18 USCA 457, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars 1b (4), 3b).

(DISSENTING IN PART) Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 5

19 NOV 1945

CM ETO 16345

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| UNITED STATES | ) | 9TH INFANTRY DIVISION |
| | ) | |
| v | ) | Trial by GCM, convened at Kothen, Germany, 8 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| Private JAMES A. QUEEN, (34119125), Company C 39th Infantry | ) | |

OPINION BY JOHN WARREN HILL
DISSENTING IN PART

In my opinion the record of trial is not legally sufficient to sustain the findings of guilty of Charge II and its Specification.

The sole evidence as to each of the essential elements of rape: penetration, lack of consent, force (and of resistance or fear) comes from the mouth of the prosecutrix. Her story at the best is rambling, uncertain, and contradictory. At the worst, it is imaginative in essential details and, more serious in my opinion, borders very markedly on the delusional.

Asked by the court if she was absolutly certain of penetration, she answered:

"As far as I believe, yes".

This answer should be analyzed carefully. It shows that there was doubt in the mind of this woman. She was an experienced wife, the mother of three children. At the time of the "rape" she was lying-

or sitting-supine, nonresistant, conscious of every act, each emotion, had there been penetration, she would have known it. I disregard he final answer that she was certain. This last answer was improperly urged if not forced out of her by a judge who heckled her with the demand; "I don't want belief. I want you to answer me", etc. To this highly imaginative, seriously ill woman, this judicial demand may well have suggested that the court wanted from her the very answer sought by the prosecution.

Here we have no timid, modest young maiden hesitant to admit that she had been penetrated. Instead we have an experienced wife who "knew all the answers." She was not a hostile witness and certainly not a reluctant one. I am bound to accept her first answer as the truth. That being the case, I must have more than her mere "belief" that she was penetrated in order to support a finding of guilty of rape. Particularly is this true in this case in view of the fact that this witness in many instances demonstrated unreliability, vagueness and-as suggested- possible delusions.

Her testimony makes a veritable shambles of the elements of non-consent, resistance and force. Accused is not said to have carried or used the ubiquitous pistol or carbine which have become the "sine qua non" in these rape cases. The only real force claimed to have been used was the holding of the prosecutrix's legs by the "second soldier" who arrived and departed so mysteriously. Yet, according to the prosecutrix her legs were paralyzed and useless as weapons of resistance. There was no need to hold them. In fact they automatically spread apart when she postured herself at the time of the intercourse. However, according to her, accused did use a terrorizing "expression." All through her testimony this prosecutrix hummed a phase, once used by accused, "Down or Under" as the "Force-motif" of her episode.

Removing from the story of the prosecutrix all other incredibilities, it is impossible to wipe out the picture, which she herself painted, of her smoking a cigarette while being raped. Such an act belies any claim to any resistance. Furthermore, a woman who would think more of a cigarette than her virtue is either unchaste or mentally ill. To place this woman in the latter category is warranted not only by the revealing character of her testimony but by her medical history which the record disclosed.

I am unable to say that the testimony on which this accused was convicted of rape was either "competent" or substantial.

For the foregoing reasons, in my opinion the record of trial is not legally sufficient to support the findings of guilty of Charge II and its Specification.

It is, however, in my opinion, legally sufficient of the remaining charges and specifications and the sentence. However, I believe, to be logical, the period of confinement should be substantially reduced.

John Bannister Judge Advocate

(353)

1st Ind

War Department, Branch Office of The Judge Advocate General with the European Theater. 9 NOV 1945 TO: Commanding General, United States Forces, European Theater, (Main) APO 757, U.S. Army.

1. In the case of Private JAMES A. QUEEN, (34119125), Company C, 39th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as commuted, which holding is heret approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16345. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16345).

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

( Sentence as commuted ordered executed. GCMO 622, USFET, 6 Oct 1945).



16345

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

BOARD OF REVIEW NO. 2

8 OCT 1945

CM ETO 16353

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| U N I T E D  S T A T E S | ) 1ST INFANTRY DIVISION |
| | ) |
| v. | ) Trial by GCM, convened at Cheb, Sudetenland, |
| | ) Czechoslovakia, 4 June 1945. Sentence: |
| Private FRANKLIN O. LILLEY (12002494), Headquarters Battery, 1st Infantry Division Artillery | ) Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Franklin O. Lilley, Headquarters Battery, 1st U. S. Infantry Division Artillery, did, at Cheb, Sudetenland, Czechoslovakia, on or about 7 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Alma Benker.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, 1st Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but, owing to special circumstances in this case, commuted it

to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Prosecution's evidence is summarized as follows:

Accused is a member of Headquarters Battery, 1st Infantry Artillery Division (R43). As related by Alma Benker, accused appeared on the balcony of the house where she lives at Karl Stilpstrasse 29, Eger, Czechoslovakia, which is also known as Cheb, Sudetenland (R43,62), about 1900, 7 May 1945 (R8). He was drunk but was able to stand by himself and had a "heavy walk" (R9). Alma Benker and Frau Schloth were both on the balcony which was one half story below the third floor where Alma Benker lived (R8). Accused threw his arms around their "necks" and, looking down from the balcony, pulled his pistol from its holster, pointed it at a man down in the yard and fired. Frau Schloth pushed accused as he fired the pistol so he would not hit the man (R8-9). About five or ten minutes later both women went back from the balcony to go down the stairs but accused interfered by grabbing Alma Benker by the shoulder and pulling her back. She "wanted" to get away from him but was unable to do so (R10). He asked her where she lived by pointing and making signs, pulled her up the stairs, pressed her against the wall and went to the door of her apartment. He motioned for her to unlock the apartment and Frau Benker rang the bell. Mrs. Schmidt, a refugee living with Frau Benker, opened the door (R11) and they went in. He obtained the key from Frau Benker and tried unsuccessfully to lock the door (R11-12). He asked the two women to lock it. Frau Benker got to the door, opened it, and yelled "Help, Help". Accused then pulled her back, grabbed both women, pushed them into the corner of the hall and pointed his pistol at them (R12-13). Frau Benker then locked the door when he "demanded" it (R14).

Accused and the two women next went to the kitchen and thence into the bedroom accompanied by a neighbor's small boy who had been in the kitchen (R14-15). Accused removed the key from the kitchen side of the bedroom door, locked the door from the bedroom side, removed the key and placed it on the night table. Frau Benker still did not know what he wanted. He pulled back the covers of one of the two beds, which were "next to each other", and indicated to her that she was to undress him (R15). While he held his pistol in his hand, she removed all his clothing (R16). He then indicated to Frau Schmidt that she undress Frau Benker whereupon she removed all of Frau Benker's clothing (R16-17). Frau Benker made no effort to resist because she thought he would shoot her. Next he indicated that she remove Frau Schmidt's clothes which she did. He then put the child in the middle of the beds, grabbed Frau Schmidt, pushed her into the right bed and pushed Frau Benker into the left bed (R17). Accused pulled Frau Benker's legs apart, put his knees between them, put

the pistol under the pillow and threw himself on top of her. He had sexual intercourse with her penetrating her sexual organ with his (R18). She did not voluntarily permit the sex relation (R26) and tried to pull away from accused by lifting her body. At her slightest motion, accused pulled the pistol from under the pillow, threatened her, and once had it on her neck (R19). Accused was in bed with her about a half hour. While he was with her, two soldiers came in. One left immediately and accused indicated that the other should go to Frau Schmidt (R20-21). A few minutes later that soldier left and then Frau Schmidt left with her clothes (R22-23). Accused got up, pistol in hand, went to the door, and acted like he wanted to go after her (R23). Later he compelled Frau Benker to dress him and asked her to sleep with him that night (R24). She dressed herself and he "demanded" she go with him which she did voluntarily (R24) thinking that she could get help on the streets (R30). They went out through the backyard and over fences (R24) at about 2015 or 2030 (R25). The accused was arrested and she went with him to the military installation and told her story (R25).

Alma Benker's testimony is substantially corroborated by the testimony of Frau Schloth with respect to the incidents occurring on the baleony, on the stairway, her cries for help from the apartment and the identification of accused (R34,35,37,39); by the testimony of Frau Schmidt as to the incidents occurring in the apartment including the identification of accused (R50-55); and by a military police sergeant as to the arrest of accused (R43-44). The latter also testified that accused had a loaded pistol and a quart bottle half full of a liquid which smelled like alcohol (R45); that accused gave his organization as 1st Signal Company (R45); and that he said he didn't know anything about the lady with him and if she told anything it would not be the truth (R47). Accused at the time of his arrest had been drinking. He was not staggering but talked in a loud voice (R47-48). He was walking about a pace in front of the woman and holding her right arm in front of her (R49).

4. The accused was advised of his rights by the law member and elected to remain silent. No evidence was introduced for the defense (R63).

