E. T. O.
BOARD
OF
REVIEW

OPINIONS

CM ETO 3162
CM ETO 3859

VOLS. 9-10

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL.
JAGC, EXEC ON 26 FEB 1952

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Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 9 B.R. (ETO)

including

CM ETO 3162 - CM ETO 3478

(1944)

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BY REGINALD C. MILLER, COL.,
JAGC, EXEC ON 26 FEB 1952

Office of The Judge Advocate General

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

BOARD OF REVIEW NO. 1

27 OCT 1944

CM ETO 3162

U N I T E D S T A T E S	4th INFANTRY DIVISION
v.	Trial by GCM, convened at Ecausseville, France, 3 July 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for eight years. Federal Reformatory, Chillicothe, Ohio.
Private ERNEST HUGHES (6395634), Company "L", 8th Infantry.	

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

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

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

CHARGE I: Violation of the 92nd Article of War.
Specification: In that Private Ernest Hughes, Company "L", 8th Infantry, did, on or about 14 June 1944, at or near Ecausseville, France, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill Albertine Coiffet, a human being, by shooting her with a rifle.

CHARGE II: Violation of the 58th Article of War.
Specification: In that * * * did, at about 0800, 14 June 1944, at Ecausseville, France, desert the service of the United States by absenting himself without proper leave from his place of duty with intent to shirk important service, to wit,

action against an armed enemy, and did remain absent in such desertion until he was apprehended at or near Ecauseville, France, on or about 2045 14 June 1944.

He pleaded not guilty to both charges and their specifications. He was found guilty of the Specification of Charge I, except the words "with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation," substituting respectively therefor the words, "wilfully, feloniously and unlawfully," of the excepted words, not guilty, of the substituted words, guilty, and not guilty of Charge I but guilty of a violation of the 93rd Article of War. He was found guilty of the Specification of Charge II except the words and figures, "desert the service of the United States by absenting himself without proper leave from his place of duty with intent to shirk important service, to wit, action against an armed enemy, and did remain absent in such desertion" and "2045", substituting therefor respectively the words and figures, "absent himself without leave from his place of duty and did remain absent without leave" and "1900", of the excepted words, not guilty, of the substituted words, guilty, and not guilty of Charge II, but guilty of a violation of the 61st Article of War. Evidence was introduced of one previous conviction by special court-martial for absence without leave for one day in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for eight years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, directed that pending final action accused be confined at the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The trial above described was a rehearing. The accused was previously tried by general court-martial which convened at Ecausseville, France, upon the following charges and specifications:

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

Specification: In that Private Ernest (NMI) Hughes, Company "L", 8th Infantry, did, on or about 14 June 1944, at or near Ecauseville, France, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill Albertine Coiffet, a human being, by shooting her with a rifle.

CHARGE II: Violation of the 58th Article of War.
Specification: In that * * * did, at Ecauseville, France, desert the service of the United States by absenting himself without proper leave from his place of duty with intent to shirk important service, to wit, action against an armed enemy, and did remain absent in such desertion until he was apprehended at or near Ecauseville, France, on or about 2045 14 June 1944.

He pleaded not guilty to both charges and their specifications. He was found guilty of the Specification of Charge I, except the words "with malice aforethought," "deliberately," and "with premeditation," of the excepted words, not guilty, of the substituted words, guilty, and not guilty of Charge I but guilty of a violation of the 93rd Article of War. He was found guilty of the Specification of Charge II, except the words "desert the service of the United States," substituting therefor respectively the words, "without proper leave," of the excepted words, not guilty, of the substituted words, guilty, and not guilty of Charge II, but guilty of a violation of the 61st Article of War. Evidence was introduced of one previous conviction (by special court-martial for absence without leave for one day in violation of Article of War 61). He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority on 18 September 1944 disapproved the sentence and ordered a rehearing before another court to be thereafter designated, and stated that the disapproval and order of a rehearing confirmed his verbal direction of 26 June 1944 and was effective from that date.

4. The evidence is legally sufficient to support the findings of guilty of absence without leave, in violation of Article of War 61 (R5,6,7,9,10) (Charge II and Specification).

5. With reference to Charge I and its Specification, the evidence shows that on 14 June 1944, accused was a member of a squad of Company L, 8th Infantry, which squad was temporarily attached to to M Company as ammunition carriers. M Company was then in contact with the enemy, about five miles from Ecausseville, France (R7). Ecausseville had been liberated from the enemy and no snipers had been in that town for the previous four or five days (R8). At about 1530 hours 14 June 1944, accused, while absent without leave from his place of duty and armed with a rifle, entered a house in Ecausseville, where he found Madame Besseliere in bed. She had given birth to a baby two days before. Accused sat down on the bed beside her

and took drinks from a bottle of "l'eau de vie" which he carried. He offered some to Madame Besseliere and to her mother-in-law, Madame Albertine Coiffet who was also present. The latter took a drink, but Madame Besseliere declined (R18). The house consisted of one room on the first floor and an attic upstairs (R17). Accused then went across the street to the home of Monsieur M. Foulard. In the presence of Monsieur Foulard, accused removed cartridges from his rifle and belt, and "went over to the stove and wanted to throw the cartridges in the stove" but Monsieur Foulard intervened and prevented it (R20). Accused returned to Madame Besseliere's house with rifle and cartridges, went upstairs to the attic, came down and went out again (R18). He returned a third time, but Madame Besseliere's husband who had returned home in the interval "put him out and told him not to come back and locked the door after the soldier had gone." He returned a fourth time and tried the locked door, saying, "open, open." (R18). Madame Albertine Coiffet went to the door to open it. Accused, standing about three or four feet from the door, pointed his rifle at the door and fired (R21). The bullet penetrated the door and struck Madame Albertine Coiffet in the center of the forehead and "the whole thing was blown off" (R13, 18). Second Lieutenant Joseph L. Brooks, 8th Infantry, arrived at the scene a few moments after the shooting. He observed accused and saw blood coming from under the door of Madame Besseliere's house. He took the rifle away from accused and placed him under arrest. Second Lieutenant Rexford M. Bloomgren, 8th Infantry, examined the rifle and the two officers noticed that it had been fired. Brooks testified that accused was unsteady on his feet, incoherent and intoxicated.

> "All his sentences were jumbled up. At one time he was talking about Napoleon. He said something about seeing Germans in a house and had a lot of funny ideas."

Accused admitted firing through the door and killing the woman. Brooks "merely asked him about firing the shot and he only admitted it and said he thought there were Germans in the house" (R12-14, 26-27).

Captain Samuel Victor, (M.C., (2nd Battalion), Medical Detachment), 8th Infantry, testified that immediately after the shooting he examined and identified the body of Madame Albertine Coiffet. He stated:

> "The deceased was lying in that position beside the door, which was closed. There was a gun shot wound of the head, which was bloody, and I was certain death must have been instantaneous."

The witness made the acquaintance of the deceased two days prior to the shooting, at which time he delivered her daughter-in-law of a baby (R24).

Following the shooting, accused, at about 1900 hours the same day, was placed in the charge of Captain Robert F. Bare, 8th Infantry. The captain did not want to ask him questions then because "in my estimation he was too drunk to talk sense to me." However, accused "either knew what he had done or someone had told him, because he tried to talk to me and explain he hadn't meantto kill anybody" (R28). At about 1100 the next morning, Captain Bare warned accused of his rights. He promised no reward to accused nor did he tell him his punishment would be lighter if he made a statement. He was then sober and told Captain Bare that -

> "On the 13th some men in his company had gone out and captured some prisoners, and on the morning of the 14th some other men and he decided to do the same thing. So they started out on the road, searching through some villages. They ran across some medicos who had some liquor and his friends stopped off with them and he then started off by himself. He stated that while going down the road he saw two Germans enter this house and he tried to get in the house. The door was locked and he shot the lock off. He said he didn't know anybody was on the other side of the door; that he did not go in the house and had not been in there before and that he would not go in then because he saw blood coming from the door. He turned around and walked to the street and did not remember who picked him up. He said when he was facing the door with the rifle he bumped the door with the rifle and it went off. He did not say he shot the lock off - he said he bumped the door with the rifle and the rifle went off." (R28).

6. After being advised of his rights, accused elected to be sworn and testify in his own behalf (R29). He testified substantially in accordance with the statement previously made by him to Captain Bare (R30).

7. The court after a recess convened at the scene of the crime (R19). The personnel of the court, prosecution and defense, and accused, the reporter and the interpreter were present. Further testimony was there received. Madame Besseliere, reminded that she was under oath, added to her testimony, pointing out a bullet hole in the door and showing where the bullet lodged inside the building (R20). Monsieur Victor Foulard was sworn and testified regarding movements and conduct of accused prior to the shooting (R20,21,22). Private Laborde, reminded that he was under oath, gave further testimony and described the manner in which accused fired through the door, how and where he stood and the manner in which he held the rifle (R22,23). After a recess, the court returned to the original court room, the personnel of the court, prosecution and defense, accused, the reporter and the interpreter being present (R23).

The practice of "viewing the premises" by a military court is authorized procedure (AW 31). However, the practice of receiving testimony and examining witnesses at a "view of the premises" is almost universally condemned and usually is reversible error (Underhill's Criminal Evidence, p.833, sec.410, Note 49; 16 C.J.,p.827, sec.2092, Note 9, 23 C.J.S., p.334,sec.986,Note 52). A "view of the premises" properly conducted and not coupled with the examination of witnesses may, in many instances, be extremely helpful and informatory to the court. When, in addition, the court either permits or directs an examination of a witness at the scene of the event, it is indulging in a highly dangerous practice, which is not approved or commended.

In the instant case, the record affirmatively shows the presence of accused and his counsel at the "view of the premises" (R19). During the examination of the witnesses at the scene of the alleged offense, no objection was offered by accused or the defense counsel, who cross-examined prosecution witnesses (R22,23).

Excluding all the testimony received by the court at the "view of the premises," there was ample evidence to support the findings of the court beyond any reasonable doubt. Under such circumstances, it is the opinion of the Board of Review that the testimony received by the court at the "view of the premises" was an error of procedure not injuriously affecting the substantial rights of accused, and under Article of War 37, the findings were not thereby invalidated (CM ETO 611, Porter; CM ETO 1262, Moulton).

8. The record of trial does not show that Captain Victor, who examined and identified the body of Madame Albertine Coiffet, was a doctor by profession (R24). However, his testimony that he had

attended Madame Besseliere at the time of her confinement and delivered her baby two days prior to the shooting indicated that he was a doctor and competent to give his opinion that Madame Coiffet's death was caused by a gunshot wound (R24) (Wharton's Criminal Evidence, 11th Edition, sec.1001,p.1763). Even one who is not an expert may, after describing a wound, give his opinion that it caused death (Ibid.,sec.1001,p.1764). The papers accompanying the record of trial show that Captain Victor was a member of the Medical Corps, and was a member of the 2nd Battalion, Medical Detachment, 8th Infantry.

9. It was stipulated by and between the prosecution, defense and accused that if Technician Fifth Grade Leonard Redeyoff, Headquarters, 4th Infantry Division, were present in court and sworn as a witness, he would identify Exhibit A as the original record of a former trial of this case on 18 June 1944, which record was compiled from shorthand notes taken and transcribed by him as reported at that trial and contained exact testimony of witnesses who testified at that trial. It was further stipulated by and between the prosecution, defense and accused that were First Lieutenant Walter E. Hollis, 8th Infantry, present in court, he would testify under oath that he is personnel adjutant of the 8th Infantry and, as such, is custodian of the personnel records of that regiment, which records show that Captain John G. Record, 8th Infantry, was killed in action following the former trial of this case in which he was a witness; that the records also show that Staff Sergeant Roger E. Oyler, Company L, 8th Infantry, was killed in action following the former trial in which he was a witness; and that the records also show that 2d Lieutenant Rexford M. Bloomgren, 8th Infantry, was wounded in action and was evacuated following the former trial of this case in which he was a witness (R5). The trial judge advocate read from the record of the previous trial the testimony of these witnesses during the presentation of evidence for the prosecution (R5,6,9-14). This procedure was proper in as much as it was agreed that the witnesses concerned were either "dead or beyond the reach of process" (MCM,1928,par.117b, p.121). It would have been better practice for the record of trial to show that accused personally agreed to such stipulations, but it may properly be taken that the defense counsel had his acquiescience in assenting thereto (CM ETO 364, Howe).

10. As the accused at the first trial on 18 June 1944 was found not guilty of murder in violation of Article of War 92, but guilty of voluntary manslaughter in violation of Article of War 93, and not guilty of desertion in violation of Article of War 58, but guilty of absence without leave in violation of Article of War 61, he could not legally have been found guilty of either murder or desertion in violation of Articles of War 92 or 58 at the rehearing on 3 July 1944. In the Manual for

Courts-Martial, 1928, it is stated in paragraph 89, page 80:

> "Upon such rehearing the accused shall not be tried for any offense for which he was found not guilty by the first court."

This language is modified by further language in the same paragraph, same page, reading:

> "Where the accused is convicted at the first trial of a lesser included offense only, a rehearing on the offense originally charged cannot properly be ordered; although even if convicted of the offense originally charged on such improperly ordered rehearing such conviction may be valid as far as concerns a conviction of such lesser included offense."

Three cases with reference to rehearings cited in the Digest of Opinions, JAG 1912-1940, secs. 408 (5) and 408 (6), pp.260-261, are pertinent. In CM 145606 (1921) it is stated as follows:

> "An accused was tried for desertion and was found not guilty of desertion but guilty of absence without leave. The reviewing authority ordered a rehearing upon the original charge of desertion. At the rehearing accused was again tried for desertion. He pleaded not guilty of desertion but guilty of absence without leave and was found guilty of absence without leave only. He was sentenced to dishonorable discharge and confinement. The reviewing authority approved the sentence and ordered its execution, but suspended the dishonorable discharge. HELD, That the rehearing, being a trial of the accused for an offense of which he had already been acquitted, namely desertion, was unauthorized because in direct violation of A. W. 50½, which is the only authority for rehearings, and the findings and sentence should be vacated."

A note following this case reads:

> "Compare with C.M. 159024 (1924) and C.M. 159219 (1924). In the latter case C.M. 145606 (1921) is mentioned but not overruled in terms."

In CM 159024 (1924) it is stated as follows:

> "An accused was tried upon a charge of desertion and was found not guilty of desertion but guilty of absence without leave. The reviewing authority disapproved the sentence and ordered a rehearing upon the original charge of desertion. At the rehearing the accused was called upon to plead only to the offense of absence without leave, of which he had been found guilty at the first hearing; and he was tried for, and found guilty of, this lesser offense only. HELD, The requirements of A.W. 50½, with reference to rehearings, were met, this case being distinguished from C. M. 145606 (1921)." (Underscoring supplied)

In CM 159219 (1924) it is stated as follows:

> "Accused was tried at a rehearing after he had previously been tried on the same charge and specification. As a result of the first trial he was found guilty only of absence without leave for the period alleged in the specification, and was sentenced to dishonorable discharge and total forfeitures. The reviewing authority disapproved the sentence and directed a rehearing. At the rehearing accused was found guilty of desertion and a sentence to dishonorable discharge and total forfeitures was adjudged. The reviewing authority approved the sentence. The record supports so much of the findings as involve absence without leave for the period alleged in the specification, in violation of A.W. 61, and supports the sentence."

In CM 198108, Casey (1932) two properly appointed courts, Courts A and B, were concerned. The reviewing authority referred a case in which an accused was charged with desertion to Court A. On 4 February 1932 Court B convened and tried the case, found accused guilty only of absence without leave for the period alleged and sentenced him to confinement at hard labor for five months and forfeiture of $14 per month for a like period. On 15 February 1932, without taking formal action on the record of trial, the reviewing authority referred the case to Court A by an indorsement describing the first trial as a nullity. At the second trial accused was found guilty of desertion as charged and sentenced to dishonorable discharge, forfeitures of all pay and allowances due and to become due, and confinement at hard labor for one year. It was held that Court B had jurisdiction to try the accused, that the action of the reviewing authority approving the second sentence must be considered as a disapproval of the proceedings including the sentence of the first trial, that the second trial must therefore be considered a rehearing and that under Article of War 50½ the record of trial was legally sufficient to support only so much of the findings of guilty as involved absence without leave from 20 October 1931 to about 12 December 1931, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involved confinement at hard labor for five months and forfeiture of $14 of his pay per month for a like period.

The Board of Review is of the opinion that the aforementioned modifying language in the Manual for Courts-Martial (par.89, p.80), and the last two cases above referred to, overruled the holding in CM 145606 (1921) cited in Digest of Opinions, JAG, 1912-1940, sec. 408 (6), p.260. This opinion is strengthened by the fact that this modifying language is not contained in the Manual for Courts-Martial, 1921. Also, as the sentence imposed on accused at the rehearing was substantially less than that imposed at the first trial no substantial right of the accused was thereby injuriously affected.

11. The evidence shows clearly that on 14 June 1944 at Ecausseville, France, accused, armed with a loaded rifle and, apparently angered becaused the door was not opened upon his demand, recklessly and without the slightest justification or excuse fired through the locked front door of the house of Madame Besseliere. Madame Albertine Coiffet, a French civilian, standing inside the door at the time accused fired, was shot through the head and killed instantly. Accused was drunk but sufficiently understood the consequences of his act for he stated soon after the event that "he hadn't meant to kill anybody."

"Manslaughter is defined to be the unlawful and felonious killing of another, without malice aforethought, either express or implied and is either voluntary or involuntary homicide, depending upon the fact whether there was an intention to kill or not" (1 Wharton's Criminal Law, 12th Ed., sec.422,pp.637-640).

"Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought" (Ibid. sec.423,p. 640).

The evidence indicated that the accused fired the fatal shot without justification and with malice aforethought, as evidenced by his cold-blooded and indifferent demeanor during and following the shooting, or at least his reckless disregard of human life and knowledge that his act might cause death or grievous bodily harm to occupants of the house. Except for the findings in the first trial, the evidence would have justified a conviction of murder in violation of Article of War 92 (CM ETO 3937, Bigrow; CM ETO 3362, Shackleford). The testimony of prosecution's witnesses, Captain Robert F. Bare (R28) and Lieutenant Joseph C. Brooks (R26), showed that the accused was drunk at the time of the shooting. The determination of the question whether the drunkenness of the accused fell short of that sufficient to affect mental capacity to entertain the necessary intent was the peculiar prerogative of the court, which question it resolved against the accused (CM ETO 3937, Bigrow,and cases therein cited). The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty of voluntary manslaughter, which offense is included in murder (MCM, 1928, par. 148a, p.162; CM 165268 (1925), (Dig. Op. JAG 1912-1940,sec. 450 (2), p.310).

12. The charge sheet shows that accused is 26 years of age and enlisted 13 February 1939. (His period of service is governed by the Service Extension Act of 1941). His prior service was as follows: "Infantry Unassigned from July 8, 1936 to December 9, 1938."

13. 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.

14. Confinement in a penitentiary is authorized upon a conviction for voluntary manslaughter (AW 42; sec. 275, Federal Criminal Code (18 USC 454). However, prisoners under 31 years of age and with sentences of not more than ten years, will be confined in a Federal correctional institution or reformatory. The place of confinement herein designated is, therefore, authorized. (Cir.229,WD, 8 June 1944, sec. II,pars.1a, (1),3a).

Edward K. Morgan, Judge Advocate

Malcolm C. Sherman, Judge Advocate

Edward L. Stamm Jr., Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 27 OCT 1944 TO: Commanding General, 4th Infantry Division, APO 4, U. S. Army.

1. In the case of Private ERNEST HUGHES (6395634), Company "L", 8th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3162. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3162).

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

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

(15)

BOARD OF REVIEW

ETO 3163

1 AUG 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private HORACE BOYD, Jr. (38339557), 214th Port Company, 386th Port Battalion.	Trial by GCM, convened at Plymouth, Devonshire, England, 12 June 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
RITER, SARGENT and STEVENS, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private Horace (NMI) Boyd, Jr., 214th Port Company, 386th Port Battalion, did, at Newton Abbot, Devonshire, England, on or about 20 May 1944, with intent to commit a felony, viz., rape, commit an assault on Yvonne Jones by wilfully, feloniously and forcibly throwing her to the ground, getting on top of her, pulling at her underclothes, striking her about the face and bruising her thighs and legs.

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

The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on the evening of the date alleged Mrs. Yvonne Jones, 35 Ley Lane, Kingsteignton, Devonshire, England, a married woman 21 years of age, went to visit Technician Fourth Grade James L. Hamilton, 216th Port Company, 386th Port Battalion, at Aller Park Camp, Newton Abbot. They walked around the camp and when it was time for her to go home, Hamilton returned to the camp to get her bicycle while she walked on down a hill reading a book (R12-16). She met accused, a colored soldier, coming up the hill, who asked where she was going. When she replied that she was waiting for someone, he said he would wait with her, but she told him to go to camp, that he would be late for bed check. He offered to walk down the road with her, but she replied that the person she was waiting for "would be down in a minute". He seized her arm, shoved her through a hedge and said "Give me some sugar". When she replied, "No, let me go", he released her and she ran up the road. He caught her, seized her arms and put them behind her back and pulled her through the hedge again, ripping her blouse. He punched her in the eye. When she screamed, he threatened to kill her unless she remained quiet. She kicked him as much as possible and screamed again. He threw her on the ground, punched her eye again and got on top of her. He told her to shut up after she screamed once more. He said that it made no difference when she remarked that she was married, and when she complained "If you do that I will have a baby", he replied "I am wearing a protection". He raised himself up and ripped her knickers. He then "must have seen someone coming" for he got up and ran (R16-18,20). At the trial, she identified accused as her assailant (R18).

When Hamilton secured Mrs. Jones' bicycle, he went up the road but could not find her. He met Technical Sergeant Robert L. Love of his company and the two men shortly thereafter heard a scream. They ran into the woods and saw accused get off the girl and run away. They ran after him and Hamilton caught him after a chase of about 100 yards. Accused shouted to Hamilton "Go on and kill me, that is what you want to do, I know this is your girl" (R7-9,13-14,18). It was not dark at the time (R14,19).

Mrs. Jones was crying. She was later examined and found to be nervous and upset. She was bruised about the left eye and there were very small abrasive areas on the inner part of her lower lip. There were three or four small scratches on both her legs. She was given a sedative and her legs were bathed with tincture of merthiolate(R10-13).

4. For the defense, accused testified that when he met the girl he asked where she was going and she replied that she was waiting for someone. He asked if he could wait with her and she said "No". She started to walk fast and then began to run while looking back at accused. She fell down,

"grabbed her eye and started hollering". Her eye was bleeding. He picked her up and she ran through the hedge. He thought she was badly hurt, ran down through the hedge, lifted her up "and she hollered again". Accused said "I am trying to help you". He then saw Love and Hamilton running toward them and ran away when he heard Love say "Cut the dirty Son of a Bitch". They overtook him when he stopped after he ran about ten feet (R21-24).

5. Competent and substantial evidence fairly tended to establish every element of the offense alleged. The testimony of the victim was amply corroborated by the testimony of other witnesses. The evidence is legally sufficient to sustain the findings of guilty (CM ETO 1673, Denny and cases cited therein; CM ETO 1873, J. Brown; CM ETO 1954, Lovato; CM ETO 2843, Pesavento).

6. The charge sheet shows that accused is 22 years ten months of age and that he was inducted 1 December 1942 to serve for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, which is considerably less than the maximum for the offense charged (MCM, 1928, par. 104c, p.99).

8. Confinement in a penitentiary is authorized on conviction of the offense alleged by Article of War 42 and sec.276, Federal Criminal Code (18 USCA 455). The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is authorized (Cir.229,WD, 8 June 1944, sec.II, pars. 1a(1), 3a).

B. Franklin Riter, Judge Advocate

Edward H. Bergert, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General, with the European Theater of Operations. 1 AUG 1944 TO: Commanding General, Southern Base Section, Communications Zone, European Theater of Operations, APO 519, U. S. Army.

1. In the case of Private HORACE BOYD, Jr. (38339557), 214th Port Company, 386th Port Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 3163. For convenience of reference please place that number in brackets at the end of the order: (ETO 3163).

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

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

(19)

BOARD OF REVIEW NO. 2

17 AUG 1944

CM ETO 3169

U N I T E D S T A T E S	1ST BOMBARDMENT DIVISION
v.	Trial by GCM, convened at American Air Force Station 109, 27 June 1944.
Private JOHN C. LEONARD (10600629), 326th Bombardment Squadron (H), 92nd Bombardment Group (H) AAF.	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for three years. 2912th Disciplinary Training Center, United States Army.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Private JOHN C. LEONARD, 326th Bombardment Squadron (H), 92nd Bombardment Group (H) AAF, did, without proper leave, absent himself from his station at AAF Station 109, from about 18 August 1943 to about 1900 hours, 7 May 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification, except the words "at AAF Station 109". 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 three years. The reviewing authority approved the sentence, designated the 2912th Disciplinary Training Center, United States Army, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The undisputed evidence shows that accused was stationed with his organization at Alconbury, American Air Force Station No. 102 on 10 July 1943 (R8), and that on that date he was sent to the 2nd Evacuation

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Hospital, later known as the 49th Station Hospital (R6,12). On 30 July his organization was notified that he was in the 16th Station Hospital, and he was so carried on the records of his organization until in March 1944 when his organization was notified by teletype, in answer to an inquiry, that he had been released from that hospital on 18 August 1943 (R7,10,16). He was apprehended by an agent of the Criminal Investigation Division, Provost Marshal General's Office, United States Army, London (R10), and a police constable of the London Metropolitan Police Department at Green Street, Southeast London (R11), on 7 May 1944 (R10). When the police rapped at that address, accused answered the door and admitted that he was Private Leonard and, after due warning of his rights in answering questions, stated that he knew why they were there and that he had been absent from his unit since approximately August 1943. The place where accused was found was his home (R11). Accused's unit moved from American Air Force Station No. 102 to American Air Force Station No. 109 on 15 September 1943. Sergeant James W. Harrison of accused's organization testified that the unit had an understanding with the 16th Station Hospital that they would be notified when accused was released from that hospital and no efforts were made to locate accused for, as far as they knew, he was still in that hospital (R15). Accused had been given no pass from his unit between 18 August 1943 and 7 May 1944.

4. No evidence was given by or on behalf of accused. His rights as a witness were explained to him by both defense counsel and the court.

5. Article of War 61 provides that,

> "Any person subject to military law who * * * absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct."

To convict a soldier for this offense, it must be shown (a) that he absented himself from his command, guard, quarters, station, or camp for a certain period, and (b) that such absence was without authority from anyone competent to give him leave (MCM, 1928, par.132, p.146). The accused was discharged from the hospital for return to duty 18 August 1943. His unit was not informed and continued to carry him on their records as absent in hospital until, upon inquiry, he was found and apprehended at his home. He admitted his long absence and that he knew why the police had come to his home.

6. The charge sheet shows accused to be 43 years and six months of age. He enlisted at London, England, on 9 February 1943, without previous service.

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

8. Confinement is authorized upon conviction of a violation of Article of War 61 and under the exceptional circumstances of this case (his domicile is London where his wife and family live), the 2912th Disciplinary Training Center, United States Army, as the place of confinement is proper.

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 AUG 1944 TO: Commanding General, 1st Bombardment Division, APO 557, U. S. Army.

1. In the case of Private JOHN C. LEONARD (10600629), 326th Bombardment Squadron (H), 92nd Bombardment Group (H) AAF, 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 3169. For convenience of reference please place that number in brackets at the end of the order(CM ETO 3169).

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

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

BOARD OF REVIEW

ETO 3180

9 AUG 1944

U N I T E D S T A T E S	9TH INFANTRY DIVISION
v.	Trial by GCM, convened at Flamanville, Normandy, France, 4 July 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private GORDON L. PORTER (15055857), Company "I", 39th Infantry.	

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

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

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

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Gordon L. Porter, Company "I", 39th Infantry, did, near Cherbourg, France, on or about 26 June 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private SAM H. SMITH, a human being by shooting him with a rifle.

He pleaded not guilty and, three-fourths of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by summary court for absence without leave for 11½ and 16½ hours respectively, in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement but directed that pending further orders accused

be held at the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution consisted of the testimony of the following witnesses, all members of accused's organization, Company I, 39th Infantry:

Staff Sergeant Stephen Ruzycki testified that on the morning of 26 June 1944 he was the leader of a squad which was sent to an outpost to protect the right flank of the company. Accused and Private Sam H. Smith (the deceased) were members of the squad. About 300 yards from the company command post the squad deployed about 150 yards along a hedgerow in the vicinity of Octeville, near Cherbourg, France. About noon the squad was relieved by a signal from the command post and Ruzycki began to gather the men (R6-7). When he came up to accused and deceased Smith, both were sitting down and accused was arguing. When witness ordered them to move out, Smith rose to his haunches. Accused seized his M-1 rifle which was beside him, jumped up and said "This -- -- pulled a gun on me. I'll kill him'". Accused snapped back the safety on his rifle and Ruzycki ordered him "to put the safety back on again". Instead, accused pulled the trigger and shot Smith between the eyes. Deceased fell on his back. Witness then took the gun from accused, put the safety on, and took accused to camp (R8-11). Witness further testified that Smith, when shot, was on his knees and sitting back on his heels with his hands on his knees. He was armed with "a German gun, either a Luger or P-38" which was in his holster. Ruzycki did not see deceased make any movement toward his pistol or attempt to open the holster (R8-9). He was smiling and did not appear to be angry. From the time deceased sat up on his haunches until the shot was fired, accused and deceased did not exchange words (R12). About 10-15 seconds elapsed during this interval, and about 2-3 seconds elapsed between the time accused picked up his rifle and the firing of the shot (R9-11). Witness did not know what the two men were arguing about but accused was doing the talking (R11-13). Ruzycki smelled the odor of liquor at the time of the incident (R11). Accused joined the squad in October 1943 and deceased joined it about ten days prior to trial. Ruzycki did not notice any previous friction between them. "There was the usual arguing among them, but no bad feeling, * * * I don't think they were buddies, but they did associate with each other" (R11-12).

Private First Class Larry L. Williams noticed the rest of the squad gathering around accused and Smith, and heard the former tell Ruzycki that Smith "had drawn a gun on him and that he was going to kill him". Witness heard the click caused by the release of the safety and a Private Gotcher who was standing in front of the witness said "'Porter, what do you mean by taking that safety off that rifle? Put that safety back on that rifle right now!'". Although witness did not "exactly see" deceased's hands, the latter appeared to be sitting back on his heels with his hands held loosely on his legs. His head was cocked on one side and he

was smiling at accused "who appeared to be rather resolute in the determination to carry out his threat. By that time he pulled the trigger". Smith fell backward with his hands thrown behind his head. Not over a minute elapsed between the time witness walked up to where he could see the two men, and the shot. Witness did not hear deceased say anything. Although Ruzycki took accused's arm on the way to camp, the latter walked "pretty straight" and "on his own power". Before leaving the bivouac area that morning, witness saw deceased empty his canteen and believed that it contained cognac. He also saw accused take a drink and put a bottle in his field jacket (R19-22).

When Sergeant Earl J. Hartzell arrived where a group of soldiers were gathered he heard accused say "'You son of a bitch! You draw a pistol on me and I'll kill you'". Accused drew his rifle back, quickly pulled it up to Smith's head and fired. Witness did not hear deceased say anything and could not see his position just prior to the shot as there were too many men around. He could see him "from his waist on up", however, and did not observe any action by deceased to indicate that he was attempting to draw a gun. Witness had never observed any friction between the two men (R15-16).

As Private First Class William E. Dietrich approached he heard accused say to deceased "'If you draw that pistol, I'll shoot you, you son of a bitch!'". Accused, who was standing right in front of deceased and pointing his rifle at his head, then released the safety on the weapon and pulled the trigger. Before he was shot, Smith, who was wearing a holster at his hip, was on his knees and sitting on his heels, with his hands open in his lap. He was smiling. Witness did not see him make any effort to draw a gun nor did he hear him speak. Dietrich had never observed any friction between the two men, and could not tell if they had been drinking (R16-19).

Private First Class Thurman L. Tomlinson heard accused and Smith arguing and heard accused say "'You son of a bitch! I'll kill you!'". Deceased was on his knees, sitting back on his heels with his hands on his legs just above his knees. He did not do anything to indicate that he was going to draw a gun. Accused, whose back was toward witness, jerked his rifle forward and pulled the trigger when the end of the barrel was about two inches from Smith's head and the shot knocked deceased backward. Witness did not see any evidence of liquor. He had heard arguments on other occasions between the two men but "nothing serious". They got along as well as most members of the squad. Deceased drank "quite a bit" and accused "also drank some". Accused seemed to be a "pretty good boy" drunk or sober, and "just wanted to argue". He did not cause much trouble and when drunk got along well with men of the company. Witness knew accused for about eight months. Deceased, recently transferred to the squad, had been in the company for several months. He also appeared to get along well in the squad (R23-25).

After accused was brought to the command post by Ruzycki, First Lieutenant William B. McClellan, executive officer of the company, went to the scene of the shooting. McClellan testified that he found Smith dead.

> "The cause of his death was a bullet going through his forehead and coming out of the back of his head and taking off the top of his head".

The "strap" of his holster was unbuttoned "but the pistol was firmly in the holster" (R26-27).

4. For the defense accused, having been warned of his rights, testified that on the morning in question deceased "had a canteen, but I didn't have any with me. Private Smith was pretty much drunk and I drank too" (R28). Accused had three drinks during the entire morning. To accused a drink meant "About three inches in a glass" (R29,32-33). He and deceased were lying down and were arguing but accused testified that he did not remember the subject matter of the argument. They were not tussling (R28,29,31-32). Suddenly deceased "jumps on his heels and falls on his knees and makes for his pistol". Deceased unbuttoned the flap of his holster and made a remark but accused did not know what he said. Accused, who was about six or eight feet away, was excited and thought deceased was going to shoot him. He seized his gun which was "lying right alongside" of him, got up, ran toward deceased and shot him when he was about a foot away. Ruzycki then came up and accused testified that the sergeant said "'Kill the son of a bitch!' Just like that! He was talking about me!". Accused was standing when he fired the shot and deceased was on his knees (R28-32).

The following colloquies occurred during accused's examination:

> "Q. Did you raise up first or did Private Smith raise up first?
> A. Private Smith raised up first.
> Q. What position were you in before this incident occured?
> A. We were all laying down and Private Smith jumped on his knees and made for his pistol and I thought he was going to shoot me, sir" (R29).

> "Q. You say that Private Smith indicated to you that he was going to get his gun?
> A. He was making this motion and he jumped on his knees and he throwed his hand back and I thought he would shoot, so I did first, sir.
> Q. Did he take hold of his gun?
> A. He had his hand back there, sir.

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Q. Could you have grabbed hold of him before he got his gun?
A. No, sir.
Q. Why not?
A. I wasn't that close, sir.

* * * * * *

Q. How close were you, then?
A. I was about six or eight feet away, sir" (R30).

"Q. At the time that you fired the shot, how far away were you?
A. I had run up on him, sir. I was about six inches to a foot away from him.

* * * * * *

Q. Then, as far as you know, he never got hold of his gun?
A. Yes, sir.

* * * * * *

Q. You never did see the gun in his hand?
A. No, sir.

* * * * * *

Q. Did you see him even open his holster?
A. Yes, sir I saw that he did open his holster.

* * * * * *

Q. But you were determined to kill him at the time that you saw him get up?
A. Yes sir. I figured that he was going to kill me, if I hadn't killed him"(R31).

"Q. You moved from about eight feet to one foot away from him before you shot him?
A. That's right, sir.
Q. Then you could have gotten to his arm, couldn't you?
A. I don't know, sir, I just didn't"(R32).

Accused further testified that on the previous evening he and deceased "had a couple of drinks and we had argued a little". Deceased then said "he would fight no son of a bitch fair"(R32). Their friendship up to the time of the incident was "all right". Accused never went out with deceased and had no dealings with him (R29).

5. Called as a rebuttal witness by the prosecution, Ruzycki testified that when he first observed the two men, accused was standing still about three feet from Smith with his gun held at his hips. Accused unsnapped the safety catch, shoved the gun forward and pulled the trigger. The muzzle was then about a foot away from Smith. Witness did not observe any affirmative action by deceased (R33-34).

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Hartzell, also called as a witness in rebuttal by the prosecution, testified that when he first observed the two men, deceased was kneeling and accused was standing still, about three feet away and leaning forward. He "brought the gun back down to his hip" and said "'You son of a bitch! You draw a pistol on me and I'll kill you!'". At the same time he "stuck the rifle up -- it was very close -- and pulled the trigger at the same time" (R34-35).

6. "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse.

* * * * * *

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

Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony"(MCM, 1928, par.148a, pp.162,163-164) (Underscoring supplied).

"It is murder, malice being presumed or inferred, where death is caused by the intentional and unlawful use of a deadly weapon

in a deadly manner provided in all cases that there are no circumstances serving to mitigate, excuse, or justify the act. The use of a deadly weapon is not conclusive as to malice, but the inference of malice therefrom may be overcome, and where the facts and circumstances of the killing are in evidence, its(sic) existence of malice must be determined as a fact from all the evidence.

* * * * * *

In order that an implication of malice may arise from the use of a deadly weapon it must appear that its use was willful or intentional, or deliberate. This, like other matters of intent, is to be gathered from the circumstances of the case, such as the fact that accused had the weapon prepared for use, or that it was used in such a manner that the natural, ordinary, and probable result would be to take life"(29 C.J., sec.74, pp.1099-1101) (Underscoring supplied).

"Deadly weapon used by the accused, the provocation must have been very great in order to reduce the crime in a homicide to that of voluntary manslaughter. Mere use of deadly weapon does not of itself raise a presumption of malice on the part of the accused; but where such a weapon is used in a manner likely to, and does, cause death, the law presumes malice from the act. * * * Mere fear, apprehension or belief, though honestly entertained, when not justifiable, will not excuse or mitigate a killing where the danger was not urgent" (1 Wharton's Criminal Law, sec.426, pp.652-655) (Underscoring supplied).

(a) It was established beyond all doubt by the evidence, including accused's own testimony, that he shot and killed the person alleged. If an intent to kill is formed suddenly under the influence of an uncontrollable passion or emotion, aroused by adequate provocation, the resulting homicide is voluntary manslaughter and not murder (1 Wharton's Criminal Law, sec.423, pp.640-642; CM ETO 1941, Battles). Mere anger in and of itself is not sufficient to reduce a killing from murder to voluntary manslaughter. It must be of such a character as to prevent the individual from cool reflection and a control of his actions (1 Wharton's Criminal Law, sec.426, pp.646-647). Heat of passion alone, without

adequate provocation, will not reduce a homicide to voluntary manslaughter (Ibid., sec.426, pp.655-656).

Whether or not the intent to kill in this case was formed under the influence of an uncontrollable passion aroused by adequate provocation, was a question peculiarly within the province of the court. It decided that accused's intent to kill was not formed under such influence and in view of all the evidence the Board of Review will not disturb the findings of the court on this ground (CM ETO 2007, Harris, Jr.).

(b) Accused contended that he killed deceased purely as a matter of self-defense.

> "'A man may oppose force to force in defence of himself * * *.' Only such amount of force, however, may be used as is reasonably proportionate to the danger. Killing in defence of the person will be justified where the circumstances are such as to warrant the conviction that danger to life or serious bodily harm is threatened and immediately impending" (Winthrop's Military Law & Precedents - Reprint - p.674).

> " To justify or excuse a homicide on the ground of self-defense it is necessary to establish that the slayer was without fault in bringing on the difficulty, that is, that he was not the aggressor and did not provoke the conflict; that the accused believed at the time that he was in such immediate danger of losing his own life, or of receiving serious bodily harm, as rendered it necessary to take the life of his assailant to save himself therefrom; that the circumstances were such as to afford or warrant reasonable grounds for such belief in the mind of a man of ordinary reason and firmness; and that there was no other convenient or reasonable mode of escaping or retreating or declining the combat" (Criminal Law from American Jurisprudence, sec.126, p.242).

> "The right to kill in self-defense is founded in necessity, real or apparent. The right exists only in extremity, where no other practicable means to avoid the threatened harm are apparent to the person resorting to the right. If there was under the facts of the particular case at bar no real or apparent

necessity for the killing, the defense completely fails, and the slayer will be deemed guilty of some grades of culpable homicide. In order successfully to assert self-defense as an excuse or justification for a homicide, the defendant must have been in imminent danger of death or great bodily harm at the time of committing the homicidal act, or must have had reasonable grounds for believing and did in good faith believe that he was in such peril and that the killing was necessary to avert such peril, and must have had no other reasonable means of avoiding death or injury - no avenue of escape - open to him.

* * * * * *

The homicidal act need not have been essential to the preservation of the slayer's life; it is sufficient if the danger threatened great bodily harm" (Ibid., sec.137, pp.249-250).

"It is the apparent and not the real actual necessity of taking another's life to protect oneself from death or great bodily harm at the hands of a person killed which controls the determination of the question whether the killing was justifiable or excusable as having been done in self-defense. Killing an assailant may be excusable, although it turns out afterward that there was no actual danger, if it is done under a reasonable apprehension of loss of life or great bodily harm, and danger appears so imminent at the moment of the assault as to present no alternative of escaping its consequences except by resistance" (Ibid., sec.138, p.251).

"What appears to be the prevailing rule in America asserts that the apprehension of danger and belief of necessity which will justify killing in self-defense must be a reasonable apprehension and belief, such as a reasonable man would, under the circumstances, have entertained" (Ibid., sec. 140, p.253).

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"There must generally be some act or demonstration on the part of the deceased which induced a reasonable belief on the part of the defendant that he was about to lose his life or suffer some great bodily harm. It is not sufficient that the deceased had the means at hand with which he could have inflicted the injury, if there was no act or demonstration which would indicate that he intended to do so. * * *. Presenting, drawing, or attempting to draw such weapons furnishes, as a rule, such appearance of necessity. No one is bound to wait until an assailant 'gets the drop on him'" (Ibid., sec.142, p.255).

"Regardless of the difference of opinion respecting the abstract duty of one, when attacked, to retreat before taking the life of his assailant, the element of practicability is always to be considered. Increase or diminution of the risk to which the attack exposes him is the true criterion for determining his duty in this respect. No one contends that retreat must be attempted when to do so either will not diminish or will increase the peril. One must, according to the rule of many courts, retreat if it is reasonably apparent that he can do so without increasing his danger; but all courts agree that if the circumstances are such that one believes on reasonable grounds that his peril will be increased by retreating, beyond that to which he will be subjected if he stands and defends himself, he is justified in standing his ground and repelling force with force, even to the taking of the life of his assailant, if necessary, provided, of course, the attack is made upon him without his own provocation. * * *. The view has even been taken that if it appears that the attack is made with the settled design and intention of taking the life of the accused or doing him great bodily harm, and that ultimate safety cannot be secured by retreat, the person assailed may advance upon and kill his assailant" (Ibid., sec.152, pp.261-262).

"Where from the nature of the attack, the assailed person believes, on reasonable grounds that he is in imminent danger of losing his life or of receiving great bodily harm from his assailant, he is not

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bound to retreat, but may stand his ground, and if necessary for his own protection may take the life of his adversary" (1 Wharton's Criminal Law, footnote, p.834).

It was clearly established by the evidence that prior to the shooting accused and deceased were arguing. However, there was no evidence whatsoever as to how the argument began, who provoked it, or its subject matter. Accused testified that he did not remember what the argument was about and at no time did any witness hear deceased utter a word. Accused admitted that he and deceased had not been tussling.

There was a sharp conflict between the testimony of accused and that of the witnesses for the prosecution as to the circumstances of the killing. Accused testified that he and deceased were lying down, arguing. Suddenly deceased jumped to his heels, fell on his knees, threw back his hand and unbuttoned the flap of his holster. Accused, who was about six or eight feet away became excited and thought deceased would shoot him. He seized his gun which lay beside him, got up, ran toward deceased and shot him when about a foot away.

On the other hand, the evidence for prosecution showed that accused and deceased were sitting down, arguing. When Ruzycki ordered them to move out, deceased rose to his haunches. Accused jumped up and seized his rifle, said deceased "pulled a gun" on him and that he (accused) was going to kill him. He released the safety on his rifle. Two witnesses testified that he was ordered to put the safety on again. Instead accused, who was holding the rifle at his hip, jerked it forward, pointed it at deceased's head and fired. During the brief interval before he was shot, deceased was on his knees, sitting back on his heels, with his open hands either on his legs or in his lap. He was smiling at accused and did not say a word. Four of the five witnesses testified that they did not see deceased do anything which indicated an attempt to draw his pistol. The fifth witness was not interrogated on this point. Accused was about three feet away from deceased during the incident and the muzzle of the gun was no more than a foot away from the latter's head. No witness testified that he saw accused run toward deceased. It appeared that the entire incident occurred during an interval of not more than one minute. When the body of deceased was later examined at the scene, the "strap" of his holster was unbuttoned "but the pistol was firmly in the holster".