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 evidence is undisputed that accused effected a pentration of the victim's genitals without her consent. From the outset he displayed a reck-

less regard for human life in shooting at the civilian. He forced the victim at gun point to lock the apartment and subsequently locked the bedroom door. Again at gun point, he caused the victim and Frau Schmidt to be undressed. He pushed the victim onto the bed and had sexual intercourse brandishing the pistol whenever she made the slightest move to frustrate the execution of his designs. While there is some evidence of his intoxication, the step by step execution of his designs negatives any conclusion that accused was not fully aware of his actions. The elements of proof are well established by the evidence (CM ETO 1069, Bell 1943).

6. The charge sheet shows that accused is 22 years and nine months of age and that he enlisted without prior service on 17 July 1940 at Syracuse, New York.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a United States penitentiary is authorized upon conviction of the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 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. 8 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private FRANKLIN O. LILLEY (12002494), Headquarters Battery, 1st Infantry Division Artillery, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of 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 16353. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16353).

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

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( Sentence as commuted ordered executed. GCMO 524, USFET, 30 Oct 1945).

16353

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

BOARD OF REVIEW NO. 3

25 SEP 1945

CM ETO 16397

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| U N I T E D S T A T E S | 11TH ARMORED DIVISION |
| v. | Trial by GCM, convened at Gmunden, Austria, 16 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U. S. Penitentiary, Lewisburg, Pennsylvania. |
| Private MAURICE L. PARENT (31435853), Company F, 41st Cavalry Reconnaissance Squadron Mechanized | |

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Maurice L. Parent, Company F, 41st Cavalry Reconnaissance Squadron Mechanized, did, at Blumau, Gemeinde Schlierback, Austria, on or about 2300, 27 June 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Huberta Prause, a human being by shooting her with a caliber 45 M-3 Sub Machine Gun.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for one day in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be 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 rest

of his natural life. The reviewing authority approved the sentence, designated the U. S. 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 at 2200 hours on 27 June 1945, accused and another soldier went on guard duty at an outpost which included a road block and adjacent railroad station at Galgenau, in Blumau, Austria (R13,25,28). At about 2215 hours a train arrived at the station and a young woman was the only person who got off (R26,28). Accused, who had been standing at the station, walked south from the station with her, and did not return to his post that night (R26,29,30). Shortly after 2300 hours, a woman's cry for help was heard by a German woman who lived a short distance south of the station (R31,Pros.Ex.2)

At about 0730 hours the following morning, accused's squadron surgeon, his company commander and an investigating officer, eadh of whom testified at the trial, were taken to a point 200 or 300 yards south of the railroad station where they saw the dead body of a young woman, in her early twenties, nude except for shoes, a wrist watch and bracelet, lying on her back near some trees along a trail through a field (R11,14-15,19). She was identified by her aunt, who was escorted to the scene, as Huberta Prause, who had been expected to return from Linz to her home near Blumau on 26 or 27 June (R20,24). The deceased had a smoke-blackened bullet wound in the left corner of her mouth, another about two centimeters above it, a third bullet wound above an eyebrow and another wound in her head, which had caused instant death. Her hair was matted with blood, brain matter and bone fragments. She had a large "black eye", similar hematomas surrounding the nipples of each breast, and bruises on the left thigh and shin. The external genitalia were virginal and showed no evidence of violence, traces of blood in that region being apparently of menstrual origin (R15-16). A .45caliber bullet was dug from the ground behind her head (R19). Strewn about an area of 12 feet, about 100 yards from the body, were found a ladies' silk shirt containing reddish brown stains, a pair of ladies' pants torn in one piece, a woman's slip torn on the left side, a used sanitary napkin, a United States Army helmet liner with the name "Maurice" and and the numbers "31435" on the inside, a magazine for a .45 caliber M-3 sub-machine gun containing three live rounds of ammunition, a gray skirt and jacket and two handbags (R8-11, Pros.Exs.3,4,5,6,7,8). The ladies' clothing was identified as deceased's clothing by her aunt (R20,25).

Accused's commanding officer went from the scene up to the outpost and was talking with the guard on duty, when accused walked up and, before his commanding officer had spoken, said, "Sir, I shot that woman". Accused then reached in the sentry box and handed over a caliber .45 M-3 sub-machine gun (R12,22, Pros.Ex.9). Later that morning a pair of "GI" trousers, containing reddish brown stains near the crotch, was found in the accused's room (R13,Pros.Ex.10).

During the same morning, after accused was warned of his rights under the 24th Article of War, he told the investigating officer that he started out to escort the deceased home, and when he wanted to "subdue" her, she at first had no objection, but immediately thereafter she ran away and he ran after her, hit her, and ordered her to lie down, which she did. When she started to get up, he "let her have it" with three or four shots. He was drunk. He did not succeed in having intercourse with her. He identified the articles found near the body (R21-22).

4. Defense counsel stated that accused had been warned of his rights and elected to remain silent, and no evidence was offered in accused's behalf (R32). On cross examination, accused's commanding officer testified that he had no reason to believe accused's character was other than excellent "because he did his job and we didn't have any trouble with him" (R13).

5. The uncontroverted evidence fairly shows that accused, without apparent justification or excuse, shot and killed Huberta Prause with a submachine gun, at the time and place alleged, because she resisted his illegitimate demands to have sexual intercourse with her. While his statement to the investigating officer indicates that he was drunk at the time of the acts, there is no evidence that he was or had been drinking at the time he left his guard post, and his actions after leaving the station with the deceased are not necessarily those of a drunk person. The question of whether he was too intoxicated to have entertained the requisite intent to kill was one of fact for the determination of the court (CM ETO 1901, Mirandi; CM ETO 2007, Harris). The conduct of accused evidences a cold and deliberate killing of his victim, and the court was fully warranted in finding him guilty of the crime of murder as charged (CM ETO 15902, Mariano; CM ETO 6159, Lewis; CM ETO 5747, Harrison, Jr; MCM, 1928, par. 148a, pp. 162-164).

6. At the outset of the trial, a report of proceedings of a sanity board was introduced, without any identification, by the prosecution without objection by the defense, showing that accused was sane at the time of the alleged acts and at the time of the proceedings (R6,Pros.Ex.1). While the report clearly constituted hearsay evidence, no issue of insanity was raised at the trial, and no prejudice therefore resulted to accused's substantial rights from the erroneous admission of the report (CM ETO 11265, Murray, Jr.).

7. The charge sheet shows that accused is 19 years five months of age and was inducted 19 September 1944 at Fort Banks, Massachusetts.

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

(364)

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 crime of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454, 567). The designation of the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B H Levy Jr Judge Advocate

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

BOARD OF REVIEW NO. 2

28 SEP 1945

CM ETO 16399

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| UNITED STATES | 13TH ARMORED DIVISION |
| v. | Pfarrkirchen, Bavaria, Germany |
| Private CHESTER J. REID (33120580), 403rd Quartermaster Truck Company | Trial by GCM, convened at Tann, Kreis, 23 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HEPBURN and MILLER, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Chester J. Reid, 403d Quartermaster Truck Company, did, at Number 20 Spardorf Station, Germany, on or about 23 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Babette Rauh.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions, one by special court-martial for absence without leave for two hours in violation of Article of War 61, for illegally carrying a knife, and indecent exposure in violation of Article of War 96 and one by summary court for absence without leave for one day in violation of Article of War 61. All members of the court present at the time the vote was taken concurring, accused was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 13th Armored Division, approved the

sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but, owing to special circumstances in this case, commuted the sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement, and withheld the order of execution pursuant to Article of War 50½.

3. The prosecution's evidence is summarized as follows:

Frau Babette Rauh, the alleged victim, testified that accused, whom she pointed out in the court room and steadfastly maintained that he was the man (R7,9,10,17,18,19,48), came to the house of her parents, Spardorf Number 20 (R6), about one o'clock in the afternoon on 24 April, although she was not quite sure of the date. When he came to the door, she was afraid and wanted to get out of the door but accused stood in front of it and would not permit her to leave. She cried for help whereupon the accused took his gun from his shoulder, loaded it and pointed it at her. He was talking but the only thing she could understand was "Fick-Fick". He pushed her backwards step by step onto the bed, and with the gun in his hand, "forced" her to take her pants down (R7). Accused had sexual intercourse with her penetrating her genitals. She did not resist because of the gun he pointed at her. During the act of intercourse the gun was on the bed (R8). After the act of intercourse accused unloaded his gun (R14). She thought accused had been drinking but did not smell liquor on his breath (R15). About five minutes later accused returned with another soldier and, after finding her, grabbed her by the arm and tried to pull her into the room where they had been before but when she cried for help, the other soldier shook his head and the two left the house (R9).