The question of the credibility of witnesses, as well as the question of fact as to whether or not accused acted in self-defense, was for the sole determination of the court. If the findings of guilty are supported by competent, substantial evidence, the Board of Review will not disturb the findings on appellate review (CM ETO 1899, Hicks and cases cited therein). The Board is of the opinion that the findings of guilty of murder are supported by evidence of such character. The testimony of the witnesses for the prosecution was clear and positive

and they were practically unanimous in their versions of the incident. Not one observed the slightest attempt by deceased, who was sitting on his heels, to draw his pistol. On the contrary, his hands were open and either on his knees or in his lap and his pistol was later found securely in his holster, although the "strap" of the holster was unbuttoned. If deceased actually attempted to draw his pistol when the two men were alone, the attempt had obviously been abandoned by the time Ruzycki and the other witnesses arrived at the scene, and accused was certainly no longer in danger of losing his life or of incurring serious bodily injury. He announced that he was going to kill deceased, released the safety on his rifle, and refused to obey an order to put the safety on again. He immediately jerked the rifle forward from his hip, pointed it at deceased's head, and shot him. Accused's use of the weapon in such a deadly manner was willful, deliberate and cold-blooded, and the evidence disclosed no circumstances "serving to mitigate, excuse, or justify the act". When he shot deceased, accused did not have the slightest cause to believe that he was imminently in danger of losing his life or of incurring serious bodily harm. The requisite element of malice is, therefore, clearly inferable (Supra). Accused's claim that he acted in self-defense is entirely uncorroborated by the other evidence which, in fact, clearly refuted the need for such action on his part (CM ETO 1941, Battles).

Ruzycki testified that he smelled liquor at the scene of the incident, and Williams' testimony indicated that both men drank liquor before leaving the bivouac area that morning for the outpost. Williams further testified that when accused was taken back to camp he walked, "pretty straight" and "on his own power". Accused testified that he consumed three drinks during the entire morning. The issue of intoxication was not seriously raised by the defense, and defense counsel in his argument stated that "the defense doesn't say that the accused was too drunk to know what he was doing" (R37). In any event, the issue as to whether accused was sufficiently intoxicated to prevent his entertaining the intent requisite to constitute murder, was one of fact for the determination of the court. In the absence of substantial, competent evidence indicating that he was so intoxicated, the findings of the court were fully justified (CM ETO 2007, Harris, Jr.).

7. The charge sheet shows that accused is 25 years three months of age and that he enlisted at Fort Thomas, Kentucky, 11 September 1940 to serve for three years. (His service period 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 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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9. The penalty for murder is death or life imprisonment as a court-martial may direct (AW 92). Confinement in a penitentiary is authorized 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. Franklin Riter Judge Advocate

Edward H. Sargent Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

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

1. In the case of Private GORDON L. PORTER (15055857), Company "I", 39th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 3180. For convenience of reference please place that number in brackets at the end of the order: (ETO 3180).

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

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

BOARD OF REVIEW NO.1

ETO 3196

12 AUG 1944

U N I T E D S T A T E S	29TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 29, U.S. Army, 19 July 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Disciplinary Barracks, Greenhaven, New York.
Private ANTHONY D. PULEIO, (31372648), Medical Detachment, 175th Infantry.	

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

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

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

CHARGE: Violation of the 75th Article of War.
Specification: In that Private Anthony D. Puleio, Medical Detachment, 175th Infantry, being present with his Detachment while it was before the enemy, did near la Conterie, France, on or about 2 July 1944, shamefully abandon the said Detachment and seek safety in the rear and did fail to rejoin it until apprehended by the Military Police.

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 forfiet all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 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. Evidence for the prosecution showed that on 1 July 1944 accused was assigned to the Medical Detachment, 175th Infantry, and was present on that date with his unit (R6). The regiment was on the line, near La Conterie, France, charged with the mission of holding the high ground around that town, and the regimental medical detachment, which was "pushing on" and "had just dug in, approximately two days" before in that area, had its command post about 1,000 yards from the front line (R6-7). About noon on 2 July accused came to First Sergeant Joseph J. Palmisano of the detachment and "asked what time we were going to eat". Palmisano said at one o'clock. He did not see accused again that day. Later in the afternoon, when litter bearers and first aid men were required, accused could not be found, either in his foxhole or elsewhere in the area (R7).

On 2 July Staff Sergeant Charles W. Oakey, Company A, 507th Military Police Battalion, saw accused near a railroad track in La Mine, (about ten miles from La Conterie) "walking around the street". Questioned by Oakey, accused told him that he (accused) was from the 175th Infantry, was afraid of the German "88's", "was afraid of being up front as he couldn't stand to hear the shells flying overhead", and "that he would give anything to be with an outfit behind the lines". Oakey caused accused to be returned to his unit (R8), where he was delivered by military police on 3 July (R7).

On 5 July accused, after receiving warning as to his rights and without receiving offer of reward or immunity, made a written sworn statement to Captain James E. Lockman, Service Company, 175th Infantry, the officer who investigated the case, which statement was received in evidence without objection by the defense (R9-10; Pros.Ex.1). The statement was as follows:

"Sworn Statement 5 July 1944

I admit that I left the front lines and I will not stay on front lines or near front lines where there is enemy fire.

If I am returned to the unit on the front lines I will do the same thing again.

When I left the unit on July 2, 1944, I had the intention of going to the beach and getting on a boat and return to England or U.S.

(Sgd) Anthony D Puleio

Sworn to before me. (sgd) James E Lockman
Capt. 175th Inf.

Witness:
Harold Scholl Cpl. Joseph Vitelli
2nd Lt Inf 428 M.P.E.G.Co.
4 PM. APO #9 A.P.O.230 "(Pros.Ex.1).

Accused further told Captain Lockman "that he made a mistake by not going AWOL while he was in England so that he would not have to go to the front lines" (R10).

4. After his rights were explained to him, accused elected to remain silent. The defense offered in evidence accused's WD, AGO Form No. 20, a portion of which read as follows:

> "Remarks --- Defective vision --- Limited assignment F. F. R. D #4 Surgeon April 14, 1944" (R11; Def.Ex.A).

5. (a) The evidence leaves no doubt (1) that accused was present with his detachment while it was before the enemy at the time and place alleged and (2) that he abandoned the detachment and sought safety in the rear at La Mine. The shamefulness of his abandonment is emphasized by his remarks to Oakey that he "was afraid of being up front" (admissible as an admission against interest (CM ETO 1302, Splain, and authorities therein cited)) and by his voluntary confession and oral statement of the same tenor to the investigating officer. Both elements of the violation of Article of War 75 alleged were thus established (CM ETO 1249, Marchetti). No evidence in the nature of a defense to the allegations was introduced by the defense.

(b) The evidence that accused failed to rejoin his detachment until apprehended by the military police, while unnecessary, "makes the evidence of accused's guilt of the offense charged the more complete and compelling" (CM ETO 1693, Allen; CM ETO 2205, LaFountain; CM ETO 2471, McDermott).

(c) The Specification alleges in effect that accused did "shamefully abandon" his detachment while it was before the enemy "and seek safety in the rear", following Form 46 (AW 75), Forms for Specifications, Manual for Courts-Martial, 1928, Appendix 4, page 244. These allegations

> "are beyond doubt equivalent to the allegation 'did run away from his company'. Interpreted in such manner the Specification clearly alleged facts constituting an offense under the clause of the Article which denounces as an offense the act of a soldier who 'before the enemy runs away'" (CM ETO 1249, Marchetti).

In both CM ETO 1693, Allen and CM ETO 2205, LaFountain, the Board of Review again upheld as legally sufficient similar specifications and proof under Article of War 75 /shameful abandonment and seeking safety in the rear/, citing as authorities CM ETO 1404, Stack; CM ETO 1659, Lee; CM ETO 1663, Ison; and CM ETO 1685, E.Dixon, in all of which cited cases the Specification charged that accused runaway from his organization.

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6. The trial judge advocate in eliciting evidence of accused's identity from witnesses Palmisano and Oakey employed flagrantly leading questions. He asked the former, "Is that the accused sitting on your left?" (R6), and the latter, "Is that the accused sitting to your immediate left?" (R8). Each question, and particularly that asked Oakey, unambiguously suggested the witness' affirmative answer. In view of other evidence of accused's identity, including his own oral statements and confession (R8,10;Pros.Ex.1), however, the impropriety could not have injuriously affected his substantial rights, within the meaning of Article of War 37.

7. The charge sheet shows that accused is 21 years of age and was inducted at Boston, Massachusetts, 27 August 1943, to serve for the duration of the war plus six months.

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 a violation of Article of War 75 is death or such other punishment as the court-martial may direct. The designation of the United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized, but should be prefixed by the words "Eastern Branch" (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

R. Franklin Potter Judge Advocate

Elwood K. Sargent Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 12 AUG 1944 TO: Commanding General, 29th Infantry Division, APO 29, U.S. Army.

1. In the case of Private ANTHONY D. PULEIO (31372648), Medical Detachment, 175th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The designation as the place of confinement in your action of "The U. S. Disciplinary Barracks, Greenhaven, New York", should be changed to "The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York" (Cir.210, WD, 14 Sep 1943, sec.VI, as amended). This may be done in the published general court-martial order.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 3196. For convenience of reference please place that number in brackets at the end of the order: (ETO 3196).

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

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

BOARD OF REVIEW NO. 1

19 SEP 1944

CM ETO 3197

U N I T E D S T A T E S v. Private JAMES L. COLSON (31130888), 1933rd Quartermaster Truck Company (Avn), and Private HAL A. BROWN (34180626), 1957th Quartermaster Truck Company (Avn), both of 466th Quartermaster Truck Regiment.	IX AIR FORCE SERVICE COMMAND. Trial by GCM, convened at AAF Station 472, England, 16 May 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. Accused were charged separately and tried together with their consent.

Accused Colson was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.
Specification: In that Pvt. James L. Colson, 1933rd QM Trk Co (Avn), 466th QM Trk Regt, APO 149 did near Newbury Berks., England, on or about 3 April 1944, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Peggy Brizelden.

Accused Brown was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.
Specification: In that Pvt Hal A. Brown, 1957th QM Trk Co (Avn), did, near Newbury, Berks., England, on or about 3 April, 1944, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Peggy Brizelden.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by special court-martial of accused Colson, one for absence without leave and improper use of a Government vehicle in violation of Articles of was 61 and 96 respectively, and one for willfully taking and using a Government vehicle and for disobeying an order to follow a commissioned officer in violation of Article of War 96. Evidence was introduced of one previous conviction by summary court of accused Brown for failing to report a female trespasser within the limits of the post, in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, IX Air Force Service Command, approved each of the sentences and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed each of the sentences, but owing to special circumstances and the recommendation of the reviewing authority for clemency, commuted each sentence to dishonorable discharge, total forfeitures and confinement at hard labor for life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused, and withheld the order directing execution of each of the sentences pursuant to the provisions of Article of War 50½.

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

About 10:00 p.m. 3 April 1944, Private First Class Raymond E. Demonge, 101st Airborne Infantry, and Peggy Brizelden, a housemaid who lived at Fox Briars, Cold Ash, England, left Newbury and started to walk along the Oxford Road (R6-7,20,45). Mrs. Brizelden, 23 years of age (R27), was a member of the "WAAFS" at the time and was stationed at Harwell. She was required to be in her camp by midnight (R21). She was married, but had not seen her husband for two and a half years and was then obtaining a divorce (R27). She had been pregnant for four months (R23). When Demonge and the girl reached Donnington Bridge shortly after 10:00 p.m., a United States Army truck came along and stopped after she flashed her torch (R7,11,21,45). At the trial she identified both accused as the occupants of the truck and testified that accused Colson was driving. It was just beginning to become dark but was sufficiently light for her to see their faces (R20-21,45-46). She asked them where they were going and said that she wanted to go to her camp at Harwell (which was on the Oxford Road about 13 miles away). Accused replied they were "going that way" and she entered the vehicle. Accused Brown told her to sit in the middle but she replied that she would prefer to sit on the side. However, she did sit in the middle when Brown insisted

that she do so, because she would be "charged" if she returned to camp late (R7,9-10,20-21,27,45). Demonge started to depart afoot when the driver (Colson) asked him if he had a cigarette. Demonge gave him the remainder of a package and when asked how far he was going, replied about a fourth of a mile. The driver said he could ride with them and Demonge jumped on the running board. He rode about a quarter of a mile, jumped off and went to his camp, which was near Newbury. He left the truck about 10:30 p.m. Demonge testified that there were two men in the truck but he did not look inside. It was dark and the speech of the men gave him the impression that they were colored (R7-9). The girl was "very upset because she couldn't get back to camp in time" (R10).

Shortly after Demonge left the truck one of the men asked the girl for a kiss and put his arm around her. She said, "If you are going to start anything like that, I would rather get out and walk." He replied "Aw, don't be like that, honey" and said that he was sorry (R22,28). "Just for fun" she showed her ring and jokingly said that Demonge was her husband. Brown showed her a picture of a negress and when she remarked that the girl in the picture was very pretty, Brown replied "She is my wife, but that is not your husband. * * * I don't believe you * * * you are not married" (R29, 51,53). They then passed a civilian, Phyllis D. Prickett, who was walking from Newbury to her home in Beadon, a distance of about seven miles. Colson jumped out and asked her the way to Lambourn. She informed him he was on the wrong road and told him where to turn around. She refused his offer of a ride and the truck was driven off, still going in the same direction. While Colson was talking to Miss Prickett, Mrs. Brizelden tried to leave the vehicle but could not "get passed the gears" which were in her way. She started to scream but Brown, who remained in the truck, put his arm around her shoulder and his hand over her mouth. He held her down and kept his hand over her mouth until Colson returned a few minutes later (R22-23, 30-32,72-73,75). Miss Prickett testified that she did not know that anyone else was in the truck at the time, and did not hear any conversation. When the truck stopped she was behind it (R75). Mrs. Brizelden testified that she was not able to see Miss Prickett very well because she was sitting on the end of the seat and "Army trucks are high up" (R30).

Mrs. Brizelden further testified that Colson then drove the truck about three miles to Chieveley Cross Roads. Neither accused spoke and she was "so scared" that she said nothing. At the cross road accused said they had to turn around. Brown and the girl left the vehicle and Colson turned it around (R23,33). As she began to mistrust them when Brown previously prevented her from leaving the truck, she thanked them and started to walk down the hill. Colson called to Brown, who shouted to her to come back. She began to run and Brown ran after her, shouting that he wanted her address, that he wanted to write to her. She called "No, I don't want a thing to do with you," and continued to run as fast as possible (R23,33-35,37). At the bottom of the hill Brown caught and seized her. He knocked her hat off, put his arms around her and tried to kiss her. She pleaded with him to let her go and said that she was going to have a baby. She started to scream and Brown said "If you don't shut up I will beat your brains out." He slapped

her face two or three times. When she tried to hit him with her torch he seized it and put it in his pocket. He then tried to pull down her knickers. By this time Colson reached the bottom of the hill and she asked Colson "Can't you stop him?" Colson stood by with "an ugly grin on his face" (R23-24,37-38,46-48). Both men then seized and dragged her to a haystack two or three yards from the road. She tried to run away, screamed and struggled, and believed she kicked one accused on the ankle (R24,38,47-48). At the haystack they pulled her about and pushed her down. While she was lying on the ground Brown removed her knickers and Colson held her down. They threatened to hurt her and she kicked and struggled (R24,55). While Colson held her down, Brown got on top of her. She struggled and tried to keep her legs together but he forcibly spread them apart, inserted his penis in her person and had intercourse with her. When he finished, Brown left and she arose (R24-25,39-40,48-50,52). Colson then pushed her down again and said "Well, what he had just had, I must have, because I am human too you know." She struggled and tried to push him away but he inserted his penis into her person. She said something to him about his wife and "seemed to hit a soft spot" for Colson said "All right if that's how you feel," arose, urinated in front of her and left. Brown completed the act of intercourse but Colson did not "properly", although he did accomplish the act of penetration (R24-25,47-50,52). She did not consent to either act of intercourse and struggled as much as she could (R24,50,52).

> "I wasn't able to put up much, of course. I wasn't able to put up much of a struggle in my condition. I wasn't that strong" (R24).

She told them she was going to have a baby (R51). She "kept on pleading with them to stop" and did not cease her resistance or give in to either accused. Both soldiers inserted their private parts into hers (R25-26).

On cross-examination, Mrs. Brizelden testified that she had discussed the case with her employer, a Mrs. Watt, within the ten days prior to trial.

> "She (Mrs. Watt) told me that I should think it over and she said 'You don't know what you are going to have to go through having this child. Why don't you change your mind?'"

Witness replied, "Yes, I know, but I can't say I gave in to them" (R40). Mrs. Watt remarked that witness would "have this on her conscience for years to come."

> "She told me, you see I wasn't injured bodily. She said, if these men had hurt me in any way, hurt my body, I should . . . . She told me that I hadn't been injured in my body -- I wasn't ready to have the baby, and if they had hurt me, paralyzed me in any way that

> would be different, but as I hadn't been hurt, she said I ought to be lenient and say that I gave in to them." (R41).

When witness told Mrs. Watt that she "didn't give in", the latter replied:

> "'God will repay you for giving in. You will be ....' she said that if I said I gave in to them, they ought to come groveling at my feet. 'You will be rewarded,' she said." (R42).

Mrs. Watt suggested that Mrs. Brizelden say that the incident was voluntary on her part and witness agreed (R42) and told Mrs. Watt she wanted to make another statement. Both defense counsel called on witness two days before trial and she made a statement to them. At the trial she identified the statement and her signature thereon. The statement recited the fact that she gave in to accused (R40-42). On cross, redirect and recross-examination, Mrs. Brizelden testified that the statement made to defense counsel was untrue. She "never gave into" either accused "for one minute". She made the statement to defense counsel solely because she was going to have a baby and she did not want to have on her conscience anything "which was going to happen" to accused (R40-42,44-45). Witness also admitted having incorporated in the statement: "Then he said he would like to have a little sugar." She was shown and read the statements of accused in which "they said they asked me for sugar". She did not know at the time what the term signified but discovered its meaning later. Mrs. Brizelden testified that actually "on this particular night nothing like that was said." She did make the statement, however, because she wanted to be lenient with accused and

> "thought by letting them off I would put that part in and make it sound more like I did give into them" (R43,50,53).

The defense offered the foregoing prior statement of witness as Def.Ex.1 (R41,43) but the court refused to admit it in evidence (R44).

Mrs. Brizelden further testified that after Colson left she ran across a ploughed field, went over a barbed wire fence and ran along the road as fast as possible (R25). At Beadon, which was about three miles from Chieveley Cross Roads, she called the Newbury police from a telephone box and waited there for their arrival. While waiting she met Miss Prickett (R26).

Miss Prickett testified that the truck which stopped by her about 10:30 p.m. had a trailer. After she gave the driver directions the truck continued on toward Chieveley Cross Roads. She later observed the light of a vehicle on top of a hill at Chieveley Cross Roads when she was about 500 yards away walking toward Beadon. Subsequently, about 11:15 p.m., a vehicle with a trailer passed her going very slowly toward Newbury. She

was certain that it was the same vehicle which stopped by her about 45 minutes earlier (R73-78). She continued walking along the road and when she reached the telephone box at Beaden about 11:45 p.m. she met a girl whose name she since heard was "Peggy" (Mrs. Brizelden), whom she saw at court on the day of trial. Peggy said that she had been assaulted by "two colored chaps" and asked Miss Prickett to wait with her until the police arrived (R74,76,79). Peggy told her that she did many things to get rid of the men but they "knocked her down by a haystack and done what they wanted." She tried to hit them with her torch but they took it away and both attacked her. She indicated that she had been overcome by force (R80). She seemed tired and her shoes were muddy. She was not crying, appeared normal and Miss Prickett did not notice if the girl was excited. When the police came they went to Miss Prickett's house where Mrs. Brizelden was "very quiet". Miss Prickett did not observe any bruises, scratches, or marks of any kind (R74,76,79).

About 11:30 p.m. 3 April, Sergeant Edward Newman, Berkshire Constabulary, Newbury, received a telephone call from Mrs. Brizelden who stated that she had been indecently assaulted by two colored soldiers. She was very hysterical and "it was sometime" before Newman "got real word out of her" as to what occurred. He went to the telephone box at Beadon and found the girl crying and in a distressed condition. Her shoes, stockings and coat were muddy, her hair was mussed, "and generally, she looked very rough". He took her to a house (Miss Prickett's) and took her statement. He noticed no bruises on her face which appeared "quite normal." (R81-82).

About 2:00 a.m. 4 April, Squadron Leader Harry B. Jones, Medical Officer at the "RAF" station at Harwell, examined Mrs. Brizelden (R55-56). He made no internal vaginal examination (R57,59). There was no inflammation of the vulva and "no apparent semen externally". She had been pregnant about three or four months (R57). There was a tremor of her hands and a slight redness of the right axillary line under one arm, which "would conform with a firm hand grip having been taken". No other bruising was present (R57-59). Her skirt was stained with mud and her knickers were mud-stained to a lesser degree. Fresh stains were present in the "gussett" of the knickers and appeared similar to seminal stains. Jones testified that his examination disclosed no visible signs of recent sexual relations except straw in her hair and the stains on her knickers (R57-58). He could not state that the examination showed there was no sexual intercourse.

> "But one would expect a certain amount of semenal stains or semen to be present in the introitus, had she recently had intercourse" (R58).

However, from his examination it was possible that penetration occurred without completion of the sexual act (R59).

About 9:00 a.m. 4 April, Dr. Charles S. Russell, gynaecologist, 27 Wood Street Close, Oxford, examined Mrs. Brizelden (R61) and found that

she had been pregnant about four months. He found no bruising of the vulva and no obvious trauma. There were no seminal stains "over her person" and no bruises or marks on her body, although he did not carefully examine the upper part thereof (R63). The vulva and perineum were intact and not injured and a swab from the vaginal introitus did not disclose the presence of spermatozoa (R65). Dr. Russell testified that he could not state whether she recently indulged in sexual intercourse or whether penetration occurred (R63-64,67-68). He believed it was possible for sexual intercourse to have occurred a few hours before, and for no seminal evidence to be present in the vaginal tract at the time of his examination. In the absence of cleansing after intercourse, it was more likely that such evidence would be present. If intercourse occurred and there was a withdrawal before emission, there would be no evidence of which he could make a record (R68). In response to his questions Mrs. Brizelden told Dr. Russell that penetration did not occur and that there was "no escape of seminal fluid." He had no reason to disbelieve her. He did not explain the meaning of "penetration" to her and she "may not have understood" (R65-68).

Recalled as a witness by the prosecution, Mrs. Brizelden testified that she told Dr. Russell there "was no penetration", and that she "thought he meant penetration was when they left something inside of me". When she said penetration did not occur, she meant that she did not think there was an escape of seminal fluid inside her person. She later asked the doctor what he meant by penetration and when he told her, she then said that penetration did occur. She reiterated her former testimony that both accused penetrated her person (R69-71). The following colloquy occurred when she was questioned by a member of the court:

> (Q) "As I recall it, you testified this morning that the passenger had a complete act there, a complete act of sexual intercourse with you, is that correct? * * *
> A. Yes, but what do you mean by completed?
> Q. What I mean by completed is that he had an emission?
> A. I suppose so, or else he held something back.
> Q. Did he have an emission in this particular case?
> A. No, I don't think so" (R72).