Frau Rauh's father testified that accused came to the house about one o'clock on 23 April, pushed Mrs. Rauh into the room when she tried to leave, and shut the door (R20-21). Her three and a half year old (R14) child started to cry but he could do nothing to help the child's mother. He saw the soldier lying in bed with Mrs. Rauh when the child pushed the door open. He cannot hear well and with the child's crying did not hear anything go on in the other room (R21). When accused left the house there was a mark on his sleeve from the coloring on the wall (R22).

Captain Suwijn of accused's organization testified that on 23 April, at about 1600, an old man reported that his daughter had been raped. The man saw about one half of men of the company and identified accused as the man who had been in the house. The accused was on his bunk, drunk. In identifying him, the man turned accused over and noted that his sleeve was coated with chalk or "something" that had come off the wall. The Captain also saw it. The woman identified accused as the one who attacked her from five or six men then in her presence (R51).



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4. The accused, after his rights were explained to him by the law member, elected to remain silent (R49-50).

The assistant defense counsel took the stand and testified that, on the day preceding the trial, several soldiers were filed through a hall before the prosecuting witness' father and he picked out one other than the accused (R28). The daughter went through the same procedure but picked out the accused without hesitation (R29). A sergeant of accused's organization testified that he saw accused about 0900 23 April and at that time he was drinking and he told him not to take more because he thought he had enough (R31). He saw him again right after 1200 chow coming from behind a refugee camp and he was drunk (R33) and at about 1700 (R35), when he saw him in bed, he was still in a drunken state (R33). He did not notice any discoloration on his clothes (R35). A corporal testified that the first sergeant sent him to put accused to bed about 1400. The accused was pretty drunk but still on his feet and he could not say whether he smelled liquor or not (R40).

Another soldier saw accused at about 1240 or 1250 heating rations and, after coming on duty at the maintenance shop at about 1300, he saw accused come into the maintenance shop and saw him lying behind a refugee house just off the maintenance shop. He was pretty drunk at that time (R45). At about 1345, he took accused to the billet and put him to bed (R45).

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 * * * Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient when there is in fact no consent" (MCM, 1928, par.148b, p.165).

In view of the undisputed evidence, the conclusion that the carnal knowledge was accomplished without consent of the victim is inescapable. The woman was prevented from leaving the room. When she called for help, the accused loaded his gun and forced her at gun point onto the bed and there effected a penetration of her genitals. In view of the positive and unimpeached identification of accused by the prosecutrix, corroborated by her father, the court was justified in accepting her testimony as against any inference which might be drawn from the incomplete account established by defense of the whereabouts of accused. The evidence indicates that accused was intoxicated on the day of the alleged offense. However, he was able to walk and fifteen minutes before the time of the alleged offense was heating rations. He loaded his rifle when the woman cried for help. After the act complained of, he unloaded it. All the facts indicate that he was not so intoxicated that he did not know what he was doing. The record is replete with evidence justifying the finding of the court(CM ETO 9083 Berger).

6. The charge sheet shows that accused is 26 years and eight months of age and that he was inducted without prior service on 17 October 1941 at Richmond, Virginia.

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

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

(TEMPORARY DUTY) Judge Advocate

Earle Hepburn Judge Advocate

Ronald D Miller Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 28 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private CHESTER J. REID (33120580), 403rd Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 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 endorsement. The file number of the record in this office is CM ETO 16399. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16399).

30 OCT 1945

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

( Sentence as commuted ordered executed. GCMO 517, USFET, 30 Oct 1945).

16399



RESTRICTED

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Specification: In that Private Jervey Zimmerman, did, at Marienburg, Germany, on or about 30 May 1945, unlawfully enter the dwelling of Stanislaw Klucha, with intent to commit a criminal offense, to wit, rape therein.

CHARGE IV: Violation of the 93rd Article of War
(Finding of not guilty)

Specification: (Finding of not guilty)

CHARGE V: Violation of the 92nd Article of War
(Finding of not guilty)

Specification: (Finding of not guilty)

GREEN

CHARGE I: Violation of the 61st Article of War
(Nolle prosequi)

Specification: (Nolle prosequi)

CHARGE II: Violation of the 65th Article of War
(Disapproved by the reviewing authority)

Specification: (Disapproved by the reviewing authority)

CHARGE III: Violation of the 92nd Article of War

Specification: In that Private William B Green, did, at Marienburg, Germany, on or about 30 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Mary Anna Klucha.

CHARGE IV: Violation of the 93rd Article of War

Specification: In that ** * ** did, at Marienburg, Germany, on or about 30 May 1945, unlawfully enter the dwelling of Stanislaw Klucha, with the intent to commit a criminal offense, to wit, rape therein.

CHARGE V: Violation of the 96th Article of War
(Finding of not guilty)

Specification: (Finding of not guilty)

By direction of the reviewing authority under Charge 1 and Specifcation against each accused a nolle prosequi was entered. Each accused pleaded not guilty to the remaining charges and specifications against him.

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

BOARD OF REVIEW NO. 3 12 OCT 1945

CM ETO 16405

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| U N I T E D S T A T E S | ) | SEVENTH UNITED STATES ARMY |
| | ) | |
| v. | ) | Trial by GCM, convened at Gutersloh, Germany, 5 July, 1945. Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor, ZIMMERMAN, for ten years, GREEN for life. United States Penitentiary, Lewisburg, Pennsylvania |
| Privates JERVEY ZIMMERMAN, JR. (35921863), and WILLIAM B GREEN, (35734979), both of 3130th Quartermaster Service Company | ) | |

HOLDING by BOARD OF REVIEW NO. 3.
SLEEPER, SHERMAN AND DEWEY, Judge Advocates

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

2. Accused were arraigned separately and tried together by direction of the convening authority upon the following charges and specifications:

ZIMMERMAN

CHARGE I: Violation of the 61st Article of War
(Nolle prosequi)

Specification: (Nolle prosequi)

CHARGE II: Violation of the 65th Article of War
(Disapproved by reviewing authority)

Specification: (Disapproved by reviewing authority)

CHARGE III: Violation of the 93rd Article of War

Zimmerman was found guilty of charges 11, 111 and their specifications and not guilty of charges 1V, V and their specifications, Green was found guilty of charges 11, 111 and 1V and their specifications and not guilty of Charge V and its Specification. Evidence was introduced as to Zimmerman of three previous convictions by summary court, two for absences without leave each for one day in violation of Article of War 61 and one for being disorderly in quarters in violation of Article of War 96. No evidence of previous convictions was introduced as to Green. As to Zimmerman, two-thirds, and as to Green, three-fourths of the members of the Court present at the time the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, Zimmerman for ten years and Green for the term of his natural life. The reviewing authority disapproved the findings of guilty of the Specification of Charge 11 and Charge 11 against each accused, approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as to the place of confinement of each accused, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence applicable to those charges and specifications of which the accused were found guilty, as approved, showed that on May 29 1945 prior to 2300 hours Zenabja Klucha, a Polish girl, living in Marienburg, Germany, went to the home of a neighbour where she met the two accused. They were doing card tricks. She left about 2330 hours and returned to her home only two meters away where she lived with her baby, her brother age 17, her mother, her father Stanislaw Klucha and her sister Maria Anna (R10-11,19,22-23,28). Accused both followed her. On entering her house she told them "no" and closed the door. Accused, each armed with a carbine, opened the door, and entered after her without invitation (R11,23-24,31).

However, Herr Klucha's testimony indicated that they did not open the door since "The door was opened so they entered by themselves" (R11). They sat down, started talking and laughing, and performed more card tricks. Green offered Zenabja his wrist watch. She told them it was late and they should go home. However, both accused remained with the family in the kitchen, demanded whiskey and offered Herr Klucha chocolate and cigarettes if they could sleep with his daughters. He refused (R11-12,24). Zenabja and Maria went to their room, closed and locked the door. Green soon thereafter came and pointed his rifle at the girl's bedroom door, which they opened at the direction of their father after he warned that "otherwise they will shoot" (R12,24,31). When their further urging to Herr Klucha that they be allowed to sleep with the girls was unsuccessful, Zimmerman loaded his rifle and pointed it at members of the family. This caused them to start yelling; the baby screamed; the two girls cried; Frau Klucha and Maria fainted (R13-14,16,20,25). With the aid of her father and Zimmerman, Green carried Maria into her bedroom and placed her on the bed. Herr Klucha left because he was "afraid he would shoot me" (R15). Zimmerman returned to the kitchen (R15,26). Green tried to bring Maria back to consciousness. While she was "still not quite alright" (R32), he got in bed with her, and, holding both her hands with one of his, inserted his penis about one half inch into her vagina. It could not go farther because she struggled violently (R32-33).

At this moment Staff Sergeant George W. Carpenter and Private First Class William B. Ernandez, Company F, 335th Infantry Regiment, who were on a "sheep security patrol" (R34,37,39) knocked on the door of the house. They found the door locked, but gained admittance after Frau Klucha broke the lock with an axe (R16,17,26,33-34). On entering, the sergeant was confronted by both accused who had him "zeroed in with two carbines" (R35). They

"were sitting in a cross fire position at the door holding their carbines pointed at me and when I entered the room I asked them to put their guns down and they did" (R36).

Ernandez asked Zimmerman what they were doing there. He replied "For the same damned thing you are doing here. Begging for some pussy" (R36,38,40). Green was in the doorway of a bedroom with Maria who was leaning against the wall, crying and saying "oh,oh,oh", her hands in a position of prayer (R36,40) Both accused left at the sergeant's request.(R36).

4. After their rights were explained, both accused elected to testify (R46-47,52). Green testified that he and Zimmerman, were out walking. At one house a "lady" called to them and they went in and started playing cards. Zenabja came in and joined the game. Later they went with her to her house and sat down but "couldn't understand what they were saying". They were about to leave when

"the lady commenced crying and then Maria Anna's sister goes over to her mother and puts her arm around her shoulder and her mother acts like she fainted and then she started putting water on her head and then the father and I help take her in the room. Then Maria Anna's sister was helping too and then Maria Anna acted like she fainted and then we got water and we put the water on her head and then the father and I took her in the bedroom and the brother and I stayed in and then me and her and the brother came out together. I did not have intercourse with her" (R 48).

He never heard anyone "holler about opening the door" whenStaff Sergeant Carpenter and the soldier with him came to the house (R48). He never pointed his weapon at Frau Klucha or the sergeant. He did not know why she was crying (R51). He never asked either of the girls to sleep with him (R52). Zimmerman testified substantially to the same effect, also that Zenabja invited them to her house. After the girls had gone to bed Green knocked

on their door to say goodnight to them and the

> "father got the impression that we was going to go into the room so he called these girls and the lady, his wife, she commenced to crying so I laid my rifle down as I thought maybe they were scared and so I went over to her and patted her on the shoulder and asked her what she was crying about. Then she acted like she had fainted so the old man got some water and I took and put some water on her head and the girl came down and sat down beside her mother and she commenced to crying. So her father, he came and got her around the shoulders to take her into the room and Green helped him take this girl into the room and the bigger boy, he went into the room with him and the father came back out and got some more water. He went back in the room and this boy and Green was still in the room. What was happening in there I don't know and after the mother stopped crying I got my chair and sat beside the foot of the bed, and pretty soon I heard this noise and knock on the door. They didn't speak anything in English. Anyway, if he did, I didn't hear him. They commenced to knocking and kicking on the door and after a while the door broke open. So when the pounding came on the door I picked my rifle up and laid it across my lap and put on my helmet. So they came in and this Sergeant, he went to Green. Green was standing beside the door, and the Sergeant went to Green and the PFC came to me. He said, "what the hell are you guys doing here?" I said "the same thing you guys would be trying in here" I said "begging some pussy" He said "I don't know what you are trying to do". He said, "I don't know what you'niggers' are trying to do here" and I said "You don't know whether I am a nigger or not." I said, "don't you ever call me that again" (R53).

He did not enter the house to commit any kind of crime and both he and Green wrote down their names when they first entered because the people were interested to know them (R 54). He "never even asked the girl for intercourse" although he admitted he "would get some if I could get it" (R57).

5. a. As to Green, the evidence under Charge III and Specification disclosed that he pointed his carbine at the door of the girls' bedroom, put the householders in fear by his conduct, locked himself and Maria in the room, placed her on the bed and there succeeded in inserting his penis one half inch into her vagina despite her resistance. His use of his carbine prior to his attack upon her was such as to cause her to fear serious bodily

harm. Any penetration however slight, of a women's genitals is sufficient carnal knowledge, whether emission occurs or not (MCM,1928, par.149h,p.165). The evidence contains all the elements of the crime of rape and the court's findings of guilty were fully warranted(CM ETO 3933, Ferguson, et al; CM ETO 4661, Ducote, and authorities therein cited; CM ETO 11621 . Trujille et al;).

b. Regarding Charge IV and Specification against Green, his unlawful entry into the home of Stanislaw Klucha was clearly shown. The fact that he thereafter consumated the rape of the owner's daughter, Maria, was sufficient to support and prove that his unlawful entry was made with the intent to commit such crime, as alleged (CM ETO 3679, Roehrborn; CM ETO 4071, Marks et al).

c. Zimmerman was found guilty of housebreaking under Charge III and Specification. The prosecution was required to prove that he entered the dwelling of Herr Klucha unlawfully and that at the time of such entry he intended to commit the crime of rape (MCM,1928, par.149e,pp.169-170). As to the entry, it was clearly shown that it was unlawful (CM ETO 3679, Roehrborn). With reference to his alleged intent at the time of his unlawful entry it could be inferred, as in other criminal offenses, from the facts. The offense of housebreaking is analagous to that of burglary, concerning which it is said:

> "whether the felonious intent be executed or not is immaterial, supposing that it can be inferred * * * Where a man burglariously entered a room in which a young woman was sleeping, and grasped her ankle without any attempt at explanation, when she screamed and he fled, this is evidence of an attempt to commit rape, and must be submitted by the court to the jury. But a mere touching of the foot of a woman is not ground from which such an intent can be inferred.
>
> "It is no defense that the intent was impossible of execution; as where the thing sought was not in the house; or that it was frustrated by extrinsic agencies" (2 Whartons Criminal Law (12th Ed., 1932),sec.1028,p.1311)

The evidence on the questions of his intent after his unlawful entry is that he offered Herr Klucha chocolate and cigarettes to sleep with one of his daughters, a desire he repeatedly expressed. As he admitted himself, he was "begging for" sexual intercourse and was there for that purpose (R36,38,40). The fact that he did not commit rape after entering the premises did not necessarily negative the conclusion by the court in the light of all the circumstances that he did intend to commit such offense at the time he entered. His conduct in the house in pointing his carbine at members of the family, so frightening and terrifying them that Frau Klucha and Maria fainted, his insistence on spending the night there, his repeated requests to Herr Klucha for sexual intercourse with the girls, all was substantial evidence from which the court could properly conclude that at the time of his unlawful entry he intended to commit rape, as alleged. (CM ETO 78, Watts; CM ETO 11608, Hutchinson, et al; CM ETO 16340, Dameso).

6. The charge sheet shows the following concerning the service of accused: Zimmerman, is 25 years ten months of age and was inducted 16 November 1943 at Cleveland, Ohio.

Green is 25 years seven months of age and was inducted 25 October 1943 at Fort Benjamin Harrison, Indiana.

Neither had prior service.

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

8. The penalty for rape is death or life imprisonment as the court martial may direct (AW 92). Confinement in a United States Penitentiary is authorized

upon conviction of the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567) and of housebreaking by Article of War 42 and section 22-1801 (6:55) District of Columbia Code. The designation as to each accused of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec 11, pars. 1b (4),3b).

B R Slaper Judge Advocate
Malcolm C. Sherman Judge Advocate
B R Avery Jr Judge Advocate

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

BOARD OF REVIEW NO. 3

8 OCT 1945

CM ETO 16409

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| U N I T E D S T A T E S | SEVENTH UNITED STATES ARMY |
| v. | Trial by GCM, convened at Gutersloh, Germany, 14 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| Private FREDERICK CONRAD (33692970), Company B, 184th Engineer Combat Battalion | |

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Frederick Conrad, Company "B", 184th Engineer Combat Battalion, did, at Sythen, Landkreis Recklinghausen, Germany on or about 5 April 1945, forcibly and feloniously against her will have carnal knowledge of Margaretta Merschiewe.

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

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

3. Prosecution's Evidence:

On 5 April 1945 Margaretta Merschiewe, a widow 49 years of age, was living in a "wash-kitchen", a very small room containing a bed, a washing machine and a sofa, at Sythen, Haltern, Recklinghausen, Germany, with her son, Gustave, age 13, and Johann Strotman, age 70. They had recently moved into this small space because their home was being used by American colored troops (R5, 7-8,11,13).

At about 2130 or 2200 hours on that day after they had gone to bed, Strotman heard knocking outside, arose and opened the door. Two colored soldiers entered, one with a gun on his shoulder. They looked around the room, went out and immediately returned. Frau Merschiewe and her son got up. She "hollered" and while the soldier with the gun stood by the door, his companion struck her in the face, broke her glasses, grabbed her by the breast and threw her on the bed (R6,8,12-13). She realized "what was going on" because "then he had already taken his penis out" (R12). He appeared drunk (R10,14). The old man went to "the guard at the door" and informed him that the woman had undergone an operation for gall-stones (R8). When the boy began "hollering", the soldier engaged in assaulting his mother produced a knife and indicated a motion from ear to ear that if he "did'nt keep still he did this way like he was going to cut my throat" (R14). This soldier also threatened the boy's mother with the knife using a forward and backward motion with his right hand (R10). He then put her legs upon his shoulders and twice "put his sexual organ into my vagina". The first time he "let it run just like one would have intercourse". She tried to protect herself by using her hand, twisting and "pushing myself back like this". He hurt her where she had recently been operated upon (R6-7,9) and she

> "hated for my son to see such an act completed. They are children. That is a terrible shame to have a boy see something like that" (R9).