Again recalled as a witness Mrs. Brizelden identified the knickers which she wore the e vening of 3 April and they were admitted in evidence "for appearance only" over the objection of the defense (R85; Pros.Ex.C).

On 4 April Marvin O. Krans, agent of the Criminal Investigation Division, Provost Marshal General's Office, interviewed accused Colson and informed him that he did not have to make a statement. Colson, voluntarily and without any threats or promises of reward, made a statement which he signed after it was written by Krans in longhand. Krans identified the statement and it was admitted in evidence as against accused Colson only

(50)

(R11-13; Pros.Ex.A). On 4 April Milton P. Kroll, also an agent of the Criminal Investigation Division, took a statement from accused Brown under the same circumstances and it was admitted in evidence as against Brown only over objection by the defense (R13-15; Pros.Ex.B).

The statement of Colson was as follows:

"On the 3rd of April, 1944 I was driving a truck which had been in a convoy but the rod knocked out of the engine and I got lost from the convoy. The convoy left me about 18 miles on the other side of Reading. We (Private Brown and I) were driving slow and on the way we stopped in three pubs. We had three glasses of beer and one cider. It had been dark quite a while when we got to Newbury. I missed the road to Lambourn out of Newbury and kept on going up the Oxford road from Newbury. I noticed an American soldier and a girl along the road. I stopped the truck and then I noticed she was a R.A.F. girl. The soldier asked me to give the R.A.F. girl a lift and she asked too. The soldier rode a little ways on the running board. Then the soldier got off. I drove up the road about a mile and I saw a civilian girl. I stopped the truck and got out and asked her if she wanted a ride. She said she didn't and that she only had a short ways to walk. I drove the truck up a ways further and turned the truck around. I told the girl I couldn't take her all the way into camp. She said that she would walk. Brown got out and let her get out then he got back in the truck. When Brown got back in the truck he said he was going to "take a leak" and got out of the truck. He came back shortly and then we came back to camp. I don't know if Brown had intercourse with her or not. Brown didn't talk about anything on the way back to camp. He just sat and layed over in the corner. The guard said it was 12 o'clock when we checked in the gate. I did not have intercourse with the girl and I dont know if Brown did or not." (Pros.Ex.A).

Brown's statement was in part as follows:

"We drove back slow and on the way we stopped in two or three pubs. We didn't have much to drink just a few beers. I don't know what time it was when we hit Newbury but I guess it was around 11 or 11:30 P.M. We took the right fork at Newbury. I think its the Oxford Road, and when we got to the turn off to Lambourn there was an R.A.F. girl and a white American soldier thumbing a ride. Colson stopped the truck. He spoke to the girl and she got in the truck and sat between me and Colson. The soldier stood on the running board on Colson's side. The girl said she had 14 miles to go. Although she wasn't really going in our direction it wasn't my truck so I didn't say anything. We drove along a few miles when we saw another girl - a civilian - on the road. Colson stopped the truck and got out and spoke to her. I was with the RAF girl in the truck but I didn't try to mess around with her or kiss her. She gave me a cigarette and thats all. Colson got in again without the civilian girl and we drove off again. A little while later the soldier got off. We drove on for a few miles further. Neither Colson nor I played around with the RAF girl or touched her breasts or legs or any part of her. Then Colson drove into a side road and turned around and stopped the truck on the side road. He told the girl that was as far as we were going. She said she'd walk the rest of the way. She got out and I walked alongside of her. I asked her for a kiss and she gave it to me. Then I asked her 'Am I going to get a little sugar.' She knew what I meant and told me 'yes.' I walked her over behind a haystack in the field and had intercourse with her once. I didn't use a rubber -- I pulled out in time. She didn't resist me or scream or anything. I didn't force myself on her or hit her or slap her. When we finished we walked over to the road and she asked me was I going to take her home. I said it wasn't my truck, I was only riding. Colson wasn't with us when all this went on. I guess he was out by the truck for we met him at the road. I left him with the girl and went on to the truck. I didn't see where he took her or what he did. They were gone for about

five minutes. I didn't hear any screams. When they came back to the road only he came to the truck -- she went on down the road. We then drove off to camp and got in about 11.30 or so * * *. Colson never told me whether he laid her. * * * " (Pros.Ex.B).

4. For the defense, Mrs. Constance Watt, Fox Briars, testified that she frequently discussed the case with Mrs. Brizelden, who told her definitely that she did not consent to intercourse with accused (R90), and that the acts were against her will (R89). She said she did not struggle because she feared an injury would result due to her "condition" (R87,89) and that she was "so overpowered and so frightened" that she did not recall "half of the time what I did" (R89). Mrs. Watt told her that she should tell the truth, should give the matter deep consideration because the lives of two men "depend on your truth", and that if she was at all to blame and was "a party to it in any way" she should say so (R88-89). The girl said that she was afraid of losing her American soldier whom she expected to marry (presumably Demonge), that the doctor's examination disclosed that she "had not been injured in her condition", that she wanted the matter forgotten and felt that she should shoulder the responsibility (R88,90). Mrs. Watt told her "If you feel like that, Peggy, I think you are doing the right thing'" (R88).

Accused, upon being advised of their rights, elected to remain silent (R92).

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

* * *

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

* * *

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

There is no question as to the identity of both accused as the men involved. The victim's testimony in this respect was of a positive character. Accused in their statements (Pros.Exs.A & B) admitted they were the occupants of the truck concerned, and that they gave the girl a ride. Colson denied leaving the truck and having intercourse with the girl after he turned the vehicle around. Brown admitted that he had intercourse with her but maintained that she consented to the act. No question as to identity was raised by the defense.

The girl's testimony concerning the fact of intercourse and her resistance and non-consent thereto was clear and convincing. She became suspicious of the two men when Brown forcibly restrained her from leaving the truck and kept his hand over her mouth while Colson was asking Miss Prickett for directions. She left them at Chieveley Cross Roads and began to walk down the hill. When Brown called for her address she said she did not want anything to do with him and began to run as fast as possible. Brown caught her at the foot of the hill and tried to kiss her. When she started to scream and asked him to let her go, he threatened to beat her brains out and slapped her face two or three times. When both accused seized and dragged her to the haystack, she screamed again, struggled, kicked one of them on the ankle and tried to run away. They pushed her to the ground and as she kicked and struggled, Brown removed her knickers while Colson held her down. Brown got on top of her, forcibly spread her legs despite her resistance and efforts to keep them together, and penetrated her person. He was aided by Colson who held her down during the act. She arose after Brown left, but Colson pushed her down again. Although she again struggled and tried to push him away, he also succeeded in penetrating her person. In view of the victim's positive testimony concerning the fact of penetration, her testimony that Colson did not complete the act "properly", and that she did not believe Brown had an emission, was irrelevant with respect to the guilt of each accused.

> "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not" (MCM, 1928, par.148b, p.165).

With respect to the degree of her resistance the girl testified, at one point, that she was not able to put up much of a struggle "in my condition." Mrs. Watt testified that the girl told her substantially the same thing. It was clearly established by the evidence that the victim had been pregnant about four months.

> "While the degree of resistance is an incident by which consent can be determined, it is not in law necessary to show the woman opposed all the resistance in her power, if her resistance was honest and was the utmost, according to her lights, that she could offer" (Wharton's Criminal Law, Vol.1, sec.701, p.944) (Underscoring supplied).

Other evidence strongly corroborated the victim's testimony. When she complained to Police Sergeant Newman over the telephone that she had been indecently assaulted by two colored soldiers, she was hysterical and incoherent. She also voiced the same complaint to Miss Prickett. Newman testified that she was crying, that her hair was disheveled and that her general appearance was "very rough." Three witnesses described the muddy condition of her clothing. A later medical examination revealed a tremor

of her hands, and a redness of the right axillary line under one arm which "would conform with a firm hand grip having been taken." Stains similar to seminal stains, in the opinion of Squadron Leader Jones, were found in her knickers. The Board of Review is of the opinion that the findings of guilty are fully supported by competent and substantial evidence of convincing character and they will not be disturbed by the Board on appellate review (CM ETO 2472, Blevins; CM ETO 3141, Whitfield; CM ETO 1899, Hicks).

6. (a) The defense on recross-examination of Dr. Russell elicited from witness the fact that the victim told him penetration did not occur (R65), and the subject was thereafter the matter of extensive examination by the court and prosecution. The court apparently accepted Mrs. Brizelden's subsequent explanation on the witness stand, that she was confused about the meaning of the term "penetration", when she was interrogated on this point by Dr. Russell. The question of penetration was one of fact for the sole determination of the court. There is no need to discuss the admissibility of such evidence as the defense raised the point during its questioning of Dr. Russell. Error, if any, was self-invited and cannot constitute error prejudicial to accused (CM ETO 438, Smith). The same principle applies to the evidence elicited on cross-examination of Mrs. Brizelden by the defense with respect to the victim's conversations concerning the affair with Mrs. Watt.

(b) The court refused to admit in evidence the prior written inconsistent statement of Mrs. Brizelden given to defense counsel, wherein she said she "gave in" to accused and that one of them asked for a "little sugar." She testified that she made the statement and identified her signature thereon. The court erred in refusing the request of the defense that the document be admitted in evidence (MCM, 1928, par.124b, p.134; CM ETO 1052, Geddies et al). The victim testified that the statement was untrue, that she "never gave into" either accused "for one minute", and explained in detail why she made the statement. The findings of the court show that they believed the testimony of the prosecutrix in this respect.

> "The question as to whether the victim consented to the act of intercourse or whether it was committed by accused by force and violence and against her will, was a question of fact within the exclusive province of the court" (CM ETO 2472, Blevins).

Although the statement should have been admitted in evidence, the Board of Review is of the opinion that the error did not injuriously affect the substantial rights of either accused. As the girl freely admitted making the inconsistent statement and its contents, nothing would be gained by the defense if it was admitted in evidence. The finding by the court of non-consent is fully supported by competent and substantial evidence (CM ETO 1402, Willison and cases cited therein).

7. The charge sheets show that accused Colson is 32 years six months of age, and that he was inducted at Fort Devens, Massachusetts, 19 September 1942. His period of service is governed by the Service Extension Act of 1941. No prior service is shown. Accused Brown is 24 years seven months of age, and was inducted 14 November 1941, at Camp Forrest, Tennessee, to serve for the duration of the war plus six months. He had no prior service.

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

9. The penalty for rape is death or life imprisonment as a court-martial may direct (AW 92). Confinement in a penitentiary is authorized for the crime of rape by AW 42, and sec.278, Federal Criminal Code (18 USCA 457). 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) and 3b).

B. Franklin Riter — Judge Advocate

Edward K. Lagg 2nd — Judge Advocate

(ABSENT ON LEAVE) — Judge Advocate

(56)

1st Ind.

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

1. In the case of Private JAMES L. COLSON (31130888), 1933rd Quartermaster Truck Company (Aviation) and Private HAL A. BROWN (34180626), 1957th Quartermaster Truck Company (Aviation), both of 466th Quartermaster Truck Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence, which holding is hereby approved.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3197. For convenience of reference please place that number in brackets at the end of the orders: (CM ETO 3197).

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

(Sentence as commuted ordered executed. GCMO 82, 83, ETO, 2 Oct 1944)

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

BOARD OF REVIEW NO. 1

CM ETO 3200

28 SEP 1944

U N I T E D S T A T E S)	2ND BOMBARDMENT DIVISION.
)	
v.)	Trial by GCM, convened at AAF Station
)	115, England, 5-6 June 1944. SENTENCE:
Private PAUL A. PRICE)	Dishonorable discharge, total forfei-
(32374452), 67th Bombardment)	tures and confinement at hard labor
Squadron, 44th Bombardment)	for life. United States Penitentiary,
Group (H).)	Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Paul A. Price, 67th Bombardment Squadron, 44th Bombardment Group (H) AAF Station 115, APO 558, did at or near the Royal Standard Public House, East Dereham, Norfolk County England, on or about 27 April 1944, with malice aforethought willfully, deliberately, feloniously, unlawfully and with premeditation kill Private Floyd H. Maynard, 13028712, 66th Bombardment Squadron, 44th Bombardment Group (H) a human being by striking him on the head with a stick of wood.

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 14 hours, in violation of the 61st Article of War. All of the members of the court present at the time the vote was taken concurring, he was 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

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

3. Prosecution's evidence discloses the following facts:

Accused on 27 April 1944 was a member of 67th Bombardment Squadron, 44th Bombardment Group (H) and was stationed at AAF Station 115 in Norfolk, England (R8,9,133; Pros.Ex.10). Private Floyd H. Maynard, the deceased, was a member of the 66th Bombardment Squadron, 44th Bombardment Group (H), and, likewise, was stationed at the aforesaid air force station (R8,9,19,25, 39). Sergeant Delbert J. Owens (R70) and Private Robert M. Lopez (R37) were on said date members of the 506th Bombardment Squadron, 44th Bombardment Group, and were also stationed at AAF Station 115. Accused and deceased were friends of several months standing (R90,92). Lopez and Owens were not acquainted with accused and had not seen him previous to the night of 27 April (R38,53,70,86). The deceased and Lopez prior to the occasion in question, had been friends (R38,49,50). Maynard was probably known to Owens (R70,71).

AAF Station 115 was situated within a few miles of the town of East Dereham, Norfolk, England (R10,33). Located in East Dereham on 27 April, was a public house known as the "Royal Standard". The public house was contained in a two-story structure, and the tap room thereof was on the street level floor. The building stood at the intersection of Baxter Road and a lane or alley which intersected the former at a right angle. If an observer stood at the intersection and faced the alley, the public house would be located on his right hand. The principal public entrance to the tap room was through a doorway, which had been constructed in the corner of the building formed by the intersection of the street wall and the alley wall thereof. There was a second doorway to the building, cut in the alley wall, which afforded ingress to the rear of the building from the alley. In front of the structure was a foot walk constructed of stone slabs. It projected into the street about three feet from the street wall of the building (R42,84; Exs.3,4,5,6). The proprietors of the public house, Mr. James Sutton (R102) and his wife, Mrs. Polly Mable Sutton, occupied the second floor of the structure as their home (R102,103).

On the side of Baxter Road opposite the "Royal Standard", there stood the dwelling of Mr. A. G. Sparrow. The front wall of the dwelling was on the street line. If an observer stood in the main doorway of the public house and looked at the Sparrow house, his line of vision would project slightly to his right. Adjoining the Sparrow house, on the observer's right, was an alley known as "Bottomsley's Yard", which extended into an open areaway in the rear (R42; Pros.Exs.7 and 9; R108,113). At the rear of the Sparrow house and facing on Bottomsley's Yard was the dwelling house of a Mr. Brooks (R113). In front of the Brooks house on each side of a central doorway was a small garden plot surrounded by a fence consisting of upright stakes driven into the ground to a distance of about a foot

to which was attached wire fence netting. At the corner of the Brooks house, nearest Baxter Road and at the end of a garden plot, was a barrel into which extended a metal spout which carried water from the eaves of the house (R42; Pros.Exs. 7 and 8; R114,121,124).

On the evening of 27 April 1944, Lopez and Owens left AAF Station 115 and arrived at the "King's Head" public house in East Dereham about 8:00 p.m., where they remained until a few minutes after 9:00 p.m. when they went to another public house, the "Cherry Tree". They stayed there about 15 or 20 minutes and then departed for the "Royal Standard", above described, arriving there about 9:45 p.m. (R37,70). At that place they encountered the deceased Maynard and accused Price (R38) who, together, had previously on said evening visited the "Light Horse Tavern", a public house, where each had consumed about three half pints of beer (R92). At 9:45 p.m., accused and deceased left the "Light Horse Tavern" and went to the "Royal Standard" (R92,101-102). There were also present at the "Royal Standard" Mr. and Mrs. Sutton, a few American soldiers, and some British civilians including Frederick Perkins, brother-in-law of Sutton (R38,53,70, 72,87,102). Lopez and Owens ordered drinks and, standing at the bar, the former engaged Mrs. Sutton in conversation. Accused talked boisterously and showed signs of alcoholic indulgence (R38,39,53,72,78). When he spoke of the day's aerial operations in a loud tone of voice, he was overheard by Lopez who said to him, "Fellow, why don't you keep quiet?" (R38,39,70, 72). Accused made no response (R38). The bartender "called time" at about 10:00 p.m. Lopez and Owens finished their drinks and about 10:15 or 10:20 p.m. they, in company with Frederick Perkins, left the taproom via the rear alley door and stood near the door talking for about 20 minutes with Perkins (R39,54,71,73,77,88). Sutton, the landlord of the public house, saw deceased and accused leave together (R102). Owens observed accused standing between the street and the rear door (R73,83) while he (Owens) was talking with Perkins. The deceased Maynard, joined Lopez, Owens and Perkins (R39,54,71,77,88). The conversation with Perkins ended at about 10:40 p.m. when he departed (R40,54), and at that time Lopez and Owens saw accused standing next to the alley wall of the public house near the sidewalk (R39,54). Accused called to deceased, "Come on. Don't let those jerks give you a snow job". Lopez responded, "What do you mean by jerks?" (R40,41,55,71). Accused advanced towards Lopez (R40,55,56), who awaited accused's approach. Believing accused was about to attack him, Lopez with his fist struck accused in the face (R40,56,71). A fight ensued. Lopez was knocked to the ground by accused who sat on top of him (R40,71). Lopez acknowledged he was beaten and asked Owens to stop the fight. Owens pulled accused off Lopez, knocked him over towards the public house building and told him to go his way (R40,71,74). Accused replied, "I will go" and walked quickly away (R74,78,79,83). He was seen by Owens to turn right toward the main section of town as he left the alley (R71,74). The fight ended about 10:55 p.m. (R57). Lopez' nose was bleeding (R40,82). Owens and Lopez then obtained their bicycles. Deceased indicated a desire to ride to camp with them and walked up the alley with Lopez to the corner of the public house at the intersection of the alley and Baxter Road. The two soldiers waited for Owens to fix his bicycle lamp (R41,71). Deceased stood to left of Lopez as they faced the street.

Lopez' bicycle was between them. Owens was five or six feet in the rear of Lopez. At that moment as Lopez stood on the edge of the foot-path in a direct line with the public house door, he saw the form of a man approaching from his right. When first seen by Lopez he stood in the center of Baxter Road opposite the entrance of Bottomsley's Yard about 10 or 11 feet from Lopez (R40-43). He advanced towards Lopez and deceased from their right swinging a club (R43,68,69). Lopez called, "Look out, he has got a club" (R41,44,63,67,71,74,85) and backed towards Owens, dropping his bicycle (R64, 65,144). The man continued to swing the club and advance towards deceased and Lopez (R41,71,74). When he reached the sidewalk he struck deceased a blow with the club (R52,57,63,66,71). Owens was five feet from the club-wielder when he struck Maynard. The blow "sounded like he hit the side of the building and the board cracked" (R84). The assailant continued to swing the club. Owens threw his bicycle towards him (R11,81). The man struck the bicycle two blows; one on the frame and one in the front wheel (R52,63,71). The three blows were administered within the distance of ten feet (R52). Owens and Lopez retreated down the alley to a point around the rear corner of the public house building (R41,44,66). The man wielding the club followed them down the alley to a point about half way to the corner of the building (R68,71). Deceased was struck about 15 minutes after the conclusion of the Price-Lopez fight (R66,74). At this time the only person in the locality were the actors in the episode: deceased, Lopez, Owens and the man who wielded the club (R46,76). Lopez and Owens waited in the rear of the public building until they were satisfied the assailant did not intend to pursue them (R41,44,71,83,143). They then returned to the location in front of the public house door. On the sidewalk they found deceased prone on his back, breathing with difficulty and in distress (R41,44,71,83). A bicycle laid across him which was removed by Mr. A. G. Sparrow, who was in his home and heard noise resembling a bicycle collision on the street. He immediately came to the scene (R84,107,144). Deceased's head was in or near the triangular entry-way of the public house and his feet projected beyond the footpath into the street (R69,83). Lopez loosened his necktie and shirt collar. Lopez and Owens discovered at the side of Maynard a piece of wood of the length, size and weight wielded by the assailant (R47,60,67,74, 75). Lopez then ran down the alley and knocked on the rear door of the public house building, aroused Sutton, who was ready for bed, and made inquiry as to the location of a telephone in order to call an ambulance (R41, 44,97,98,102,146). Sutton went to the sidewalk in front of the public house entrance and saw a man prostrate on the ground (R103).

Captain Ira C. McKee, 506th Bombardment Squadron, 44th Bombardment Group, on the e vening of 27 April was engaged in escorting some members of the Women's Auxiliary Air Force (British) to their home base from a dance. His truck was stopped by either Lopez or Owens at about 11:30 or 11:40 p.m. in front of the "Royal Standard" (R116,117). He noticed a man on the ground who appeared to be badly hurt. His head was on the sidewalk and his body in the street (R116,117,119). Captain McKee went to a neighboring telephone and called the guardhouse and ordered an ambulance (R116). In the meantime, Lieutenant Morton R. Taylor, 66th Bombardment Squadron, 44th Bombardment Group of AAF Station 115, had also arrived at the scene (R116,119) and was directed by Captain McKee to assume charge until the ambulance arrived (R116).

The ambulance left the station at 11:55 p.m. and proceeded to the scene of the disorder in East Dereham. Upon arrival of the ambulance deceased's hands "had started turning blue and he had his tongue between his teeth and was biting it and he was sort of all choked up" (R11). He was removed to the station hospital (R12) and was sometime thereafter followed by Lopez and Owens on their bicycles (R71,72,147). Upon arrival at the hospital, Maynard was examined by Captain Myron F. Sessit, M.C. He was dead but rigor mortis had not commenced. The body was removed to the station morgue (R16-17). At 9:30 a.m. on 28 April an autopsy was performed on the body by Major Ralph H. Riegleman, M.C. (R19). The examination revealed that there was a laceration of the skin in the left frontal area of the skull. There was but little breakage of the skin and there had been a small amount of bleeding from the lesion (R20). The diagnosis disclosed that the injuries consisted of a skull fracture of the left frontal area with a basal fracture determined by the fact deceased had bled from the ears, nose and mouth (R20,25,27). In the opinion of the medical officer, Maynard's death was not caused by the lesion of the frontal area but was the result of the basal fracture of the skull (R25,26,27). The force of the blow was transmitted from the frontal area to the base of the skull (R26,29). Captain Benjamin Hair, M.C., who performed the autopsy was of the opinion that deceased had received a severe, heavy blow by a blunt instrument. The type of the frontal laceration required a blunt instrument. A sharp instrument could not have been used (R28,29). It was possible, but unlikely that the injury could have been caused by a hard fall (R30).