As the soldier "sort of had the hiccoughs and then vomited", she was able to escape and went to the home of a neighbor (R7).

On the same evening between 2000 and 2200 hours, Private First Class Frank B. McClain, of accused's company, was engaged in digging "a hole four by four" for the company mess a short distance from this temporary home of Frau Merschiewe (R15-16, 17). Accused, who had been drinking, (R19), 25) came along, talked with him and helped him dig (R16).



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After it was completed and McClain was in the barracks, accused

> "came there and told me he knew where there was two dames. He was supposed to go down there and I was to go with him, and we went on to the house" (R16).

On the way they passed Private First Class Silas Blackmon, of their company, who was on guard. McClain said "that he was going looking for some women" and Blackmon told them, "why do you tell me about it". McClain said that maybe he would go too and claimed that accused knew where the women were (R23-24). Accused and McClain left.

The latter testified that he was armed with a carbine (R18,23) when he and accused arrived at a house about 50 yards from Blackmon's post. When they knocked on the door, an old man opened it. They looked in and McClain said, "I don't see nothing", because they did not see "the young women we were looking for" but only a boy about seven, a woman and an old man (R15-16,17,20). They returned to Blackmon's post and talked with him for a while. Accused said "I think I will go back down" and left them. After about ten minutes McClain went back to the house where he saw accused "standing by the bed, kneeling in a crouched position" talking to the woman who was in bed. McClain "told him to come on let's go (R17). The old man said something in German which he did not understand (R19). As accused paid no attention, McClain "caught him in the back and told him to come on *** ". However, as he did not come, McClain left (R18). He did not see accused with any knife, nor did he see him strike the woman (R21-22). Accused had been drinking but he would not say he was drunk (R20).

Blackmon testified that after the two men left his post together, following McClain's statement that he "was going looking for some women", he walked his post. In a short time McClain came back alone, left to search for accused and again returned alone. Blackman then saw a light in a garage or tool shed about 30 to 50 yards from his post. McClain exchanged a few words with him and then "he disappeared". The next morning some military police arrived and "we were told not to let nobody leave the billet area" (R25-26).

4. After his rights were explained (R28-29), accused testified that on the evening of 5 April 1945 he cleaned a stove for the mess sergeant, finished his work about 2200 hours, took a drink, wrote a letter home and went to bed (R32-33). He was not with McClain that night (R33), never saw the boy, Gustave, before and testified regarding Frau Merschiewe "I don't even think she was raped at all" (R34).

5. It was shown beyond any reasonable doubt that Frau Merschiewe was brutally attacked by a colored soldier who obtained carnal knowledge of her by force and without her consent at the time and place alleged. The evidence contains all the elements of the crime of rape (CM ETO 4661, Ducote, and authorities therein cited; CM ETO 11621, Trujillo et al; CM ETO 3933, Ferguson et al). The testimony of the various witnesses established clearly and convincingly that it was accused and none other who committed the rape as alleged. His testimony was unsatisfactory and unworthy of belief under all the circumstances shown. The court's findings of guilty were fully warranted.

6. The charge sheet shows that accused is 20 years one month of age and was inducted 9 June 1945 at Pittsburg, Pennsylvania. He had no prior service.

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

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

B R Roeder Judge Advocate

Malcolm C. Sherman Judge Advocate

B K Levy Jr Judge Advocate

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

BOARD OF REVIEW NO. 5

CM ETO 16415

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| U N I T E D S T A T E S | ) | XII TACTICAL AIR COMMAND |
| v. | ) | |
| Private JAMES LETT (34746512), Company A. 459th Signal Heavy Construction Battalion | ) | Trial by GCM, convened at Headquarters XII Tactical Air Command, 20 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

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

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

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

CHARGE: Violation of the 86th Article of War.

Specification 1: In that Private James (NMI) Lett, Company "A" 459th Signal Heavy Construction Battalion, being on guard and posted as a sentinel at the bivouac area, Company "A" 459th Signal Heavy Construction Battalion near Karlsrhue, Germany, on or about 3 May 1945, was found sleeping upon his post.

Specification 2: In that Private James (NMI) Lett, Company "A", 459th Signal Heavy Construction Battalion * * * near Karlsrhue, Germany, on or about 3 May 1945, did leave his post before he was regularly relieved.

ADDITIONAL CHARGE 1: Violation of the 92nd Article of War.

Specification: In that Private James(NMI) Lett, Company "A" 459th Signal Heavy Construction Battalion did near Heidelburg, Germany, on or about 26 May 1945

forcibly and feloniously, against her will, have carnal knowledge of Dina Demharter.

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

Specification: In that Private James (NMI) Lett, Company "A" 459th Signal Heavy Construction Battalion, having been duly placed in arrest in his Company Area on or about 10 May 1945, did near Heidelburg, Germany, on or about 26 May 1945 break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found not guilty of Specification 2 of the Charge, and guilty of the charges and the other specifications. Evidence was introduced of two previous convictions, both by special court-martial, one for absence from appointed place of duty in violation of Article of War 61 and the other for improper use of a vehicle and absence without leave in violation of Articles of War 96 and 61, respectively. 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 withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution showed by competent evidence that accused, a Private, Company A, 459th Signal Heavy Construction Battalion (R7.11), was posted as a sentinel at the bivouac area of his command, near Karlsrhue, Germany, at about 2000 hours, 3 May 1945, for a four-hour period. During this period, he was found asleep inside a culvert which was located within and beneath the area of this post (R7-14; Pros.Ex.1).

On 26 May 1945, accused near Heidelburg, Germany had sexual intercourse with one Dina Demharter, a 25-year-old civilian woman who was married with one child and who had been separated from her husband by the war for the preceding six months. She had bicycled to a wooded area to gather wood (R30,36). While there, she was accosted by a negro soldier (not accused) who asked her to "promenade". She refused and remained there about 45 minutes, when accused arrived at the scene of the wood picking (R31,33,34). He also asked her to "promenade" and offered her some chocolate and "what he had". She refused and accused took her bicycle and said if she did not "promenade" with him she would not get her bicycle. She again refused and said she wanted her bicycle. Accused told her that if she would "fick-fick" she would get her bicycle, otherwise she would not (R30). Frau Demharter knew the meaning of "fick-fick". She called for help as loud as she could, she "was getting scared". Accused appeared to be unarmed except that he

motioned toward a pocket and said "If a white man comes", he would shoot him (R31,34). She told accused she would report him to his commander. Then another colored soldier arrived on the scene. Frau Demharter told him accused wanted to take her bicycle. He talked to accused, but could not help her. Some German soldiers passed on a skirting road. She went out of the wood to them and asked for help. They did not assist, but went away (R31,32). She returned back into the woods and to accused. She "put everything on one card" and told him that "he should walk in the wood a little way", and she would follow him. Accused walked further into the woods, whereupon she took her bicycle and started running with it. But accused ran after her, caught her, and threw her down, held her with one hand, opened his pants with the other and put his penis in her vagina (R32, 33). The woman said she weighed 92 pounds (R30). She "did not offer much resistance" (during the preliminaries) (R33). The intercourse lasted one minute. She did not struggle with him and offered "no resistance" (R35). She explained that she was afraid he was going to hit her and "there were rumors around there that the negroes were very mean". He never struck her at any time (R35). At one time, "he hauled off with his hand and later he got up, and I also got up". He offered her chewing gum which she did not take (R33). He would not however, "give her the oranges or chocolate bars", although he showed "it" to her (R35).

Private Seymour Heywood, a prosecution witness, was the negro soldier to whom Frau Demharter had told her story, the one who arrived according to her during the first part of her encounter with accused. Heywood testified that as he walked through the woods he heard a woman crying. Investigating some 30 feet away from the road he found accused and the woman in question. They were about 30 feet apart. The bicycle was then about 6 feet from accused and 36 feet from the woman (R15-17). The woman was crying (R18). Accused asked by Heywood the reason the woman was crying said that he had promised the woman oranges and candy for sexual intercourse and that after having the intercourse he had not kept his promise( R19,20). In about 15 or 20 minutes Heywood returned to the scene of his conversation with accused and found the prosecutrix and accused sitting under a tree, the woman had ceased crying and no bicycle was to be seen (R19,23).

On May 10 1945, accused was placed in arrest in his Company area. This arrest was in effect at the time accused had the afore described meeting with Frau Demharter, and the scene of that episode was outside the Company area (R50).