John J. Abbott, Agent Provost Marshal General's Department, interviewed accused on 28 April 1944, and thereafter on 2 May accused signed and delivered a written statement. Without objection by defense, the statement was admitted in evidence (R132,133; Pros.Ex.10). The pertinent part of the statement is as follows:

> " After completing my twentieth (20) combat mission on the morning of 27 April 1944 I spent the rest of the day until 1800 hrs doing various things on the base at AAF Sta 115. At about 1800 hrs I left AAF Sta 115 and visited East Dereham, Norfolk, having arrived there by cycle. After having some tea and leaving my cycle at Bond's bike shop I went to the Light Horse Public House. After being there about ten (10) minutes I was joined by another American soldier whom I knew as 'Jimmy' but who has since been identified to me as Pvt. Floy H. Maynard. Pvt. Maynard and myself remained at this 'pub' until about 2130 hrs. During this time we drank only bitter beers to the best of my knowledge. The next thing that I recollect happening is turning right into the alley way adjacent to the Royal Standard Public House. There seemed to be a group of people arguing in the alley way and as Pvt.

Maynard and myself walked toward these people I was struck by an unknown person. This blow caused me to fall to the ground and upon arising I was again struck, this time in the nose causing it to bleed profusely. The next thing I remember is that I walked out of the alleyway adjacent to the 'pub' and in the direction of the bike shop. The next thing I remember is finding the bike shop closed and located my cycle on the outside of the shop. The next thing that I remember is throwing my clothes on the foot of my bed.

I do not remember visiting the Royal Standard Public House on 27 April 1944 at any time of the day or evening.

I do not remember being involved in any argument or discussion at any time on 27 April 1944.

I do not know in what manner or at what time I returned to AAF Sta. 115 after my visit to East Dereham, Norfolk, on 27 April 1944.

I have read my statement of 3 pages and it is true."

In the consideration of important and vital issues which are involved in the case, certain additional evidence relevant thereto will be hereinafter epitomized.

4. Testimony of the defense witnesses summarizes as follows:

Private Robert A. Webster, 1287th Military Police Company, was with a young woman at the "Royal Standard" public house in East Dereham at about 9:30 p.m., on 27 April 1944 (R151). Accused arrived about the same time and sat at a table with witness and the girl. He was noisy, talked loudly with a "thick tongue", and made discourteous advances to the girl. He was "pretty drunk" (R151,152).

Private First Class Ivan Melchard, 66th Bombardment Squadron, was in East Dereham on the night of 27 April. At about 11:00 p.m. he was in front of the "King's Arms" public house. A weapons carrier passed and he mounted it (R153). After traveling about two blocks it stopped before a crowd of people. Witness left the carrier and saw Maynard on the ground (R153,157). He also saw a British civilian, commonly called "Knobbie", whom witness knew was a friend of deceased, walk by deceased and never stop to inquire the cause of the incident or his condition (R154). Witness had seen Maynard and the civilian together on several occasions (R154,155).

After he was advised concerning his rights, accused elected to become a witness on his own behalf (R158). He testified that up to and including 27 April he had completed 20 missions as flight engineer on a combat crew and on the afternoon of said date he "signed up for another tour"

- "put my name up for another tour of duty". He was acquainted with deceased, and "had been out in his company a dozen times". He would "meet him in town and finish the rest of the evening with him" (R159). On the evening of 27 April he left AAF Station 115 and went to East Dereham. He first went to the Red Cross Club and then to Bond's bicycle shop where he left his bicycle (R160,162). He then proceeded to the "Light Horse" public house where he consumed intoxicating beverages. While he was drinking deceased arrived. Both imbibed freely (R160). He had no memory of being in the "Royal Standard" during the evening, but "from all the evidence that has been brought forth, it seems like I was in there, but I do not remember it" (R160-161). He did not remember making advances to a girl (R161). He remembered being in a fight but could not recall the identity of his opponent (R160-161). He never knew Lopez personally but had seen him around camp. The next day he saw him at the guardhouse and his face was familiar (R161). He remembered that in the course of the fight he was twice knocked down. He also remembered that he was hit in the face; the last time on his nose because it was bleeding and hurt as he lay on the ground (R161,167). He had no memory of leaving the "Light Horse" public house (R161). He recalled that after the fight he went to the bicycle shop for his bicycle. The shop was locked and the bicycle was in the yard. He took it and started toward the road but did not know in which direction he headed (R162,166). Upon his return to camp he had no recollection that he attempted to remove blood stains from his clothing. Under oath he did not "recall" using a stick which was shown him nor did he "recall" striking his good friend Maynard with it. He categorically denied that he killed Maynard (R162). Upon cross-examination the following colloquy occurred:

> "Q. Now, I believe the last, or practically the last question that your counsel asked you was, 'Did you kill Maynard?' and your answer to that question was 'No,sir?'
> A. That is right, sir.
> Q. How can you say whether you did or did not kill Maynard?
> A. Just my own belief and my own feelings, sir.
> Q. But you have testified to the fact that you were at the bicycle shop and could recall that and then there is a long gap and you are in your barracks. You have placed yourself on record that you did not do something to which you cannot testify.
> A. I can testify to that as far as I know, sir. I am saying from my own feelings. I have never had a desire to commit a crime with any instrument." (R164).

On cross-examination he also admitted that he was a frequent visitor in East Dereham during a period of seven months and was "pretty well acquainted" with the locality in which the "Royal Standard" was situated. He knew that there existed three specified alleys leading from Baxter Road in that proximity, but did not notice the alley known as "Bottomsley's Yard" (opposite

the "Royal Standard") until the next day (R166,167). On the night of 27 April he wore shoes with leather soles and leather heels "with iron around the side". His blood was type "O" (R169). He could not remember being in the "Royal Standard" on the night of 27 April and, therefore, he could not remember that deceased was with him in that public house (R172).

5. Certain cogent and vitally important questions arose during the trial with respect to the admission of evidence. They will be considered preliminary to disposition of the case upon its merits.

(a) The objections of defense (R22,23,24) to the introduction in evidence of photographs of deceased (Pros.Exs.1 and 2) were without merit. There is substantial evidence that they were true and correct pictures of deceased taken at the time of the autopsy and that they truthfully and accurately portrayed the condition of his body at that time. Accurate photographs of the deceased are universally admitted in evidence in trials involving homicide upon proper identification. There was no error in their admission in evidence (2 Wharton's Criminal Evidence, 11th Ed., sec.773, p. 1317; MCM, 1928, par.118b, p.122; CM ETO 438, Smith).

(b) The use by Captain Hair of a true and correct copy of the autopsy protocol, prepared by him and Major Riegleman, to refresh his memory when testifying as to the extent of deceased's injuries (R28,31), was proper (CM ETO 895, Davis, et al, and authorities therein cited; CM ETO 739, Maxwell).

(c) The prosecution by its question to the witness Gay:

> "During the time you have known Private Price what can you say as to his general deportment? How has he conducted himself?"

improperly put in issue accused's character (MCM, 1928, par.112b, p.112). Gay answered, "As a gentleman" (R93). The error was non-prejudicial, however, inasmuch as the answers accrued to accused's benefit.

(d) The defense registered a vigorous objection to the prosecution's tender in evidence of a club or stick of wood, a large splinter and two small splinters of wood. The objection was overruled and the club and splinters were admitted in evidence (R139-141; Pros.Ex.12). It is necessary to summarize prosecution's evidence relevant to the club and splinters in order to understand the substance of the objection.

Reference to the prosecution's evidence hereinabove set forth establishes beyond all reasonable doubt the following facts:

Deceased's assailant struck deceased on the head with a club. The blow fractured deceased's skull which fracture was the cause of his death. After striking deceased, the assailant hit Owens' bicycle; once on the frame and once on a wheel. When Lopez and Owens returned to the sidewalk, they discovered deceased prostrate thereon and they also saw by his side a club or stick of wood.

The chain of evidence with respect to this club or stick of wood from its position near the body of deceased to its production in court is as follows:

Both Lopez and Owens identified the club or stick offered in court as the club or stick which they saw lying beside accused's body (R47,76). Lopez also testified that it was similar in length to the stick with which deceased was struck (R47,60) as it appeared to have aluminium paint on it as a result of striking Owens' bicycle (R60). Owens described the club that he saw at the side of deceased's body as being about 3½ feet in length and "cornered on one end" (R75). He also believed the club exhibited to him in court was the club used by the assailant "because I seen it lying besides the body and it has got aluminium paint on it and my bicycle has got aluminium paint on it" (R80).

Sutton, landlord of the "Royal Standard", approached deceased after he had been called by Lopez and kicked a stick of wood with his foot. He picked it up and stood it against the corner of his shop (R102,103). Sutton identified Prosecution Exhibit 12 as the club he found near deceased and which he stood in the corner of his shop (R103). He was positive in his identification of the stick because of its weight and the fact that a hole was bored in it (R104,105).

When Captain McKee arrived on the scene of the homicide, he discovered a stick of wood on the ground parallel to deceased's body, but it was removed when he returned from the telephone (R116). (Obviously, Sutton arrived in the meantime and picked up the club). In court, he identified the stick of wood presented to him as being either the one he saw on the ground close to deceased or one similar to it (R118).

Harold Joseph Hempstead, a member of the Norfolk Constabulary, and whose work was that of crime detection (R120), was informed of the homicide at 9:30 a.m. on 28 April. He went to the "Royal Standard" and discovered a puddle of blood by the front door of the public house. Next to the blood he found two or three small splinters of wood and about four feet distant therefrom a large splinter of wood. Under a shed at the rear of the public house he found a stick of wood (R121). He retained the splinters and stick of wood until he delivered same to John J. Abbott, Agent Provost Marshal General's Department, United States Army (R123). Hempstead identified the stick of wood or club and the splinters shown him in court as the club and splinters he discovered in the manner and at the place aforesaid. He further testified that he had compared the splinters with the stick of wood and that the splinters were of the same color, nature and texture as the stick of wood (R121-123). About ten days previous to the homicide, Hempstead had occasion to inspect the exterior of the Brooks House located in Bottomsley's Yard. At that time he observed the stakes in the front of the house, and a wire fence surrounding the same (R124). The sticks of wood which formed the up-rights of the fence were of the same kind of wood as the stick and splinters shown him in court (R121). The fence up-rights or stakes also had holes in them identical with the hole in

this stick. In the vicinity of the Brooks house, there was no other wood similar to the stick (R124). On the morning of 28 April he visited the Brooks house and there discovered that the fence of the flower plot on the left-hand side of the door had been disturbed. The stake first to the left of the door had been pulled from the ground and the wire disentangled from it. There was a hole in the ground where the stake or up-right had been and the stake was gone (R121,124; Pros.Ex.8).

A. G. Sparrow who lived in the house opposite to the "Royal Standard", as hereinabove described, at 11:20 p.m. on 27 April (R111) was in the front room of his house. He heard a noise which sounded as if a stick were being scraped along the side wall of his house which borders on the alley - "Bottomsley's Yard" (R108). However, when he made a search of the wall two days later, he could find no new marks thereon (R110). Sparrow made an inspection of the area in the immediate proximity of the Brooks house after deceased had been removed in the ambulance. He discovered the wire fence netting had been pulled across the pathway, the water barrel at the corner of the house displaced, and one of the fence stakes missing (R108).

Technical Sergeant Abbott, the investigator for the Provost Marshal General's Office, identified the stick of wood and the splinters displayed to him in court as the stick of wood and splinters delivered to him by a fellow agent, Sweeney, who was absent on duty, and could not be produced as a witness (R126,135). Abbott tagged the stick for identification. The splinters were contained in a brown manila envelope. The tag was in his own handwriting. He delivered the stick and splinters to Inspector William Garner of the Norfolk Constabulary (R126,135). Inspector Garner received the stick of wood and splinters from Abbott and forwarded the same by railroad to the Forensic Laboratory at Nottingham for examination (R137). The same were returned to him from the laboratory and he redelivered them to Abbott (R134,137). Abbott kept the stick and splinters in a cabinet in the office of the Provost Marshal General until he brought them to court (R134,136).

It was stipulated by prosecution, the accused and defense counsel (R138) that Dr. Henry Smith Holden, Director of the Home Office (Forensic) Laboratory at Nottingham, if present in court, would testify as set forth in his written report dated 5 May 1944 (R139; Pros.Ex.11). The part of said report relevant to the stick of wood and splinters was as follows:

> "On Wednesday, 3rd May 1944, I received by rail from the Norfolk County Police * * * clothing labelled 'C. Clothing of deceased', wooden stake labelled 'D. Weapon' and the envelope labelled 'E. Splinters from weapon' (all produced).
>
> I have examined these.
>
> * * *
>
> I removed from Maynard's tunic two small splinters of bloodstained wood. These are

fragments of Eucalyptus diversicolor. The splinters of wood found at the scene of the affray andthe heavy wooden stake are also Eucalyptus diversicolor, and one of larger fragments from the scene makes an accurate fit with the stake itself.

No human blood or hair is present on the stake."

The first ground of defense's objection to the admission of Prosecutions Exhibit 12 (club and splinters) was that the failure of the prosecution to produce Sweeney, the investigating agent, to whom, Hempstead, the English detective delivered the exhibit and who, in turn, delivered it to Abbott, broke the continuity of proof of identity of the exhibit and, therefore, prosecution failed to prove that Prosecution Exhibit 12 was in fact the club used by the assailant. The defect of such contention lies in the fact that independent of the chain of evidence in support of identity of the exhibit, there is substantial evidence that the club produced in court and admitted in evidence was the same club as was used in the commission of the homicide. Lopez, Owens and Sutton testified that the stick exhibited in court was the identical stick they saw at the side of deceased (R47,76,104,105). Dr. Holden's report disclosed that he removed from deceased's tunic two small splinters of blood-stained wood which were fragments of Eucalyptus diversicolor and the stick of wood was also Eucalyptus diversicolor (Pros.Ex.11). Captain McKee identified the club shown him in court either as the one he saw at the side of deceased or one similar to it (R118). On the question whether Prosecution Exhibit 12 (club) was the identical instrument used by the assailant when he struck deceased, Lopez and Owens both testified as to marks on the exhibit and identifying facts from which the inference is not only plausible but also convincing that the assailant's weapon and the exhibit were one and the same article. Therefore, in the absence of Sweeney's testimony concerning his custody of the club, there was substantial evidence in the record which traced the exhibit from its use in the commission of the homicide to its presence in the court room. There is not even an implication in the record that the club and splinters had been altered or changed.

The second ground of defense's objection raised directly the major factual issue in this case, to wit, whether it was accused who struck deceased on the head with the club and thereby caused his death.

A lethal weapon found near the scene of the crime is admissible in evidence provided there is proof connecting accused with it (Underhill's Criminal Evidence, sec.116, p.51; 20 Am.Jur., sec.718, p.601; CM ETO 739, Maxwell). Manifestly, if there is no substantial evidence that it was accused who struck deceased with the club (Pros.Ex.12), prosecution's case against him fails in its entirety. This element of the case will be hereinafter discussed.

There are also other questions arising in connection with the admission of certain evidence vital to the prosecution's case which will be considered in connection with the problem of proof of identity of the assailant.

6. The court by its findings concluded that it was accused who inflicted the fatal injuries upon deceased. The duty of the Board of Review, sitting in appellate review, is to examine the record of trial for the purpose of determining whether there is substantial, competent evidence to support this finding of the trial court. It will apply the following principles:

> "Convictions by court-martial may rest on inferences but may not be based on conjecture. A scintilla of evidence - the 'slightest particle or trace', is not enough. There must be sufficient proof of every element of an offense to satisfy a reasonable man when guided by normal human experience and common sense springing from such experience" (CM 223336 (1942), Bul.JAG, Vol.I, No.3, sec.422, p.159).
>
> "In the exercise of its judicial power of appellate review, under A.W. 50½, the Board of Review treats the findings below as presumptively correct, and attentively examines the record of trial to determine whether they are supported in all essentials by substantial evidence. To constitute itself a trier of fact on appellate review and to determine the probative sufficiency of the testimony in a record of trial by the trial court standard of proof beyond a reasonable doubt would be a plain usurpation of power and frustration of justice" (CM 192609, Hulme, 2 B.R. 19,30).
>
> "The weighing of the evidence and the determining of its sufficiency, the judging of credibility of witnesses, the resolving of conflicts in the evidence and the determination of the ultimate facts were functions committed to the court as a fact-finding tribunal. Its conclusions are final and conclusively binding on the Board of Review where the same are supported by substantial competent evidence * * *" (CM ETO 895, Davis, et al).

The Board of Review (sitting in the European Theater of Operations) has scrupulously observed the foregoing principles (CM ETO 106, Orbon; CM ETO 132, Kelly and Hyde; CM ETO 397, Shaffer; CM ETO 422, Green; CM ETO 492, Lewis; CM ETO 804, Ogletree, et al).

Evidence relevant to the identity of deceased's assailant, not hereinbefore summarized, is as follows:

Lopez: The assailant as he approached swinging the club wore an American Class "A" military uniform (R44,62). There was insignia over the left pocket of his blouse which Lopez believed to be Air Corps "wings" (R44, 61,62). Accused, deceased, Owens and Lopez were the only ones present during the Lopez-Price fight (R46), and after Price left and prior to the approach of the assailant, only deceased, Lopez and Owens were in front of the public house (R47). Not over eight minutes expired from the time Price left the alley at Owens' directions and the time deceased was struck (R46). Lopez had never identified accused as the man who wielded the stick that struck deceased (R48), but following the homicide, Price was brought to the guardhouse and Lopez identified him as the man with whom he had fought (R48, 49). Price was of the same build and size and appearance as Lopez' opponent (R49). When accused was in the public house on the evening in question he was dressed in a Class "A" uniform and wore "wings" (R149,150).

At the time Lopez, Owens and Perkins conversed outside of the public house, it was dark and it was difficult to recognize a person beyond a certain distance (R54). Lopez did not know where Price went after the fight (R57). As the assailant approached, Lopez could not identify him because of darkness (R57). Under oath he could state he was of the size of accused (R58) but not exactly his shape (R59). Lopez was unable to swear that accused was the assailant (R63,143), although he believed the man who advanced towards him swinging a club was Price (R65).

Owens: After Owens stopped the fight between Lopez and Price, he told accused to leave as the "M.P.'s would be along and pick us all up". Accused replied, "'I will go'" and walked away fast (R73-74,79,83). When Owens pulled accused off Lopez, accused "wanted to go ahead and fight. I had to hold him away from Lopez and he wanted to know what it was all about * * *" (R74). It was not less than ten minutes and not over 15 minutes between accused's departure and the time deceased was struck (R74). The assailant wore an American uniform (R76). It did not look like an officer's uniform (R82).

> "He had a shiny thing here on his coat. (Indicating) Looked like wings to me. I taken it for wings. He had a garrison cap on - a peaked cap with a bill * * *" (R77, 80,81).

He was about five feet ten inches in height and of medium build (R76). After Perkins departed, only accused, deceased, Lopez and Owens were present (R77). There were no other American soldiers until the truck arrived (R77).

Owens would not and could not swear under oath that it was accused who struck the fatal blow (R82).

Perkins: On the night in question a person could be recognized at 25 yards distance. It would be unusual if a person could not be recognized within five or six feet (R90).

Sparrow: At 11:20 p.m. on 27 April he was in the front room of his house. He heard a "scuffle" at the back of his house and soon after a sound from the street like a collision of bicycles (R107). He went out to the street and saw a tall soldier going to the back of the "Royal Standard" and somebody running down the road (R107,109) who wore the uniform of an American soldier (R109). There was a definite "patter pat" on the pavement which came from leather soles (R109). Had there been iron taps on the heels the noise would have been much greater (R112). He heard the noise on the street which he thought a collision about five minutes after he heard the disturbance in the backyard (R111,113). Sparrow subsequently saw the tall soldier who ran to the back of the "Royal Standard", on the street in front of the public house while awaiting the arrival of the ambulance (R108,114). A person could be recognized at a distance of five feet on that night (R114, 115).

Accused on the night of 27 April 1944 wore shoes with leather soles and leather heels with "iron around the side" (R169).

As preliminary to the determination whether there is substantial evidence identifying accused as the assailant, it is necessary to consider whether the court was correct in admitting certain evidence which was cogent in this aspect of the case.

(a) On direct examination of Lopez, the following coloquy occurred:

"Q. At the time the blow was struck who was closest to the man who struck the blow?
A. I was, sir.
Q. Were you in a direct line with him?
A. Well, he was walking towards us.
* * *
Q. If you had remained in the position you were in would that blow have struck you or Private Maynard?" (R50).

Over objection of defense counsel, Lopez answered:

"A. Well, after what had happened and in my own feelings I think the blow was really meant for me. It is just that I happened to be lucky to see him first. I don't think it was intended for Private Maynard" (R51) (Underscoring supplied).

The motion of the defense to strike the underscored answer was denied (R51). Was it admissible? The possibility that it may have been unresponsive to prosecution's immediate question was not asserted by the trial judge advocate

and such objection was not available to the defense (70 CJ, sec.731, p.754). A more serious question arises whether the answer was a conclusion of the witness and invaded the province of the court as a fact-finding body.

> "An ordinary witness may be permitted to testify to his opinion or conclusion where the facts as they appeared to him at the time cannot clearly and adequately be reproduced, described, and detailed to the jury; * * * When the opinion of a nonexpert witness is received, the facts and circumstances upon which he bases his opinion or conclusion should be stated as far as is practicable, in order that the jury may have some basis upon which to test the value of his opinion; * * *" (16 CJ, sec.1532, pp. 747-748).

> "In determining what is a statement of fact, as distinguished from an opinion or a conclusion, the courts sometimes disregard distinctions which are more metaphysical than substantial, and hold admissible a statement which, although it may fall under the head of opinions or conclusions, represents such a simple and rudimentary inference as to be practically a statement of fact. The immediate conclusions of a witness, drawn from what he saw and heard, are not rejected as opinion evidence. It is not always practical to put before the jury all the facts in separate form, especially as regards a collateral matter; and a witness is still testifying to facts and not to opinions or conclusions when, instead of stating separately certain facts within his knowledge, he gives a composite statement or shorthand rendering of collective facts" (16 CJ, sec.1532, p.749).

> "'if a declaration is an expression of an opinion drawn from facts immediately under the observation of the declarant - for instance, if he sees his assailant and from appearances which he may describe he draws a conclusion as to his identity - it is admissible; but if the opinion is the result of a course of reasoning from collateral facts it is inadmissible.'" (25 ALR, pp.1377-1378, State v. Wilks, 278 Mo. 481; 213 SW 119).

"Whenever the opinion of the witness upon such a question, or on one coming under the same rule, is the direct result of observation through his senses, the evidence is admitted. * * * And although opinions, as derived, may sometimes be erroneous, yet they are not generally so, and when carefully weighed are sufficiently reliable for practical use in the ordinary affairs of life. The witness does not unnecessarily substitute his judgment for that of the tribunal. But if the opinion of the witness is the result of a course of reasoning from collateral facts, it is inadmissible. As, for example, if at the time to which the question of identity applied he did not see or have the testimony of any sense as to the person in question, but believed it to have been he because he might have been there, and had a motive to have been there, and to have done the act alleged. In such a case the tribunal is as competent to reason out the resultant opinion as the witness is, and by the theory of the law, it alone is competent to do so. To allow any influence to the opinion of the witness would be unnecessarily to substitute him to the function of the tribunal." (25 AIR, 1378, State v. Williams, 67 N.C. 12).

The foregoing exception to the rule prohibiting a witness from testifying as to his opinions and conclusions is further recognized and expounded in Wigmore's Code of Evidence, 32nd-33rd Edition, 1942, sec.756, p.159; 2 Wharton's Criminal Evidence, 11th Edition, sec.946, pp.1661,1662; 20 Am.Jur., sec.769, p.640; State v. Collins - Montana - 294 Pac.957, 73 AIR. 862,866; House v. State, 94 Miss. 107, 48 South. 3, 21 LRA (NS) 840; Hollywood v. State, 19 Wyo. 493,522, 120 Pac. 471, 122 Pac. 588. The Board of Review recognized and applied the exception in CM ETO 996, Burkhart.

The situation here presented is peculiarly within the exception to the general rule. Lopez testified specifically as to the approach of the assailant toward him and deceased and his own actions when he saw the threat to himself and also described the manner in which the fatal blow was administered to the deceased. Upon the totality of this evidence - "what had happened" - the court allowed him to superimpose his statement, "I think the blow was really meant for me * * * I don't think it was intended for Private Maynard". Such thought was not the result of reasoning based on an independent collateral fact but was a "short hand summary" by witness directly and immediately based on the facts and circumstances he had previously described in detail. The court was in possession of this basic evidence and it was in a position to give such weight and value to his statement as it deemed appropriate under the circumstances. It could

reject it entirely as possessing no inherent worth or it could consider it with other evidence in reaching its findings. There was no error in overruling the objection and in denying the motion to strike.

(b) Further, in his direct examination, Lopez was asked:

> "Private Lopez, have you ever made a statement identifying the person who struck Maynard?" (R51).

Over the objection of defense the witness answered:

> "Just like I said before, in my own feelings I have never actually identified Private Price as the man who swung the club, but under the circumstances that he had been fighting with with me and I have never had any trouble before so I figured nobody had a grudge against me and in my own feelings I would figure who would swing the club, but as far as actually identifying him I never have" (R52) (Underscoring supplied).

On cross-examination of Lopez, the following colloquy is shown:

> "Q. From the fact that you had a fight with Private Price you feel that it must have been he?
> A. Yes, sir.
> Q. And if there hadn't been a fight then it would be much harder for you to state that you thought it was him?
> A. Yes, sir, I guess it would" (R59).

Upon examination by the law member, the following appears without objection from the defense:

> "Q. Is there any doubt in your mind as to who was swinging that blow?
> A. * * * In my own feelings it couldn't have been anybody else but Private Price, but as far as identifying him and seeing his face and swearing it was him I can't say that. No, sir" (R66) (Underscoring supplied).

The witness Owens, when subjected to interrogation by the court, was asked:

> "You stated that Lopez said, 'He has got a club. Look out'. In your mind whom do you think he meant when he said, 'He has got a club'?" (R85).

Owens answered:

> "I didn't know. When I looked up I seen the club striking, but I didn't know who it was. I had no idea who it was, but the way it seemed to me was the first thing that struck me that the only one who had any reason to do any striking was the one Lopez hadhad the fight with, but I wouldn't say it was him because I couldn't" (R85) (Underscoring supplied).

Upon motion of the defense, Owens' answer was striken because it was an opinion of the witness.

There is a manifest contradiction in the ruling of the law member. Either the law member was correct in his ruling on Lopez' testimony and wrong with respect to Owens' statement or vice versa. The two rulings cannot be reconciled as consistent. Lopez and Owens in their respective answers (underscored, supra) each refused to identify accused as the assailant, but Lopez "in his own feelings" believed, and it "seemed" to Owens, because deceased had been engaged in a fight with Lopez within a few minutes prior to the assault on deceased that accused was deceased's assailant. The ultimate impact of Lopez' statement in regard to the intended victim of the assault ((a), supra) was identical with the probative result of Lopez' and Owens' several statements with respect to the identity of deceased's assailant. In each of the three statements responsibility for the homicide was fixed upon accused. Lopez' first declaration supported the inference that accused wielded the club because Lopez believed the blow was intended for him. Lopez' second statement and Owens' declaration directly designated accused as the assailant.

The Board of Review has carefully analyzed the situation thus presented and its considered opinion is that there is no difference between Lopez' statement as to the intention of the assailant which inferentially marked Price as the assailant and his subsequent statement directly designating accused as the assailant. Owens' rejected declaration is in the same category. The Price-Lopez fight upon which both Lopez and Owens based their deductions was not an independent collateral incident but was an episode which lead directly to the tragic denouement. Events precedent and subsequent to it connected it with the homicide. Lopez and Owens had described them and the combat itself in detail. The court was fully apprised of the factual background and was enabled to determine the probative value of the deductive statements of the two witnesses. The law member correctly ruled as to the admissibility of Lopez' statement; he was in error in striking Owens' declaration, but it was an error in favor of accused.

The proof of the vital fact that accused was deceased's assailant is dependent upon evidence of a circumstantial nature. Lopez and Owens each repeatedly refused to make a definitive identification of accused as the assailant and there was no other witness who was in the position to give

identification testimony. As above demonstrated, the duty of the Board of Review is to determine whether the evidence of identification possesses the required probative worth and substantive quality necessary to support the court's finding that it was accused who inflicted the fatal injury upon deceased. From the overall evidence in the case several facts are established beyond all reasonable doubt which form the matrix of circumstances upon which the identification of accused must depend. They are as follows:

1 - Accused and Lopez engaged in a fight which was terminated by Owens. Accused desired to continue the altercation with Lopez. He was restrained by Owens who directed him to leave the scene.

2- Accused departed from the locus of the fight in a direction which made it possible for him to cross Baxter Road, enter Bottomsley's Yard, secure the fence stake (Pros.Ex.12) from the Brooks' flower plot, and return to the locus of the homicide within a period of time of not less than eight minutes nor more than 15 minutes.

3 - The club wielded by the assailant was a fence stake taken from the flower plot in front of the Brooks' house.

4 - The assailant was of the size of accused. He was an American soldier clad in a Class "A" uniform. Over the left pocket of his blouse he wore an insignia which appeared to be "wings". Accused was an American soldier, was so dressed and wore wings on the left side of his blouse (R149, 150).

5 - No other American soldiers were in the near vicinity of the "Royal Standard" from the time of the termination of the Price-Lopez fight to the time the fatal blow was struck except accused, deceased, Lopez and Owens.

6 - Swallow saw an American soldier fleeing from the scene of the crime. His footsteps made a distinctive sound. The accused (identified as such) was not seen at the locus after the homicide. The heels of his shoes were iron clad "around the side".

7 - Accused as a witness on his own behalf admitted his presence at or near the "Royal Standard" prior to his fight with Lopez; admitted the fight with Lopez and admitted he knew of the existence of three alleys in the proximity of the "Royal Standard", which intersected Baxter Road, but singularly denied knowledge of the existence of "Bottomsley's Yard". He claimed intoxication to the degree he could recall nothing after he left the fight except his call at the bicycle shop and his arrival at his barracks.

The Board of Review in measuring the inculpatory value of the foregoing circumstances for the purpose of determining whether they constitute substantial evidence within the scope of its powers on appellate review, believes it should refer to two decisions which have been cited on numerous occasions by Boards of Review in connection with the problem here presented.

The first is Buntain v. State, 15 Texas Crim. Appeal 490, wherein the court held that evidence of opportunity alone to commit a crime is insufficient to uphold a verdict of guilty and that a conviction must be founded

> "upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt".

The Manual for Courts-Martial has elucidated the foregoing principle in this language:

> "The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence, but any fair and rational hypothesis except guilt; what is required being not an absolute or mathematical certainty" (MCM, 1928, sec.78, p.63).

It may be conceded that the evidence in the instant case leaves open a possibility that accused when he left the public house alley after the conclusion of the fight with Lopez proceeded to the bicycle shop, took his bicycle and rode to camp. In that case he, of course, would not have been the assailant. Such interpretation, however, does not give proper value to proven factors of a highly incriminating nature: that the killer was of accused's size; that he wore wings on his blouse as did accused; that he was an American soldier; that by reason of his fight with Lopez, there existed a motive on the part of accused to return to the scene of the fight after arming himself with the fence s take and seek Lopez for the purpose of wreaking his vengence upon him; and finally that accused elected to rely upon the always unsatisfactory defense of loss of consciousness during the crucial period, rather than testifying directly to facts in support of an alibi. When these circumstances are considered, it becomes apparent that the possibility that accused was not the assailant is not a "fair and reasonable hypothesis" of innocence but rather a strained, forced and unnatural deduction. Conversely the established facts when properly harmonized and correlated must compel any reasonable minded person to the conclusion that accused was the assailant. Therefore, the principles of the Buntain case are not violated.

The second case which deserves consideration, because of its prominence in military justice adjudications, is People v. Razezicz, 206 NY 249, 99 NE 557. The fundamental principle therein announced is:

> "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. * * *
> (3) When in a criminal action the people seek to prove a defendant guilty of the crime with which he is charged, the courts allow testimony of all circumstances that may have a fair and

> legitimate influence in determining the question involved. In any case evidence of circumstances may be so remote as to have no legitimate influence in determining an issue. Such remote testimony tends rather to confuse and conceal the real issue and may result in improperly influencing the jury in determining the question presented to them. It is frequently said as we have quoted that inference cannot be based upon inference. Such a rule is denied by Greenleaf (Greenleaf on Evidence (16th Ed.), and the statements and illustrations by Greenleaf are repeated by Wigmore in his work on Evidence and by some others. Perhaps the weight, if any, to be given to such remote inferences should not be stated generally in the form of rules, but rather in each case by direct decision, or by applying the rules that relate to remote testimony. When testimony is remote, it is of little value, and, when too remote from which to draw any legitimate conclusion, it should be wholly rejected."

Proof of Razezicz' guilt was largely premised on a circumstance that previous to the homicide (which was perpetrated by use of a bomb), accused had exploded a bomb of the kind used in killing the victim. There was no direct proof that it was Razezicz who participated in the explosion of the bomb on the prior occasion. The establishment of such fact depended upon proof of circumstantial facts from which accused's activity might be inferred. It was against this situation that the court's remarks were directed. Obviously the rule of that case can have no application in the instant case. Each and every one of the facts incriminating Price were proved beyond all peradventure. Proof of the Price-Lopez fight, for example, did not depend upon inference, but upon direct evidence and accused's own admission. The principles announced in the Razezicz case are of undeniable worth and validity but they are applicable here, if at all, only in a most general sense.

The Board of Review, therefore, concludes that the record of trial contains evidence of a most substantial character identifying accused as deceased's assailant.

> "With this evidence before the court, it was its province and duty to evaluate it, judge of the credibility of witnesses and reach a determination whether the accused was the man who committed this atrocious crime. The evidence identifying him as the culprit was substantial and its reliability and trustworthiness are unimpeached. Under such cir-

> cumstances, the finding of the court will be accepted as conclusive and final upon appellate review" (CM ETO 3375, Tarpley).

The Tarpley case is sustained by CM ETO 492, Lewis; CM ETO 503, Richmond; CM ETO 531, McLurkin; CM ETO 559, Monsalve; CM ETO 1621, Leatherberry; CM ETO 2686, Brinson and Smith.

7. The fact of the homicide was undisputed. Accused's identity as the person responsible for Maynard's death was established by competent substantial evidence. There remains for determination the question whether the homicide constituted the crime of murder. The ultimate decision on this question requires consideration of different facets of the evidence.

(a) Lopez' deduction from the circumstances surrounding accused's attack that the blow which killed Maynard was intended for him is based upon an abundance of substantial evidence. In truth, such conclusion is the only legitimate and logical one which can be drawn from accused's conduct. Maynard was a friend of accused. The two men had spent the evening together in amicable accord. There is not an inference or suggestion in the evidence that any differences had arisen between them. Accused's last spoken word, as shown by the record, was a solicitation of Maynard to join him in order that they might return to camp together. Conversely, accused and Lopez had been engaged in a fight which was ended by Owens at Lopez' request when he had been bested by Price. After the combatants had been separated, both men remained belligerent. Owens, as the ranking soldier present, was duty bound to prevent further disorder. Accused's prompt compliance with Owens' demand that he leave was, therefore, not an unusual occurrence as it was simply a recognition by Price of Owens' authority. However, Price's obedience to Owens' order does not spell the conclusion that his belligerency towards Lopez was satisfied. The implication is otherwise. This chain of events leads definitely to the conclusion that accused armed himself with the lethal club and returned to the front of the public house with the intention of dealing further with Lopez. Deceased and Lopez stood near each other facing the street. Accused was swinging the club wildly. He struck in the direction of Lopez who avoided the blow. Maynard received its full force. The conclusion is irrefragable that accused intended to strike Lopez but by a trick of fortune inflicted the homicidal blow on deceased. The situation is covered by the following legal principle:

> "Where A aims at B with a malicious intent to kill B, but by the same blow unintentionally strikes and kills C this has been held by authorities of the highest rank to be murder, though if A's aim at B was without malice, the offense would have been but manslaughter" (1 Wharton's Criminal Law - 12th Ed., sec.442, pp.677-679).

The above doctrine is also confirmed by authorities set forth in an annotation contained in 18 ALR at page 917, et seq. and has been recognized and applied in the administration of military justice in CM 221640, Loper (13 B.R. 195,204) and CM ETO 422, Green. Accused's misplacement of the fatal blow whereby he struck deceased instead of Lopez, did not yield him any defense.

(b) Beyond doubt accused and Lopez were engaged in a sudden affray, which was initiated by Lopez when he first struck accused in the face. It will be assumed that accused was provoked to such degree that it aroused in him heat of passion that displaced his deliberative and reasoning faculties and had he, at the time of the combat, struck Lopez in such manner as to cause his death that he would have been guilty of manslaughter and not murder (CM ETO 72, Jacobs and Farley; CM ETO 506, Bryson).

The evidence is clear that accused left the scene of the affray, crossed Baxter Road, entered Bottomsley's Yard, pulled a fence stake from the Brooks garden plot, and returned to the locus of the homicide. The period of time within which this action occurred is fixed at from eight to 15 minutes. The question obviously arises whether accused was acting under the anger and heat of passion, aroused as a result of his fight with Lopez, when he struck the fatal blow or whether he had passed through a "cooling period" during which his anger had subsided and his power of deliberation and reason had been again enthroned. The Board of Review (sitting in the European Theater of Operations) in CM ETO 292, Mickles, considered and discussed in detail the question of "cooling time". The following quotation is appropriate:

> "From the foregoing statements of the principle of law involved, it will be seen that there are two methods of applying the doctrine of 'cooling time':
> (a) The 'Reasonable time' rule: If there is a sufficient period of time between the provocation and the killing for the accused to 'cool his passions' the killing will be attributed to malice and will be murder, and the determination of this reasonable time is governed by the standard of an ordinary reasonable person.
> (b) The 'dependent on circumstances' rule: 'cooling time' is to be determined by the circumstances and conditions of each case whereby the question of malice is determined not by the standard of a 'reasonable man', but by the standard of the accused thereby allowing consideration of the accused's individual temperament and of all of the circumstances involved in the killing. The Board of Review is not required in this case to adopt one of these rules to the exclusion of the other. In fairness to the accused the Board

of Review elects to consider the problem on the basis of both rules. Under either rule the questions as to whether there is a cooling time and as to whether or not the accused acted under heat of passion or with malice are essentially questions of fact within the exclusive and peculiar province of the court".

In the instant case whether accused's conduct be measured by the "reasonable time" rule or the "dependent on circumstances" rule, the findings of the court are supported by substantial evidence that the heat of passion engendered in accused as a result of his affray with Lopez had spent itself and that he acted with malice aforethought when he returned to the public house armed with a lethal stick. Under such circumstances the determination of the court will not be disturbed by the Board of Review upon appellate review (CM ETO 292, Mickles; CM ETO 3042, Guy).

(c) In considering whether accused was guilty of murder the following legal principles are relevant:

"Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse. * * *.

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

Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not * * *; knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused" (MCM, 1928, par.148a, pp.162,163-164).

The use of a deadly weapon (which may consist of a club or stick of wood) in a manner likely to cause and causing death raises a presumption of malice (Ibid., sec.426, pp.652-655).

An intent to kill

> "may be inferred from the acts of accused, or may be founded on a manifest or reckless disregard for the safety of human life. Thus an intention to kill may be inferred from the willful use of a deadly weapon" (40 CJS, sec. 44, p.905).

Under the foregoing authorities, accused's act in striking the deceased on the head with the fence stake or club, under the circumstances shown by the evidence, warranted the inference of a coexistent intent to kill. It was within the province of the court to ascertain whether the fence stake in accused's hands, in the manner in which it was used by him, was likely to produce fatal results (Collins v. State, ___ Okla Crim. Rep ___, 210 Pac.285, 30 ALR 811,815 and annotation). Substantial evidence warranted the court in finding that the stake became a deadly weapon when accused applied it to deceased's head in such a manner. Under such circumstances, the act evinced a "manifest or reckless disregard for the safety of human life" and carried within itself proof of malice aforethought. The homicide was murder (CM ETO 268, Ricks; CM ETO 422, Green; CM ETO 438, Smith; CM ETO 739, Maxwell; CM ETO 1901, Miranda; CM ETO 1922, Forester and Bryant; CM ETO 2007, Harris; CM ETO 3180, Porter; CM ETO 3042, Guy; CM ETO 3585, Pygate).

8. The charge sheet shows that accused is 24 years two months of age and that he enlisted at Catskill, New York, on 11 July 1942, to serve for the duration of the war plus six months. He had no prior service.

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

10. Imprisonment for life is an alternative mandatory sentence for the crime of murder (AW 92). Confinement in a penitentiary is authorized for such crime by Article of War 42 and section 275, Federal Criminal Code (18 USCA 454). Inasmuch as the sentence included confinement at hard labor for more than ten years, i.e., life, confinement in the United States Penitentiary, Lewisburg, Pennsylvania, is authorized (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4) and 3b).

B. Franklin Riter Judge Advocate

Edward H. Longsdorf Judge Advocate

Edward L. Stevens Jr. Judge Advocate

CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 28 SEP 1944 TO: Commanding General, 2nd Bombardment Division, APO 558, U.S. Army.

1. In the case of Private PAUL A. PRICE (32374452), 67th Bombardment Squadron, 44th Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. On the day of the offense accused had completed 20 combat missions and had indicated his willingness to complete another tour before his return home on furlough. He had previously been convicted by summary court for absence without leave for 14 hours but his prior record is bereft of any indications of a vicious or criminal character. Though the offense of which he stands convicted cannot be minimized the record indicates the attack was likely the result of over indulgence in intoxicants which in turn might have been induced by the accumulated nervous tension resultant on 20 combat missions. Since the accused does not appear to be inherently vicious and in view of his prior commendable combat service and the attendant circumstances of the homicide, I recommend for your consideration the reduction of the period of his confinement. In the e vent you adopt this suggestion your decision should be indicated in a supplemental action which should be returned to this office for attachment to the record of trial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3200. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3200).

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

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

BOARD OF REVIEW NO. 1

CM ETO 3209

- 9 SEP 1944

U N I T E D S T A T E S)	6TH ARMORED DIVISION
)	
v.)	Trial by GCM, convened at Batsford,
)	Gloucestershire, England, 11 July
Private JAMES H. PALMER)	1944. Sentence: Dishonorable dis-
(34264806), Service Com-)	charge (suspended), total forfeitures
pany, 15th Tank Battalion.)	and confinement at hard labor for two
)	years. 2912th Disciplinary Training
)	Center, Shepton Mallet, Somerset,
)	England.

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

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

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

CHARGE: Violation of the 96th Article of War.
Specification: In that Private James H. Palmer, Service Company, 15th Tank Battalion, did, at Moreton-in-Marsh, Gloucestershire, England, on or about 26 June 1944, wrongfully and willfully strike Pilot Officer Ronald Hall, R.A.F., a commissioned officer of the British Armed Forces, knowing him to be such commissioned officer of the British Armed Forces, in the face with his fist, to the prejudice of good order and military discipline and proper relations with allied British military authority.

He pleaded not guilty to the Charge and Specification and was found guilty of the Specification except the words "knowing him to be such commissioned officer of the British Armed Forces", of the excepted words not guilty, and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority approved the sentence and ordered it executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement.

The proceedings were published by General Court-Martial Orders No.25, Headquarters 6th Armored Division, APO 256, U.S. Army, 25 July 1944.

3. It was clearly established by the evidence, including accused's own testimony, that at the time and place alleged he struck Pilot Officer Ronald F. Hall, a commissioned officer of the British armed forces, in the face with his fist in a public dance hall. Only two questions need be considered: (1) whether the court's denial of accused's plea in bar of trial was proper; (2) whether the evidence was legally sufficient to support the sentence.

Before any evidence was offered by the prosecution, the defense entered a plea in bar of trial on the ground that accused "has received punishment under Article of War 104 for the offense herein charged" (R5). The defense then called as a witness accused's company commander, Captain J.H.Green, Service Company, 15th Tank Battalion. Captain Green testified that on 29 June 1944 he imposed disciplinary punishment on accused under Article of War 104 for the offense of striking Pilot Officer Hall on 26 June at a dance in Moreton-in-Marsh. Accused, who was formerly a private first class, was reduced to the grade of private and "restricted for one week" (R5-7). The following entry pertaining to accused was made in the company punishment record book

"DATE	OFFENSE	PUNISHMENT	APPEAL	OFF.IN'L.
29 June 1944	Disorderly conduct	Rd to Pvt and restricted for 1 wk	No	JHG " (Ex.A).

In Company Order No.2, Service Company, 15th Tank Battalion, 29 June 1944, it was stated that under the provisions of Army Regulations 615-5, as amended, accused "is reduced to the grade of Private for Misconduct" (Ex.B). At the conclusion of Captain Green's testimony the court closed, and upon being re-opened the law member announced that the plea in bar "is disallowed for the court feels that this case is of such a serious nature that it cannot be punished under the 104th Article of War" (R7). The charge sheet shows that charges for the offense of striking Hall were preferred by Captain Green on 3 July.

Article of War 104 provides that the commanding officer of any detachment, company or higher command may, for minor offenses, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless accused demands trial by court-martial

> "Punishment under the 104th Article of War may be pleaded in bar of trial. Such punishment, however, does not bar trial for another crime or offense growing out of the same act or omission" (MCM, 1928, par.69c, p.54).

> "The fact that disciplinary punishment under A.W. 104 has been enforced may be shown by the accused upon his trial for a crime or offense growing out of the same act or omission for which such punishment under A.W.104 was imposed and enforced" (Ibid., par.79e, p.67).