4. Advised of his rights as a witness accused elected to remain silent(R75). The defense offered evidence that on the day of the alleged rape, at about the same time, Frau Demharter came near accused's tent and beckoned to him. Accused took an orange and piece of chocolate and went out to her. The two went a little further back up in the woods (R61-64). The defense also showed that neither of the two sentinels whose respective tour of duty bracketed the time of the alleged rape, heard any unusual noises at the scene in question, although the place where they were on guard was about a city block from the place where the intercourse

took place (R20,57,61).

5. The offense alleged in Specification 1 of the Charge: asleep on post while on a sentinel, in violation of Article of War 86, was fully proved. The same is true of the offense alleged in the Specification, Additional Charge II: breach of arrest in violation of Article of War 69.

6. With respect to the charge of rape found in Additional Charge I and its Specification, the Board of Review is of the opinion that the record of trial does not support all the elements essential to this offense. However reprehensible accused's conduct was, there is in the record substantial, affirmative evidence that to all intents and purpose this woman manifested to accused a definite complacency and consent. Such manifestation, unless resulting from force or threats of death or great bodily harm is a defense. An element of this offense is the intent to accomplish intercourse by the use of force if necessary. This intent hidden, in the mind, is usually revealed by proof of resistance and the employment of terror producing threats or the use of force. But if there is no resistance, or if no threats are employed, and no offer of force, no declaration of felonious purpose, it is impossible as a matter of law to support a finding which is necessarily predicated upon such intent. These principles correlate with the doctrine that if the man is led by the conduct of the woman

> "to believe that he has her consent, the crime of rape is not committed * * * consent may be expressed or implied. A man will be justified in assuming the existence of consent if the conduct of the prosecutrix toward him at the time of the occurrence is of such a nature as to create in his mind an honest and reasonable belief that she has consented by yielding her will freely to the commission of the act. Any resistance on the woman's part falling short of this measure is insufficient to overcome the implication of consent * * * And the rule of law is well settled that although a woman objects verbally to the act of intercourse, yet if she by her conduct consents to it, the act is not rape in the man. So it has been held that voluntary submission by the woman, while she has power to resist, no matter how reluctantly yielded, amounts to consent and removes from the act an essential element of the crime of rape" (44 Am.Jur., secs.11,12, p. 909).

The Board of Review has heretofore adopted and acted upon the legal principles above stated (CM ETO 9301, Flackman; CM ETO 10446, Ward and Sharer; CM ETO 10700, Smalls; CM ETO 13778, Nordike).

There is no evidence that accused used any force or threatened violence toward this woman. At one time, she was free of him and went back. As she testified she "put everything on one card"; she gambled with her honor to recover he bicycle. She manifested her consent to him in the clearest way. She told him to go back further in the woods and she would follow him. Accused was justified in believing that she had consented. He evidently gave her the bicycle and then she ran. He caught her and held her. She made no resistance. Assume that she indicated by running that she had withdrawn her consent. The fact that he caught her and again took the bicycle away, and that she then made no resistance to the intercourse, may well have indicated that she again had consented and was agreeable to intercourse for the price of her bicycle.

The fact that the bicycle was hers and that she had a right to it have no bearing in the case. Neither does the fact that accused had no legal right to impose upon the woman the condition that she surrender her virtue in return for her bicycle. The girls who "consent" rather than walk home cannot charge rape. The law demands that they prefer to walk. Likewise the woman here involved cannot trade her virtue for her bicycle and then assert that she was"raped" she had the free agency choice of maintaining her virtue and losing her bicycle or gaining her bicycle and losing her virtue. Electing the second course she "consented" . Her conduct toward accused was of "such nature as to create in his mind an honest and reasonable belief that she consented by yielding her will freely to the commission of the act". No other reasonable interpretation can be placed upon her conduct without subverting the facts and injecting into the case a doctrinaire interpretation of the undisputed evidence - a process at war with the practical understanding of the same.

Of necessity, the law is cautious in enlarging the situations where the consent given is <u>not</u> legal consent, so as to support the charge of rape. Of course consent obtained through fear of bodily injury or death is not the consent regarded by law as a defense in these cases. Nor is there consent where the woman is unconscious; and

> "when intercourse is had with an idiotic or insane woman without resistance or with consent, the question of whether a crime is committed depends on the capacity of the woman to understand the nature of the act, and upon the possession by her of a will power with which either to consent or refuse" (44 Am.Jur.sec.10,p. 907).

> "While there are some decisions which intimate that stratagem may supply the place of force and that consent to the act of intercourse gained by fraud does not prevent the offense from being rape, <u>as a general rule, at common law and under statutes</u>

adopting the common-law definition of the offense, consent, although gained by fraud, deprives the offense of the essential element of rape, and the mere intent to use force, if it should become necessary to accomplish his purpose, does not satisfy the requirement of force. Many authorities hold that where a woman admits the defendant to sexual connection under the belief that he is her husband the act does not amount to rape, since there is neither actual nor constructive force. Under the common law or under general statutes defining rape as the carnal knowledge of a woman forcibly against her will or without her consent the consent the consent of the woman to sexual intercourse, even though such consent is secured by a sham, mock, or fictitious marriage which the woman believes in good faith to be a valid marriage, prevents the act from being rape. These rules however, are frequently changed by statute. In some jurisdictions, it is declared to be rape to obtain carnal knowledge of a woman by fraud, and such fraud may consist, among other things, in the use of some stratagem, by which the woman is induced to believe the offender is her husband. Under such statute it has been held that a man who induces a woman to have intercourse with him through the means of a fraudulent marriage is guilty of rape. A statute may be so worded, however, as not to render one guilty of rape where the intercourse is secured through a sham marriage" (Ibid.Sec.14, p.910).

The woman was in no fear of death or great bodily harm. She was afraid she would lose her bicycle. Such fear is not the kind that the law subsitutes for force and violence as an element of rape. Sexual intercourse between female and male has been the subject of barter and trade through the ages. When a woman exchanges her favors for silver or "silks and satins" there is no rape. Simularly when she voluntarily gives them to regain her property she enters upon a bargain which does not permit her to cry "rape" on the witness stand. If under the Common Law, consent obtained by fraud bars rape, consent obtained by the imposition of an unlawful condition not creating fear of death or great bodily harm cannot constitute the required element in the crime. Considering all aspects the Board of Review is compelled to conclude that there is no substantial evidence that the sexual act was the result of force, violence or fear.

6. The charge sheet shows that accused is 20 years and 7 months of age, and was inducted 1 April 1943 at Fort Benning, Georgia. No prior service is shown.

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

substantial rights of accused except as noted herein were committed during the trial.

In the opinion of the Board of Review, the record of trial is not legally sufficient to support the findings of guilty of Additional Charge I and the Specification, legally sufficient to support the findings of guilty of the remaining charges and specifications, and sufficient to support the sentence.

8. Penitentiary confinement is not authorized for any of the military offenses of which accused is guilty (AW 42). Designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (Cir.210, WD, 14 Sept 1943, Sec VI, or amended).

Judge Advocate

Judge Advocate

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Branch Office of The Judge Advocate General
with the
European Theater
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BOARD OF REVIEW NO. 2

6 OCT 1945

CM ETO 16424

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| U N I T E D S T A T E S | SEVENTH UNITED STATES ARMY |
| v. | Trial by GCM, convened at Augsburg, Germany, 28 June 1945. Sentence: |
| Corporal MASON BURROW (34719536) and Private WILLIE L. DAVIS (34719759), 3660th Quartermaster Truck Company | BURROW - Acquitted; DAVIS - Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

HOLDING by BOARD OF REVIEW NO. 2
HEPBURN, MILLER and COLLINS, Judge Advocates

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

2. Accused were tried on the following Charges and specifications:

DAVIS

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Willie L. Davis, 3660th Quartermaster Truck Company, did, at Langweid, Germany, on or about 18 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Anna Stephinger.

BURROW

CHARGE: Violation of the 92nd Article of War.

Specification: (Identical with that above as to Davis).

Each accused pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, accused Burrow was found not guilty and accused Davis was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions was introduced.

Three-fourths of the members of the court present when the vote was taken concurring, Davis 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. The acquittal of Burrow is published in General Court-Martial Order Number 188, Headquarters Seventh Army, 26 July 1945.

3. The evidence for the prosecution identified accused Davis as a member of the 3660th Quartermaster Truck Company, stationed near Langweid, Germany, on 18 May 1945 (R6,7). That evening he visited a displaced personnel camp which was in the same community, and while there joined accused Burrow and other soldiers who had brought an army truck to that camp (R7). At about 2200, the two accused left the camp in the truck and did not come back until 2300 (R8,10). When they returned, the accused and a "Russian guy" got out of the vehicle (R8). Accused Davis then said to another soldier in the group, "I have fucked" (R9).

At about 2230 that same evening an army truck stopped outside the house of Frau Anna Stephinger in Langweid (R10,11). A negro and "white American" dressed in military uniforms entered her house without permission. The white soldier asked her to come with them to "show the way". She went to the door of her house to give them the direction to Munich. There she saw the truck with more men. At that time the white soldier graspedher by one hand and the negro soldier by the other and held her firmly. She cried for help, and two other men came, one of whom was a negro. Her mouth was held "shut from behind", and the four of them dragged her down a hill and threw her on to the ground (R12). One of the men was "a Pole" (R16) who appeared to be the ring-leader of the group (R19). She repeatedly cried for help, and one of the men choked her so that she could not scream while others kept her mouth and nose shut (R12). Her undergarments were removed, and while she was held firmly, one negro attempted to have intercourse with her but did "not succeed very well because I drew myself up" (R13). And then, the other colored soldier laid on top of her and being unable to resist further he had intercourse with her by inserting his penis into her female organ (R15). She screamed and struggled but they held her firmly and choked her (R15-17). Her nearest neighbor heard her screams and call for help (R20). Before the men left on the truck, she was able to get away. She ran to the neighbor's house (R17), where it was observed that her hair was in disorder, there were scratches on her face and her nose was "thickly swollen". She was bleeding from her mouth, had a bad contusion of one eye, sundry other scratches and red and blue spots (R22). The face injuries were corroborated by the stipulated testimony of a German doctor who examined her on 19 May 1945 (R41, Def.Ex.1). She was not able to identify the accused because she could not recognize either of the two colored soldiers involved (R18).

A pre-trial statement made by accused Davis was offered and received in evidence, over the objection of the defense (R36,Pros.Ex.A), after testimony had been taken as to the circumstances under which the statement had been made, and the law member had ruled that it was voluntarily given (R23-34,36). The CID Agent who took and prepared the typed statement for the accused, who could neither read nor write, testified that the accused voluntarily supplied the information contained in the statement and voluntarily signed it after it was carefully read and explained to him (R25). The accused testified that the Agent threatened to "see to it you get hung if you don't make a statement" and when he made the statement he "figured it would be easier on me if I would tell the truth" (R29). In the statement, accused Davis admitted driving the Army truck away from the displaced persons settlement at Langweid, with another soldier, whose name was obliterated from the statement, and two Russians, after one of the Russians asked him if he wanted "zig zig". They drove to a house in Langweid, Germany, and the two Russians went into a house and came out with a woman whom they took down the road. The Russians "got the woman on the ground and held her down there" while the other unnamed soldier, and then accused, had intercourse with her. One of the Russians had his hands over her mouth. After accused finished with the woman, they left her and the four of them returned in the truck to the displaced persons settlement (Pros.Ex.A).

4. On being advised of their respective rights as witnesses, both accused elected to remain silent (R45). Character evidence was introduced in behalf of the accused to the effect that each was very well thought of in their organization and of excellent character prior to the incident in question (R42,43;Def.Ex.2).

5. Rape is definied as the "unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.148b, p.165). The undisputed evidence in the instant case establishes the commission of that crime as found by the court and accused's participation therein is clearly shown by his pre-trial confession (CM ETO 1202, Ramsey et al). Though the defense objected to the admission into the evidence of accused's pre-trial statement, substantial proof in the record supports the showing of its voluntary character, and the ruling of the law member admitting it will not be disturbed (CM ETO 9461, Bryant; CM ETO 4055, Ackerman).

6. The charge sheet shows that accused Davis is 25 years of age. Without prior service, he was inducted 27 August 1943 at Camp Forrest, Tennessee.

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

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

Earle Hopkins Judge Advocate

Ronald D Miller Judge Advocate

John J. Collins, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 2

6 OCT 1945

CM ETO 16440

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| U N I T E D S T A T E S | CHANOR BASE SECTION, UNITED STATES FORCES, EUROPEAN THEATER |
| v. | |
| Private First Class WILLIAM A. JONES (36467680), 4059th Quartermaster Service Company | Trial by GCM, convened at Charleroi, Belgium, 30 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

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

Specification: In that Private First Class William A. Jones, 4059th Quartermaster Service Company, did, at or near Havre, Belgium, with malice aforethought, feloniously, unlawfully, and with premeditation kill one Private First Class Samuel Warren, a human being, by shooting him with a rifle, on or about 14 June 1945, thereby inflicting a mortal wound as a result of which the said Private First Class Samuel Warren died at or near Havre, Belgium, on or about 15 June 1945.

He pleaded not guilty and, three-fourths of the members present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service,

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

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

On 14 June 1945 accused was a member of the 3141st Quartermaster Service Company (R32). On that date the deceased was on guard duty at the gate in front of the school building where the organization was billeted. During the period from 2135 hours to 2200 hours, Private First Class Harvey D. Taylor assumed deceased's duties as guard so that the latter could go and "just look" in on a dance their organization was having that evening (R6,14). At 2200 hours the deceased, accompanied by accused, reappeared at the guard post and took a carbine from Private Taylor's shoulder. He gave the weapon to the accused and then deceased and Private Taylor went to their billet and the former entered his quarters, which were downstairs in the building (R11,12). Private First Class Carzell Byrd who was in the hall observed deceased alone in his room and three or four minutes later he saw accused enter deceased's room. Accused was carrying a carbine over his shoulder and he began talking to deceased. In a short time Private Byrd heard a shot and he ran down the hall to another room. While he was in this other room he heard two more shots. Just before the first shot and again before the second and third shots were fired, accused was heard to say, "I'll shoot" (R8,16). It was 2217 hours when the shots were heard (R19).

After hearing the shots Private First Class Charles E. Estelle entered deceased's quarters and found him "laying facing the door practically half on the bed". Deceased said "Come here, Jones shot me" (R19,20). It was observed at this time that deceased was bleeding from the lower part of his stomach (R12).

First Sergeant Robert B. Duncan attended the dance and, as a result of a report, he returned to the organization area between 2200 and 2300 hours. Accused was standing in front of the gate, at the entrance of the billets, armed with his carbine. Accused told Sergeant Duncan "he had shot Sammy Warren", and when they went into deceased's quarters, accused said "I shot him. I shot the son-of-a-bitch three times" (R13,20,26,27,29). Sergeant Duncan disarmed accused and observed that his carbine had an odor of burnt gun powder about it (R28,35).

After an agent of the Criminal Investigation Division testified as to its voluntary nature (R21-25), a statement signed by accused was received in evidence over objection by defense counsel (R25; Pros. Ex.1). In this statement accused related that he attended a dance on 14 June 1945 and while he was seated at a table with some civilians, deceased entered the room, grabbed him by the tie and

belt and pulled him out of the building. The deceased continued to pull him along the street towards his company area and when they were about 50 feet from the gate entering this area, deceased hit him, knocking him down. Deceased then picked him up and dragged him to the gate. Somehow he got possession of a carbine and as deceased walked away from the gate he said, "God dammit I'm going to kill you". The latter entered his billet and in about three minutes he (accused) became scared and went to the deceased's room. He found the deceased looking in his duffle bag, did not say anything but raised his weapon and shot the deceased three times. The deceased said, "I'm not going to kill you Jones" after which he slumped over on a cot. He did not mean to kill the deceased but he was afraid the deceased was going to shoot him because he (deceased) was looking in his duffle bag and he (accused) thought deceased might have a gun in there (Pros. Ex No.1).

Captain Israel Diamond, Medical Corps, testified that he is a physician and pathologist and laboratory officer of the Third Station Hospital. Late at night Private Samuel Warren was brought to the hospital by members of his unit. He was alive at this time and was given a blood transfusion. He was dead the next day and an autopsy performed on his body revealed five gunshot wounds. One of the wounds on deceased's right thigh indicated that the shot "must have been fired fairly close to the body" as there were powder marks around the wound. The immediate cause of death was that the deceased, due to his weakened and extremely shocked condition, aspirated the contents of his stomach into his lungs, "which is the equivalent to drowning". Captain Diamond further testified that there was no question in his mind that Private Warren would have died as a result of his gunshot injuries "if this terminal event --- this aspiration of the stomach -- had not occurred" (R35-38).

4. Accused after his rights as a witness were fully explained to him (R56,57), was sworn and testified substantially as follows:-

On 14 June 1945, he attended a company dance with a Belgian lady and her husband. They were upstairs dancing and because it was crowded they came downstairs to drink some lemonade and beer. Samuel Warren entered the room, grabbed him by the necktie and said "Come on goddam it go on guard. If I can't be at this dance you can't be either". He replied "It isn't time for me to go on guard. It is only ten o'clock" and deceased said, "Goddam it you are going on guard now". A corporal present unsuccessfully attempted to persuade the deceased to let him go and after he removed his tie, the deceased grabbed him by the belt and pulled him outside. Warren led him up the street during which time he protested that he would not go on guard until 2400 hours. Just as they reached the corner gate of their billets, deceased struck him on the head, knocking him down and lifted him up, led him to the gate and said, "You will walk guard". When the deceased released him he was excited and nervous and before Warren entered the building he said "I am going to blow your brains out". He (accused) had a carbine and entered the deceased's room and shot him. He was "angry, scared, nervous and I didn't know what I was doing" (R58,62). The agent of the

Criminal Investigation Division, explained his rights under the 24th Article of War to him but he did not understand them. This agent asked him for a statement and after he told the agent what he had to say the agent said "that statement isn't worth a goddam. If you don't tell me the truth I am going to fuck you up". (R57,58).