Captain Green's testimony clearly establishes that the offense for which accused was tried in the instant case was the same offense for which he received punishment under Article of War 104.

> "Whether or not an offense may be considered as 'minor' depends upon its nature, the time and place of its commission, and the person committing it. Generally speaking, the term includes derelictions not involving moral turpitude or any greater degree of criminality or seriousness than is involved in

> the average offense tried by summary court-martial" (Ibid.,par.105,p.103) (Underscoring supplied).

Disciplinary punishment administered under Article of War 104 for the commission of a major offense is void (JAG 250.3, 14 Jan 1935; id. 15 Aug 1935). For example, it was held that the submission of a fraudulent claim in the amount of $376.40 for allowances in lieu of quarters for dependants in violation of Article of War 94, was not a minor offense under Article of War 104 and purported disciplinary punishment under the latter article did not constitute former jeopardy in bar of trial by court-martial for the same offense. SPJGJ 1944/6033, 12 April 1944 (Bull.JAG, Vol.III, No.5, May 1944, sec.462 (2), p.192).

> "As only minor offenses may properly be disposed of under A.W.104, if it should develop that serious offenses had in fact been committed, the accused could legally and properly be brought to trial notwithstanding prior action under said article" 250.451, 4 Jan.1926; 250.3, 31 Jan. 1930 (Dig.Op.JAG, 1912-1940, sec.462 (2), p.369).

The reason for the foregoing rule is obvious. To permit a junior officer authorized to administer disciplinary punishment under the Article to have uncontrolled discretion in determining whether or not an offense is "minor" in character, and to hold that his decision in this regard is final in all respects, would deprive higher military authority of all power in the premises,would cause gross miscarriages of justice and would deprive higher commanders of their prerogatives in disciplinary matters.

Accused, without any provocation whatsoever, struck in the face with his fist, in a public dance hall, Pilot Officer Hall, a commissioned officer of the British armed forces, while Hall was dancing. The dance was given under the auspices of the Air Training Corps, the junior section of the Royal Air Force. Accused apparently believed Hall was a negro because of the latter's color and the evidence indicates that he struck the officer solely because he objected to the fact that the latter was dancing with a white girl. English civilians and members of both the British and United States armed forces observed the incident. Several United States soldiers surrounded accused and escorted him from the floor. One witness testified that there was "arguing and loud talking on both sides and quite a bit of conversation after the incident". The couples on the floor were

"taking sides". A British Flight Officer testified that when he informed accused that Hall was a British officer and a friend of the witness, accused replied that the witness was "a ____ negro too". Hall testified that the blow was "very severe" and that when the wound was treated medically some of his hair was "cut off". At the trial, which occurred 15 days after the incident, he still had a scar on his head.

As has been stated, whether an offense may be considered "minor", depends on its nature, the time and place of its commission and the person committing it. The unprovoked, entirely unwarranted assault by accused upon a commissioned officer of an allied airforce, at a public dance given under the auspices of a branch of that airforce, certainly was not a "minor" offense. It is obvious that considering the underlying reason for the assault, a highly dangerous and inflammatory situation might have developed, as a result of accused's commission of the offense alleged. Fortunately, the good judgement of others intervened. The dereliction of accused clearly involved a greater degree of seriousness "than is involved in the average offense tried by summary court-martial". The maximum punishment imposable for assault and battery is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period (MCM, 1928, par.104c, p.100). A summary court cannot adjudge confinement in excess of one month nor forfeiture of more than two-thirds of one month's pay (AW 14). Trial of accused by summary court for the offense alleged would, under the circumstances, result in the imposition of a wholly inadequate sentence. In view of the foregoing authorities and for the reasons stated, the Board of Review is of the opinion that the denial of accused's plea in bar of trial was proper.

4. The question next presented is whether the evidence was legally sufficient to support the approved sentence of dishonorable discharge (suspended), total forfeitures and confinement at hard labor for two years. The court found accused guilty of willfully and wrongfully striking

> "Pilot Officer Ronald Hall, R.A.F., a commissioned officer of the British Armed Forces, in the face with his fist, to the prejudice of good order and military discipline and proper relations with allied British Military authority."

The court excepted from the Specification the words "knowing him to be such commissioned officer of the British Armed Forces". The offense remaining was that of assault and battery in violation of Article of War 96. The substantive allegations of the

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Specification which set forth the fact of the assault and the means employed, follow the usual form of specification for assault and battery (MCM, 1928, App.4, form No.126, p.254). The description of the status of the person assaulted, and the allegation that the commission of the offense prejudiced "proper relations with allied British military authority", merely characterize the degree of aggravation of the offense alleged for consideration in fixing a sentence within the maximum limitation. Assault and battery is specifically listed in the Table of Maximum Punishments and the maximum punishment imposable therefor is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period (MCM, 1928, par.104c, p.100). For the reasons previously stated, the offense committed by accused was not "minor" in character. In view of all the surrounding circumstances, it was undoubtedly of a decidedly aggravated nature. The court was entitled to consider the degree of aggravation when determining the sentence, and could impose any sentence up to and within the limitation of punishment prescribed for the offense alleged. The degree of aggravation of assault and battery does not change the nature of the offense itself, nor does it create a different offense. Such a principle would entirely void the maximum limits fixed by the President. In CM 218883, Long (12 B.R. 167) accused was found guilty of striking his superior officer in violation of Article of War 64. The evidence showed that accused knew the officer to be his superior officer and that accused recognized him, but that the officer was not in the execution of his office when the incident occurred. The Board of Review (sitting in Washington) held the record of trial legally sufficient to support only so much of the findings of guilty as involved findings of guilty of the lesser included offense of assault and battery in violation of Article of War 96 and to support only so much of the sentence as involved confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period. In the instant case the officer assaulted was not the superior officer of accused and the court found that accused did not know him to be a commissioned officer of the British Armed Forces. The principles enunciated in the Long case are determinative in the case under consideration.

5. The charge sheet shows that accused is 25 years of age and that he was inducted 15 March 1942 at Fort McPherson, Georgia, to serve for the duration of the war plus six months. He had no prior service.

6. The court was legally constituted and had jurisdiction of the person and offense. Except as noted no errors injuriously affecting the substantial rights of accused were

committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of two-thirds of accused's pay per month for a like period.

B. Franklin Riter Judge Advocate

Edward K. Ferguson Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat.732; 10 USC 1522), is the record of trial in the case of Private JAMES H. PALMER (34264806), Service Company, 15th Tank Battalion.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that so much of the sentence as exceeds confinement at hard labor for six months and forfeiture of two-thirds of the soldier's pay per month for a like period be vacated, and that all rights, privileges and property of which he has been deprived by virtue of those portions of the sentence so vacated be restored.

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

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

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

(Sentence vacated in part in accordance with recommendation of Assistant Judge Advocate General. GCMO 86, ETO, 30 Sep 1944)

(91)

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

BOARD OF REVIEW NO. 2

12 AUG 1944

ETO 3210

UNITED STATES	WESTERN BASE SECTION, COMMUNICATIONS ZONE, (formerly designated as WESTERN BASE SECTION, SERVICES OF SUPPLY) EUROPEAN THEATER OF OPERATIONS.
v.	
Private EDWIN MILLER, Jr. (33578680), 293rd Replacement Company, 4th Replacement Battalion, 10th Replacement Depot.	Trial by GCM, convened at Lichfield, Staffordshire, England, 13 July 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Edwin (NMI) Miller, Junior, 293rd Replacement Company, 4th Replacement Battalion, 10th Replacement Depot, Pheasey Estate, Staffordshire, England, then of: 317th Replacement Company, 48th Replacement Battalion, 10th Replacement Depot, Doddington Park, Staffordshire, England: did, at Doddington Park, Staffordshire, England, on or about 23 December 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Coventry, Warwickshire, England, on or about 23 June 1944.

He pleaded not guilty "to the specification and Charge as read" but guilty "to the lesser included offense of absence without leave for the period indicated in the specification", (23 December 1943 to 23 June 1944), in violation of Article of War 61. All the members of the court present when the vote was taken concurring, he was found guilty of the Charge and Specification. Evidence of two previous convictions was introduced, each by summary court, for absences of ten days and 18 days, respectively, 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 20 years. The reviewing authority approved the sentence but reduced the period of confinement to ten years, designated The Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The undisputed evidence shows that accused absented himself without leave from his organization from 0600 hours 23 December 1943 (R9; Pros.Ex.1) until he was apprehended at Coventry, England, 22 June 1944 (R14). Mrs. Emily R. Lucas, employed by the Ministry of Food at Coventry, testified that on the 22 June while she was working at the National Registration Office,

> "a young man came into the office to apply for a ration book and identity card, who claimed to be Frank O'Neill. Particulars were checked up and I found that the old ration book had belonged to a man of sixty-four. It obviously didn't belong to the man who was applying. I asked him how many previous books he had had and he said, 'One'. The old ration book which he had was actually a replacement and it certainly was not the first one. When I checked up further, I telephoned the CID * * *" (R11-12).

Samuel Hudson, Detective Sergeant, Coventry City Police, testified that he was called by telephone to the Coventry Registration Office on 22 June 1944. Accused was there pointed out to him standing at the counter and dressed in civilian clothes.

> "As a result of what I was told, I went to him and said, 'We are police officers. What is your name?' He replied, 'Frank O'Neill.' I said, 'I have reason to think that is not your name. Have you any documents on you to verify it?' He replied, 'No documents'. I said, 'How long have you been in Coventry?' He said, 'Coventry? Three weeks'. I said, 'Where did you come from before?' He said, 'Before Coventry -

Ireland'. I told him I was not satisfied and I cautioned him. I said, you will have to come with us to the Police Office. He said, 'The Police Office? More questions?' I said, 'Yes.' Each time I spoke,-he put his hand to his ear as though he was deaf, and he spoke in broken English. I took hold of his left sleeve and we walked out of there. After we had walked a few yards, he suddenly struck out at Carvell with his right fist, but the blow fell short. We then each took hold of an arm and took him along to the Police Office. He continued to assume deafness and spoke in broken English.

"He then said, 'I am a Norwegian. My name is McClusky.' I said, 'How did you get here?' He said, 'Came on boat. Came over on a boat from Norway few months ago to Ireland.' I said, 'We will see what you have on you.' Amongst the property he produced, was an American soldiers' pay book, and on one of the pages, in typewriting, words indicating that he was on indefinite leave pending discharge on medical grounds. I noticed that one or two of the words were incorrectly spelled. I said, 'You are a deserter from the American Army.' He said, 'Yes, I am. I will tell the truth.' He then gave true particulars about himself. And the American authorities were notified and later came and took him into custody." (R14).

4. On being advised of his rights and after conferring with his counsel, accused elected to make an unsworn statement and then asked that his statement made to "a man in the Investigating Department of the Tenth Replacement Depot * * * be considered as his unsworn testimony" (R17; Pros.Ex.3). In this statement dated 24 June 1944, accused covers the period of time from his release from the guardhouse at Camp Kilmer, New Jersey, in November 1943 when he was shipped overseas. He was transferred shortly after his arrival in England to Doddington Park near Crewe.

'Immediately upon arrival * * * I amongst all other white soldiers, was told that there would be no passes while we were at that camp. * * * After four days * * * I decided to leave camp without a pass, and it being a Saturday, to stay away for the week-end. * * * I arrived in Coventry * * *. Instead of returning to camp after the week-end, I decided to stay on indefinitely, as I was fed up with the Army, and to visit with relations, and generally to

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visit about England. * * * About the 3rd or 4th of January 1944, I traveled * * * to London. * * * When I left Doddington Park, I had $235 with me * * *.

"On the day that I arrived in Coventry, I went to visit Miss Edith Mary Widlake * * *. I took her out socially almost every night until 1 May 1944. I explained to her and her people * * * that I was with the * * * Hospital, at Stoney, and that I had a pass every night to leave camp. * * * during all of this period, although I was wearing my Class 'A' uniform, I kept pushing off the date of my return to camp. My attitude was the deuce with all of it; I really did not want to return. * * *

"On evening of 15 May 1944, I proposed to Miss Widlake, and was married to her on 17 May 1944 * * *. I then went to live with my wife at her parents home. * * * I inserted an advertisement in * * * newspaper, stating that for painting and decorating of homes, I could be contacted * * *. It was my idea to make more money than the Army was paying me.

"On 22 May 1944, I changed from Class 'A' uniform into civilian clothes. * * * I started doing painting jobs for civilians. I did four jobs in all * * *.

"It was during the latter part of May 1944, that I stopped on the street, by British CID men and was asked what I, an American, was doing in civilian clothes. I showed them my pay-book, which had a typewritten statement therein contained saying that I was on indefinite leave awaiting discharge from the Army. I typed the statement myself while I had been working in one of the civilian homes. This statement was untrue, but the CID men were taken in by it, and allowed me to proceed.

"On June 22, 1944, * * * I visited the Food Office in Coventry. I had previously found a ration book, endorsed * * * in name of 'Frank O'Neill', and wished to exchange same for a new one * * *. I told them at Food Office that I was Frank O'Neill. * * * The signatures did not check. The young lady clerk went to the phone, after telling me to wait * * *. Shortly thereafter two members of British CID came down, and took me to a Police Station in Coventry. I was questioned there, and admitted that I was an American,

away without leave. I was at that time attired in grey trousers, zippered jacket and blue zippered shirt. * * *

"I honestly intended to return to the U. S. Army at some future date but couldn't get up enough 'guts' to go back."

5. "Desertion is absence without leave, accompanied by the intention not to return * * *". (MCM, 1928, par.130, p.142). It is necessary to prove that the accused absented himself without leave with the intention at sometime during such absence to remain permanently away from his organization, and that the absence was of the duration and terminated as alleged. Accused in his statement to the investigating officer, adopted by him as his unsworn statement to the court, admitted his absence without leave and stated "I was fed up with the army"; "I really did not want to return". He was gone approximately six months and when arrested was dressed in civilian clothes and tried to escape. During his absence he married, avoided arrest by false representations and when attempting to exchange a ration book, used an assumed name. These facts strongly indicate accused's intention to remain permanently away from his place of duty; together they allow of no other conclusion (CM ETO 1549, Copprue, et al; MCM, 1928, par. 130, p.143-144).

6. The charge sheet shows accused to be 21 years and five months of age. He was inducted at Philadelphia, Pennsylvania, 21 January 1943, with no prior service.

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

8. Confinement in a penitentiary is authorized for the offense of desertion in time of war (AW 42). As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, is proper (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1),3a).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 12 AUG 1944 TO: Commanding Officer, Western Base Section, Communications Zone, European Theater of Operations, APO 515, U. S. Army.

1. In the case of Private EDWIN MILLER, Jr. (33578680), 293rd Replacement Company, 4th Replacement Battalion, 10th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 3210. For convenience of reference please place that number in brackets at the end of the order: (ETO 3210).

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

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

BOARD OF REVIEW NO. 2

26 AUG 1944

CM ETO 3212

U N I T E D S T A T E S v. Flight Officer FORREST A. MULL (T121085), Maintenance Division, BAD No. 2.	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE. Trial by GCM, convened at AAF Station 582, 10 July 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for three years. 2912th Disciplinary Training Center, Shepton-Mallet, Somerset, England.

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

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

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

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

Specification 1: In that F/O Forrest A. Mull, Maintenance Division, BAD No. 2, AAF Station 582, APO 635, BADA, ASC, USSTAF, U. S. Army, was at Site No. 9, AAF Station 582, APO 635, U. S. Army on or about 17 May 1944, drunk and disorderly in station, to wit: the Officers Club, Site No. 9, AAF Station 582, APO 635, U. S. Army.

Specification 2: In that * * * * having received a lawful order from Major Chester E. Peterson to remain in his quarters, the said Major Chester E. Peterson, being in the execution of his office, did at AAF Station 582, APO 635, U. S. Army, on or about 17 May 1944 fail to obey the same.

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

Specification: In that * * * * did, at AAF Station 582, APO 635, U. S. Army, on or about 17 May 1944, with intent to do him bodily harm, commit an assault upon Major Chester E. Peterson by pointing at him with a dangerous weapon, to wit: a .45 calibre, 1911 model service pistol and by pulling the trigger on said pistol.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority approved the sentence, designated the 2912th Disciplinary Training Center, Shepton-Mallet, Somerset, England, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The undisputed evidence, in substance, shows:

That accused was on 17 May 1944 stationed at "Warton Air Depot, BAD #2" (AAF Station 582) in the manufacturing branch, Maintenance Division (R43), and lived in Barracks O-3, Site #9 (R36). He was seen by Jerald C. Andrews, Warrant Officer, Junior Grade, of the same unit, at the Officers' Club at Site #9, first at about eight o'clock in the evening of 17 May (R9). Accused had some friends, a Lieutenant Myers and two ladies, with him (R11). Andrews had been drinking and had some drinks with accused (R9). He testified that later in the evening he came into the dining room from the kitchen with a sandwich when accused, coming from the direction of the officers' lounge, pushed him up against the wall. Andrews remarked to accused that he was a little too drunk to be pushing people around, when accused struck him in the face, knocking off his glasses. In the ensuing scuffle, they bumped the table and went down on the floor. They were separated and went their ways. During the "tussle", accused cursed Andrews and had his hands up in a threatening manner (R10-11). Andrews did not join accused and his party who sat down at a bridge table in the lounge (R12), but he did talk to them at times. Two nurse Lieutenants were also present (R13). Andrews testified that Lieutenant Mary Fuller, one of the nurses, said two or three times in reference to accused, and loud enough for anyone to hear it, "As far as I am concerned, he can go to hell. I am through with him", but he denied repeating this to accused (R14). Captain James P. Galvin, Station Chaplain, saw accused at the bar and in the lounge of the officers' club about 10:30 that evening and for a time thereafter, during which time Andrews kept aggravating accused, who was drunk, by repeating to him, "Mary said you can go to hell" (R21-22). Andrews was also intoxicated (R23). Around midnight accused was asleep in a chair (R24).

Second Lieutenant Albert C. Meyer, Detachment #9, 92nd Station Complement Squadron, testified that he and accused started drinking in the afternoon of 17 May and later "picked the girls up and brought them" to the party (R24). If accused was not drunk, "he should have been". Meyer saw the scuffle in which Andrews and accused were on the floor and "it had all the appearance of being a fight". He separated them as much as he could but they were still trying to swing blows at each other (R25).

First Lieutenant John F. Mannella, of accused's unit, testified that he was in the club the evening of 17 May until the incident occurred around eight o'clock. Accused was sitting quietly talking to a lady (R26) when Andrews came up and "yelled at him that a certain person * * * said that Mull could go to hell" (R27). Accused just ignored him but a little later Mannella heard some scuffling in the rear of the officers' club. Major Peterson walked up and was talking to accused. Later Major Peterson returned to the club and stopped just inside the door. He stated to Mannella and the Chaplain that he had sent accused to his quarters. As they were about to leave accused appeared in the doorway and asked the Major to step outside as he wanted to talk to him and was told by the Major to come inside if he wanted to talk. Accused came in the inside door with an automatic in his hand.

> "he headed it towards the Major. The Major backed up behind the door and I guess we were all kind of shaken there for a minute. I jumped on Mull's back and knocked the gun from his hand, and took it up after and checked it. There was nothing in it" (R27).

As accused walked towards the Major, Mannella heard a click of "the sort an empty gun will give when the hammer drops" (R28). Accused was taken to the hospital (R29) for examination. He was unsteady on his feet and appeared to be intoxicated (R30). Major Rollin H. Smith, Medical Corps, on duty at the Station Hospital, examined accused just after midnight on the morning of 18 May and found him "moderately drunk". Accused had difficulty in talking but he gave his name, his job on the station, and repeated some "tongue twisters" for the Major, though incorrectly and with difficulty. He performed coordination tests. He swayed to and fro in his walk (R32).

Private First Class Lewis E. Webster, on transportation duty at this station, was called by accused, who asked for a jeep. When Webster arrived at Site #9, accused was asleep and a girl asked him to take her to Blackpool. They went to the Motor Pool to get the ticket changed and returned to secure accused's signature but he was gone. While they waited accused "came in with a gun and he pulled the gun on Major Peterson", saying, "You have asked for it". He pointed the gun, a regular .45 Army pistol, at Major Peterson and pulled the trigger, the click was heard. He had a kind of mad-looking expression on his face. This was about a quarter after twelve (R33).

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Major Chester E. Peterson, Military Administration Division, Base Air Depot #2, and Commanding Officer of Site #9, testified that he saw accused and Warrant Officer Andrews in the officers' club on the night of 17 May when he went to investigate a disturbance which he found involved them. Lieutenant Meyer was holding them apart. Andrews was very excited and hysterical but stated there had been a fight between him and accused in which he had been knocked down several times, and he wanted to continue the fight. Accused said he would drop the fight then but not for later on and said that if Andrews began, "he would kill him". Major Peterson then told accused "that due to this incident, I was restricting him to his quarters, and that he must remain there overnight". He took accused to his quarters and repeated the instructions to him several times and returned to the club. Just before he reached the club door, he heard someone shout "Pete" or "Peterson" from the direction of Barracks 0-3, looked back and saw the door was open and a man was standing in the door. He entered the club and stood talking to Chaplain Galvin and Lieutenant Mannella when accused entered the outer doorway of the club and called, "Peterson, I want to see you outside". When told to come in, accused insisted he wanted to see Major Peterson outside. As Peterson started towards the door, he saw accused had a pistol in his hand pointing at him (R37) and, with the remark, "You have got this coming", pulled the trigger. Accused was seized, disarmed and turned over to the Officer of the Day. Prior to this incident, when accused was being escorted to his quarters, he had stopped Major Peterson and told him he had a girl friend he wanted to take to Blackpool and had been informed that she would be taken home properly, but that he was under restriction in quarters and must remain there overnight. At this time accused talked quite clearly, was steady on his feet, and appeared to have control of himself (R38). In Major Peterson's opinion, accused was not drunk (R39) at that time, nor when he returned with a gun, though he was under the influence of intoxicating liquor (R40).

4. The evidence for the defense is summarized as follows:

Second Lieutenant Mary E. Fuller, of the Army Nurse Corps, testified she was present on Site #9 in the lounge of the officers' club the night of 17 May. Andrews several times approached her and mentioned that accused was there with a young lady and that she made the remark that she did not care who he was with and, as far as she was concerned, Andrews could tell him so, and Andrews did, in a very loud voice. She met accused at the door as she was leaving about midnight, and in her opinion he was intoxicated (R42).

Accused, as a witness for himself, testified that he went to the officers' club on Site #9 with Lieutenant Meyer and two girls about eight o'clock on the night of 17 May.