Madame Fernande Rousseau, who accompanied accused to the dance and two soldiers of his organization corroborated accused's account of the incident at the dance that preceded the shooting (R42, 43,46,47,55,56).

Various defense witnesses described the deceased as a quarrelsome person who frequently started arguments (R40,43,51,52). His height was estimated at six feet, one inch, and his weight at 190 pounds. He was a robust, well developed and muscular man (R40). Accused was known as a cooperative cheerful soldier who did not easily become excited. He hadn't been in any trouble in the Army prior to this incident (R39,43,54)

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

Although no witness actually saw accused fire the fatal shot, competent, substantial evidence and accused's own admission in his sworn testimony establishes beyond any doubt that accused shot and killed Private Warren at the time and place alleged. Whether this homicide was perpetrated with malice aforethought and without legal justification was a question of fact for the court to decide and their affirmative answer thereto is amply supported by the evidence of the circumstances under which the slaying took place. Accused's statements to his first sergeant right after the shooting are conclusive on this point. (CM ETO 15788, Polson).

The defense presented evidence tending to show accused acted in the heat of great passion. It was the function and duty of the court and the reviewing authority to determine from all the evidence whether passion under adequate provocation not cooled by the passing of time reduced the crime to manslaughter. (CM ETO 6682, Frazier; CM ETO 11958, Falcon). Inasmuch as the uncontradicted evidence discloses that Private Warren had ceased his provocative conduct and retired to his quarters, and accused, after the lapse of at least five minutes, followed him into the building and fired the fatal shots thereafter, the findings of the court on this issue are fully sustained by the evidence and will not be disturbed by the Board of Review.

6. The charge sheet shows that accused is 28 years and six months of age and was inducted 24 March 1944. He had no prior service.

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

8. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 US CA 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).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

12 OCT 1945

CM ETO 16479

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| U N I T E D S T A T E S | ) | 82ND AIRBORNE DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at APO 469, U.S. Army, 21 May 1945. |
| | ) | |
| Second Lieutenant FREDERICK D. JOHNSTON JR. (O-1172508), 320th Glider Field Artillery Battalion | ) | Sentence: Dismissal, total forfeitures and confinement at hard labor for five years. United States Penitentiary, Lewisburg, Pennsylvania. |

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Frederick D. Johnston, Jr., 320th Glider Field Artillery Battalion, then Second Lieutenant, Headquarters 82d Airborne Division Artillery, having been duly appointed Exchange Officer of the 82d Airborne Division Artillery Exchange, by the Commanding Officer, 82d Airborne Division Artillery, did, at Market Harborough, Leicestershire, England, between 1 May 1944 and 11 August 1944, feloniously embezzle by fraudulently converting to his own use about five hundred seventy-five pounds (£ 575), lawful money of England, value about two thousand three hundred twenty dollars ($2320), the property of the 82d Airborne Division Artillery Exchange, entrusted to him in his capacity as Exchange Officer of the said Exchange.

16479

He pleaded not guilty to and, at least two-thirds of the members of the court present at the time the vote was taken concurring, was found of the Specification, Guilty, except the words "five hundred seventy-five pounds (£575)" and "two thousand three hundred twenty dollars ($2320)", substituting therefor the words "four hundred fifty pounds (£450)" and "one thousand eight hundred fifteen dollars and seventy five cents ($1815,75)", of the excepted words Not Guilty, and of the substituted words Guilty, and guilty of the Charge. No evidence of previous convictions was introduced. At least 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 and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority, the Commanding General, 82nd Airborne Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for prosecution.

Accused was Exchange Officer, 82nd Airborne Division Artillery Exchange, from 18 February through 8 August 1944, in charge of four exchanges, each of which had a manager or steward and the main one of which was at Market Harborough, Leicestershire, England (R7-8, 30, 35-37, 41, 43, 46, Pros. Ex. B). In the operation of the exchanges he was governed by Army Regulations pertaining to post exchanges. In short, he drew and issued merchandise to the four exchanges for sale. He collected the cash receipts of three exchanges and deposited it in Barclays Bank, Market Harborough, England, to the account of Q-101-68 (R9-10, 30-31, 38). The manager of the fourth exchange deposited his receipts in Barclays Bank at Hinckley to the credit of the account of Q-101-68 at Market Harborough,(R38,47). The property and money belonged to the Army Exchange Service and "the 82nd Airborne Division Artillery Exchange had to account for it" (R34).

Sales at the fourth exchange from 1 through 8 August 1944 amounted to £298-8-11 (R46-47) all of which was deposited by its manager in Barclays Bank at Hinckley for credit to account Q-101-68 at Market Harborough (R47,49). For this period the manager of the first, second and third exchanges turned over to accused "approximately" 270 pounds (R38-29), "around" 175 pounds (R42-43) and £309-10-8 (R45) respectively, for a total of £754-10-8. During August there was deposited at Barclays Bank, Market Harborough, to the account of Q-101-68, £325-15-9, this being exclusive of deposits hereinbefore shown to have been made at Hinckley (R49). The difference between £754-10-8 and £325-15-9 is £428-14-11.

On 21 August 1944 an Inspector General and his assistant questioned accused about an alleged shortage of approximately £428 for 1 through 8 August 1944. He then stated that on 7 August 1944, while making a bank deposit, he had lost from a jeep a cigar box containing money (R50-53). Soon thereafter accused admitted the explanation was not

true (R55). He also stated he had lost $800 or $900 playing poker but had paid these losses by personal checks on his bank in the States (R54-56). On 26 August 1944, the exchange council met and asked accused to explain a fund shortage of £428-12-9. Accused gave no explanation (R33-34). And he gave no explanation to a board of officers when told the board had found, from its investigation of the operation of the exchange from December 1943 through 8 August 1944, a shortage of approximately £570 (R48-49).

4. No witnesses were called by defense. After his rights as a witness were explained to him accused elected to remain silent (R56-57).

5. The Board has not undertaken to set out herein the evidence relating to shortages prior to 1 August 1944. To do so would be profitless. Such evidence shows little, if any, more than that, prior to 1 August 1945, accused was a heedless manager. Irregularities which occurred during the trial have been considered by the staff and theater judge advocates in lengthy reviews and found by them to have impaired no substantial rights of accused. Suffice it to say that the Board also has considered these irregularities and likewise concluded that they impaired no substantial rights of accused. The evidence is compelling that, between 1 August 1944 and 11 August 1944, accused embezzled approximately £428-14-11, having an approximate value of $1730.00. From 1 through 8 August 1944 on which latter date he was relieved as Exchange Officer, he received approximately £754-10-8, which it was his duty to deposit in a certain account. During the month of August only £325-15-9 was deposited therein. Accused was a fiduciary. Thrice he was called upon to account for the difference. Twice he made no explanation. The third time he made an explanation that he later admitted to be false. Though the Board is unable to determine how the court arrived at its finding of £450, the difference between that amount and £428-14-11 "is, comparatively, so slight as to make the error in the finding immaterial" (CM 145331, Dig. Op JAG 1912-40 sec. 452 (14) p.338. The evidence in the record of trial supports the findings of guilty (Dig. Op. JAG 1912-40, sec. 451 (13) p.338, CM ETO 8164 Brunner; CM ETO 11905, Howse. See CM ETO 1302 (1944) Splain, Dig. Op. (ETO) 501, for discussion of the elements of the crime of embezzlement).

6. The charge sheet shows that accused is 25 years nine months of age, that he was appointed a second lieutenant 29 October 1942 and that he had prior service as an enlisted man from 3 April 1941 to 28 October 1942.

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

8. Dismissal, total forfeitures and confinement at hard labor is authorized punishment for an officer upon conviction of embezzlement. Confinement in a penitentiary is authorized upon conviction of embezzlement

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when the amount involved exceeds $35 by Article of War 42 and sec. 22-1202 (6:76) District of Columbia Code. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, Sec. II, par. 1b (4), 3b).

B K Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B K Sleeper Jr Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 12 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main) APO 757, U.S. Army.

1. In the case of Second Lieutenant FREDERICK D. JOHNSTON, JR, (O-1172508), 320th Glider Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this endorsement. The file number of the record in this office is CM ETO 16479. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO ~~16479~~).

B. FRANKLIN RITER,
Colonel, JAGD,
Acting Assistant Judge Advocate General.

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Sentence ordered executed. GCMO 522, USFET, 30 Oct 1945).

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY CARL E. WILLIAMSON, LT. COL.
JAGC, ASS'T EXEC ON 20 MAY 54

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