> "We arrived at the Club, went straight up to the bar, ordered some drinks, stayed there drinking for approximately an hour. I started to get sleepy and went over to the

> fireplace and listened to the radio. I dozed off as I was sitting there, and they waked me up to answer the telephone. Well, prior to that we had ... I think we had two drinks with Meyers and his girl friend, and that was when I dozed off, and they wakened me up. I went out to answer the telephone. Just as I reached the telephone, I bumped into Andrews and he made another crack. I told him to get out of my way. I do not know whether I was hit on purpose or whether he bumped me up against the wall. I didn't know anything more until next morning, when Captain Foley waked me up, at which time he talked to me and discussed the matter and told me I should not make any statements" (R43).

He remembered Andrews repeatedly yelling at him "that Mary said that I could go to hell", but insisted that he had no recollection of anything after Andrews hit him. The next morning his head had a slight bump and was sore behind his ear. He did not recall being ordered to remain in his quarters that night or of pointing the pistol at Major Peterson, with whom he was friends, and pulling the trigger. He "felt lousy" the next couple of days but did not report to the hospital as he was under guard in his quarters (R44). He had gone to Blackpool right after lunch on 17 May with Lieutenant Meyer and they had continued drinking all the afternoon and evening. He had not eaten since the night before (R46).

Captain Max Werner, 92nd Station Complement Squadron, testified that he knew accused and had roomed with him. That he was a doctor in general practice since 1933 and that in hisopinion a blow in back of the ear sufficient to raise a slight lump might affect a person suffering "such a concussion that he would appear to be acting normally at that time, and still have no recollection of what he was doing" (R49). It would be difficult to distinguish between concussion and intoxication (R50,51).

Major Smith, a prosecution witness recalled, testified that there are definite characteristics in cases of concussion. He examined accused fully at the time of arrest and found no evidence of concussion, the effects of which may appear similar to intoxication to a layman but are easily distinguished by a professional man (R52).

5. Accused does not deny any of the events shown by the evidence produced against him. His defense is that he remembers nothing that occurred after his altercation with Andrews until sometime the next day. He claimed to have had a slight lump and bruise behind his ear the next day and produced professional testimony to show that it was possible for such a blow as he claimed to have suffered to cause concussion and temporary loss of memory, particularly when connected with intoxication.

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The drunk and disorderly charge, and the failure to obey the order to remain in his quarters, being the specifications to Charge I, are clearly shown. The only question needing consideration is whether, under the circumstances shown, the requisite intent existed to do bodily harm to Major Peterson in the assault shown to have been made on him by accused.

> "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" (MCM, 1928, sec.126, p.135; 1 Wharton's Criminal Law, sec.407, p.599).

The question of whether accused was suffering from concussion caused by a blow on the head, rendering him unconscious of his acts, or whether he was sufficiently intoxicated to prevent his entertaining the intent to do bodily harm in the assault made on Major Peterson, were both questions of fact for the determination of the court. As there is substantial evidence that accused was neither so intoxicated nor suffering from concussion, the findings of the court will not be disturbed (CM ETO 82, McKenzie; CM ETO 969, Davis; CM ETO 2007, Harris).

6. The charge sheet shows accused to be 27 years and five months of age. He was appointed Flight Officer at Army Air Forces Glider School, Dalhart, Texas, 25 January 1943, with prior service from March, 1942.

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

8. The sentence does not exceed the maximum for the most serious offense charged (MCM, 1928, par.104c, p.99). Confinement in 2912th Disciplinary Training Center, Shepton-Mallet, Somerset, England, is authorized (AW 42).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 26 AUG 1944 TO: Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U. S. Army.

1. In the case of Flight Officer FORREST A. MULL (T121085), Maintenance Division, BAD No. 2, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3212. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3212).

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

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

(105)

BOARD OF REVIEW NO. 2

8 SEP 1944

CM ETO 3213

UNITED STATES	)	VIII AIR FORCE COMPOSITE COMMAND
	)	
v.	)	Trial by GCM, convened at AAF
	)	Station 342, 5 and 6 July 1944.
Private DONALD G. ROBILLARD (32384072), Headquarters and Headquarters Squadron, 4th CCRC Group, attached to 12th Station Complement Squadron.	)	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that Private Donald G. Robillard, Headquarters and Headquarters Squadron, 4th Combat Crew Replacement Center Group, attached to 12th Station Complement Squadron, did, at Army Air Force Station 342, APO 639, on or about 27 May 1944, feloniously take, steal, and carry away the following articles, to wit: One (1) summer flying suit, one (1) summer flying jacket, one (1) pair of British flying gauntlets, one (1) pair of British flying goggles, one (1) British winter flying helmet, one (1) set of earphones, total value about thirty-three dollars and forty-one cents ($33.41), property of the United States.

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

Specification 1: In that * * * having been restricted to the limits of his detachment area, did, at Army Air Force Station 342, APO 639, on or about 14 June 1944, break said restriction by going to the Horseshoe Public House, Village of Uppington, County of Shropshire, England.

Specification 2: In that * * * did, at Army Air Force Station 342, APO 639, on or about 20 June 1944, in an affidavit, make under oath a statement as follows: "* * * I deny all charges except taking a pair of G.I. olive drab gloves. I did not break restriction * * *", which statement he did not then believe to be true.

He pleaded not guilty to and was found guilty of the charges and specifications. Evidence was introduced of two previous convictions by summary court, one for "drinking and disorderly in improper uniform during duty hours", in violation of Article of War 96, and the other for absence without leave for two days, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence of record is substantially as follows:

Specification, Charge I:

Private Louis Karshnock, Jr., of accused's organization, testified that in the latter part of May, he and accused were members of the alert platoon guarding the station air field at night and were jointly posted on Post 4, "A" Flight, at approximately 11 p.m. During their tour of duty, sometime between 12:30 and 1 a.m., each took from the area which they were guarding a summer flying suit, a leather flying jacket, gauntlets, gloves and helmet complete with earphones and goggles (R7). When relieved from duty, accused wore under his overcoat the flying jacket which he had taken, with the other articles tucked inside. When accused arrived at his billet, he emptied his barracks bag and placed the purloined equipment in the bottom. About four or five days later, witness saw accused wearing the flying jacket (R7-8). At that time, while he and accused were together, both wearing flying jackets, "Corporal Chaney saw" them. About 8 or 9 June, accused and witness learned of the imminence of a "shakedown" inspection, whereupon accused put the flying equipment in his shelter-half and placed it in the

ventilator (known also as the escape hatch) in the air raid shelter (R9). Witness identified the flying jacket taken by accused (Ex."B") by means of a missing strip of material. "I saw him cut out that strip in there", he testified (R9-10). On cross-examination, witness admitted that he concealed in a bolster the equipment which he (the witness) had stolen, and hid it also in the air raid shelter, in a corner under some machine gun mounts (R12-13). He admitted that while in the guardhouse he made a statement to (Private Ralph A.) Soto that accused "didn't have a thing to do with this stealing" (R16-17).

Corporal Robert H. Cheney testified that, at least twice between 19 May and 10 June 1944, he observed accused in company with Karshnock in the vicinity of the station, both wearing leather jackets (R50). On cross-examination, Cheney testified he observed the two wearing the jackets, both around the barracks and at the pub. Asked how he happened to remember their wearing jackets on these occasions, he testified, "We don't all have jackets like that. We're not issued them" (R51). He did not observe how accused's jacket fitted him. After the witness answered affirmatively the question, "He [accused] is a pretty small man, isn't he?", defense counsel proceeded, "If it was a great big jacket you would have noticed it. Did it appear like that to you?" The witness replied, "No, sir". (The jacket was introduced in evidence as Exhibit "B" for the prosecution but was withdrawn. The only record of its size is defense counsel's uncontradicted statement made during his direct examination of accused while the latter tried the jacket on, "You wear size 37. This is a size 42 by record" (R87)).

The uncontradicted evidence of various witnesses shows that on 10 June 1944 there was a shakedown inspection of the possessions of the men in accused's barracks (R20,25,31), during which a shelter-half was found in the escape hatch in the air raid shelter containing the articles enumerated in the Specification, Charge I. A bolster was also found in the air raid shelter, containing the articles which the witness Karshnock admitted stealing (R20-21,26,31). A fingerprint was discernable on the goggles found in the shelter-half. It was carefully preserved, compared with accused's fingerprints, which were taken for the purpose, and identified by competent expert testimony as being positively the left thumb of accused (R21,27,32-34,43-49; Exs.H,I,J).

The shoulder straps on the flying jacket found in the shelter-half (Ex.B) at some time or other had some sort of insignia of some nature on them, which had been removed (R37). The width of the marks remaining indicated a lieutenant's bars. On 4 July 1944, Sergeant Martin Silva inspected a full barracks bag in accused's barracks, stenciled with accused's last name. He did not testify whether the contents of the bag included a shelter-half but did testify that he found, among its contents, a piece of leather (Ex.K) which, in his opinion, was similar to pieces of leather on which you mount the bars of a lieutenant (R41-42).

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As to the ownership of the property described in the Specification, Captain Louis D. Cross, commanding A Squadron, 495th Fighter Group, identified the stolen articles as flying equipment such as had been reported missing from his flight prior to the shakedown inspection (R38-39). Evidence was adduced of the list cost prices of the stolen articles, as shown by the station air corps supply records. The prices correspond with the values alleged (R52-53).

For the defense, Private Ralph A. Sota, of accused's organization, testified that while accused and Karshnock were in the guardhouse awaiting trial for the offense under consideration, witness was there also serving a 30-day summary court sentence (R78). Karshnock told witness that accused "didn't take any stuff". Karshnock later undertook to explain to witness his subsequent implication of accused, by saying that

> "when the F.B.I. took me /Karshnock/ to the woods they told me I should confess; that they had my fingerprints and /accused's/ prints and me thinking that I was going to do /accused/ a favor by saying he was in with me and save him a perjury charge".

Karshnock also told witness that accused "was going to be all messed up on this trial because he was going to be charged with perjury" (R79).

Accused testified under oath that he had never taken any government equipment while on Army Air Force Station 342, except "one pair of o.d. gloves, Government issue". He was on guard duty with Karshnock two or three times, the last time being 8 June. At no time while on duty with Karshnock did it ever come to accused's notice that Karshnock was taking government property from the flights they were guarding. Accused never saw him do so nor did Karshnock ever mention the fact (R83). While on guard duty, accused and his co-sentry would go inside the buildings they were guarding, when it gets cold about 3 or 4 a.m., for the purpose of getting warm, "and if we didn't wear enough clothing we would go in and borrow one of the jackets hanging on the wall and wear it on tour and replace it in the morning" (R83-84). Several times accused had flying helmets on. He would even take them out of the flight building,

> "get into a plane, plug the earphones in trying to listen in on any message the tower would send out to the night flyers if they were flying * * * After I finished listening in, I would turn the switch off, climb out, take off my helmet, put on my own helmet, and bring it into the flight and hang it up. * * * Goggles are always on the helmets. * * * In fact, they are fastened on" (R84).

It was possible that Karshnock could have entered a building without accused's knowledge and taken a helmet which accused had recently hung up after using, as it was customary for one man to be patroling one end of the post and the other man to be patroling the other end. On Sunday, 10 June, the date of the shakedown inspection, accused left the station on pass at 9 a.m. and returned about 4:30 p.m. With reference to the theft, "The first inkling that I had that anybody even so much as suspected that I was implicated was on Monday". He testified:

> "It was about, I imagine about three o'clock in the afternoon and they called me up to the orderly room and two C.I.D. men were there and they brought me in one of the sergeant's room and asked me a lot of questions about the flying clothes and if I had taken any of them. I told them that I hadn't and they immediately, well, hinted very broadly that I was lieing about it and they questioned me, asking me several questions and reworded their questions and just kept on questioning me for about forty-five minutes or an hour."

Accused not only verbally maintained his innocence but demanded to make and did make a sworn statement in writing asserting it (R85). He was confined in the guardhouse 15 June. He was permitted to take what clothing and bedding he deemed necessary from his barracks bag, but left the majority of his equipment, as well as his overcoat, which he packed in his barracks bag on leaving, beside his bunk, and they remained there until his trial, accessible to everyone. There was no lock on his barracks bag, which he left "packed full" with "Roughly everything I owned except what I brought to the guardhouse", including one shelter-half, the "one I was issued. * * * To the best of my knowledge", he testified, "it's still there" (R86-87,89). Accused wore a size 37 jacket. When, upon direct examination, he donned Exhibit B, the leather jacket described in the Specification, the defense counsel noting it was size 42, remarked, "If you were going to take a jacket you'd take one that would fit you better, wouldn't you? That fits you almost twice. Yes, sir", accused replied, adding, "Here's the size of my blouse", whereupon defense counsel exhibited accused's blouse to the court, remarking, without contradiction, "For the record he wears a size 37 blouse" (R87).

Upon cross-examination, when accused was asked how he accounted for his fingerprints on the goggles, he replied, "I can't give any explanation for it, other than that I might have touched them while taking them from the hook" (R89). He had not seen the jacket (Exhibit B) before the trial. He admitted wearing an Air Corps jacket once but asserted that it was Karshnock's (R90). He denied ever wearing a leather jacket when Karshnock was also wearing a leather jacket, explaining, "I fought with Karshnock too much". They were not "buddies" before "this thing came up" but just acquaintances (R91). At no time

did accused have occasion to take a shelter-half to the air raid shelter (R94). Asked if he could account for "that piece of leather insignia being found in your barracks bag", accused replied that he thought it was a very good case of "planting" but he did not know on whose part. "That's the only way I can imagine how it got there because the bags were accessible to anyone who wanted to go into them" (R94-95). Asked how he accounted for Karshnock's testimony, accused testified,

> "Well, if I was a psychologist, I'd be able to figure him out. There's a lot of things done to me personally, the other fellows in the guardhouse well know, that no normal human being would do."

"Well," inquired the trial judge advocate, "if I were going to take something, would it be reasonable that I would take two complete sets of flying equipment? That stuff could be sold, sir", replied accused, "Karshnock, if he hasn't been broke, has been badly bent. * * * The English civilians will pay anything you want for [the stuff]" (R95). Asked by a member of the court if he could give any reasonable explanation for Karshnock's accusations, accused testified,

> "I don't know too much about law or what can or can't be given to defendants if they turn state's evidence. It may be that the prosecuting attorney did hint in private that he would be a little lenient with Karshnock when he would come up for trial if he should turn state's evidence" (R98).

(In this connection, it is noted that when the trial judge advocate completed his direct examination of Karshnock, and remarked to defense counsel, "Your witness, Captain", the law member interposed:

> "LM (to Prosecution): Have you made it clear to the witness as to his testifying here. Does he understand . . . .
> "Pros: He understands I am attempting to protect him as far as I can.
> "LM: You are liable to lose a lot of protection on a cross examination" (R11))

4. Specifications 1 and 2, Charge II:

On Monday, 12 June, following the shakedown inspection, First Lieutenant Stephen M. Cohn, 495th Fighter Training Group, commanding officer of accused's detachment, placed accused under restriction, at which time, according to Lieutenant Cohn's testimony,

"I said, 'Private Robillard, do you understand what the Articles of War mean by placing one under arrest?' And Robillard said, 'Do you mean barracks arrest, area arrest or post arrest?' I said, 'Let's not get technical. You will stay in D-3 Site except for going to meals and for ablution purposes.' I said, 'D-3Site doesn't include the Horseshoe Inn.' I specifically said the Horseshoe Inn because at that time the Inn and the road leading thereto had been construed as being part of the post and for that reason I didn't want these men to go to the Horseshoe Inn for their own pleasure, so I specifically said he would not go to the Horseshoe Inn; and he said, 'Does that mean I can't go there for a beer?' And I said, 'You are to stay in this area.'" (R27).

Karshnock testified that after he was restricted, he accompanied accused to the Horseshoe Pub, "about seven-thirty or eight, maybe a little later" in the evening. He saw "Pfc Hart and /Sergeant/ Garside" there. Accused was still at the pub when witness started walking back toward camp with some girls whom he had met. Witness was "picked up" and confined that night (R11).

On direct examination, Private James W. Hart, 1385th M.P. Company, testified that on 14 June 1944, he knew accused by sight but not by name. He had seen them taking accused's fingerprints in the guardhouse. At about eight o'clock on the evening of 14 June 1944, witness, while standing in the vestibule of the Horseshoe Pub, saw accused standing at the pub door. He also saw accused and Karshnock talking together for a few minutes in the vestibule. The witness left at about 9:30 p.m. accompanied by Karshnock (R54-55).

Upon cross-examination, the same witness testified that, on the evening in question, he was conversing with Karshnock at the door of the pub, when accused arrived and entered alone. Karshnock left with another soldier. When Karshnock returned, witness was in the doorway talking to three girls. The five - Karshnock, witness and the three girls - then left the pub and walked down the road. The witness admitted he had previously signed the written summary of a verbal statement which he made to an officer, not in the witness' exact words, which was introduced as defense Exhibit 1. According to this statement, which was sworn to, as well as subscribed by the witness, when he first arrived at the pub, he saw Karshnock standing there talking to several girls. He went in, saw Karshnock and Robillard, and heard them say they were restricted to the detachment area. He stayed in the pub for approximately an hour, during all of which time Karshnock

and accused were there. Karshnock departed with two other soldiers, returned, and later, accompanied by the witness, walked along the road toward the main gate of their station. According to the witness, this statement "tied in" to his testimony at the trial (R56-58).

Sergeant James H. Garside, of accused's organization, testified that he saw accused in the Horseshoe Pub at 2100 hours, 14 June 1944 (R59-60).

Captain HaroldE. Kerper, Headquarters and Headquarters Squadron, 333rd Service Group, testified that, having been appointed to investigate the charges against accused, he interviewed and explained his rights to him and that accused made to him, as investigating officer, the following sworn statement in writing:

> "I have been informed of the charges against me by Captain Harold E. Kerper, Investigating Officer on my case. I deny all charges except taking a pair of G.I. olive drab gloves. I did not break restriction as charged in Specification II Charge II. At the time it was claimed that I was at the Horseshoe Public House, Village of Uppington, County of Shropshire, England, I was with a girl friend of mine back of an air raid shelter on D-3 Site, adjacent to the orderly room ofD-3 Site. This was about 1945 hours to about 2015 hours. After that time I returned to my barracks to write some letters and stayed there until 2300 hours at which time I went to bed. At about 2130 hours Corporal Bradley came into the barracks. I spoke to him a short time. I went to bed at about 2315 hours" (R61-62).

For the defense, Private Edna Adams, (British) "A.T.S.", testified that on 14 June she left her camp at Donnington at 5 p.m. for the purpose of visiting accused. When, accompanied by a fellow service woman, she arrived at accused's station at approximately 7 p.m., he was not at their "meeting place" (R64). Another soldier, however, informed accused that she was waiting, and he ultimately joined her, explaining that he couldn't stay out very late as he was more or less under arrest. The witness' "girl friend" left, and she and accused remained together until 7:30 or 8 p.m. Accused never left camp and when the witness departed she "left him on the camp". She rejoined her "girl friend" at the Horseshoe Pub where the two sat outside until 8:30. She did not see accused there. If he had come to the pub, she would have noticed him. She was "flustered" when "a Captain Kerper" took her written statement (Pros.Ex.M), reading:

> "I am acquainted with an American soldier named Private Donald G. Robillard. I had met him twice. The last time I saw him was

on a Wednesday, June 14th, at approximately 1800 hours. At this time I talked to him for about ten or fifteen minutes. I left him then and bicycled back to my station at Donnington. At no time did I enter the camp, which is known to me as Atcham.'"

After he left, she recollected all that had happened, and told her own officer, as soon as she got back, that she had "given the wrong time". Her testimony on direct examination was a true story of all that happened that night (R65). On cross-examination, she admitted signing and swearing to a written statement, dated 20 June 1944, reciting,

"The last time I saw [accused] was on a Wednesday, June 14th, at approximately 1800 hours. At this time I talked to him for about ten or fifteen minutes. I left him then and bicycled back to my station at Donnington. At no time did I enter the camp, which is known to me as Atcham".

She testified that the statement was not true. She met him, that evening, on a "kind of road leading to the camp but it wasn't on the camp. * * * I saw him at 6:30 or 7:00 and stayed with him until a quarter to eight". They did not go for a walk but "just sat down and talked". (R66). Accused "wasn't out of the area of the camp" (R67). At 8:30 p.m. witness departed from the pub, where she had met her girl friend after leaving accused, and went back to her own camp (R68).

Private Olive Williams, (British)"A.T.S.", testified that she left her station at Donnington with Private Edna Adams about 5 p.m., 14 June, and reached "here" about six o'clock. She left Adams at the end of the road which leads from the Horseshoe Inn to accused's camp. Adams, unaccompanied, rejoined witness at approximately 7:30 p.m. They went to the Horseshoe Inn and remained until 8:30, when they left for Donnington (R69-70). On cross-examination, she testified that upon arrival she went down to the camp gates with Adams, sat down for a bit, and waited. Before leaving, she saw accused and Adams together. She was positive that they were on the road half-way between the camp gates and the Horseshoe Inn. Witness actually saw accused come out of the gate and on to the road where she and Adams were waiting (R71-74). Adams and accused were still at their meeting place when the witness left them (R76).

Accused testified that after he made a sworn statement in writing, denying the alleged thefts, Lieutenant Cohn informed him he was under arrest, explaining that he was "not to leave the immediate area of D-3 Site". Accused inquired if the area included "the road going to the Horseshoe Pub because that was part of our site", and

Lieutenant Cohn "said no". Accused denied leaving the station while under restriction, to go to the Horseshoe Pub (R85-86). On the night of 14 June he did not see Sergeant Garside at the Horseshoe but "was on my bunk (at the barracks) when he came in the room" (R93). At no time, on the night in question, did he see Pfc. Hart, who, he asserted, had been undertaking to get accused into trouble "ever since I took a broad away from him" (R94).

5. Recalled by defense, after accused had testified, Lieutenant Cohn was asked by the prosecution, on recross-examination, "what kind of a soldier was Private Robillard?" He replied,

> "Private Robillard, except for military courtesy, which he almost burlesqued, was a poor soldier. He did not respond promptly to orders, did not keep his area clean, and acted in a surly manner to his non-commissioned officers" (R101).

6. Evidence of accused's good character is generally admitted in all criminal cases.

> "The state, however, cannot show the bad character of the accused until the accused has raised the issue by offering evidence of good character. In other words, the state cannot offer evidence of the bad character of the accused except to rebut his evidence of good character, but when the defendant puts his character in issue, the prosecution may rebut such evidence by proof of bad reputation". (Wharton's Criminal Evidence, sec.330, pp.456-458).

Accused, in the instant case, did not put his character in issue. Moreover, since evidence of collateral offenses "is irrelevant where it has no tendency to prove some material fact in connection with the crime charged or where it merely" (as in the instant case) "tends to show that the accused is a criminal" (undesirable) "generally" (Ibid, sec. 343, p.485), Lieutenant Cohn's testimony was inadmissible for the further reason that it amounts to a blanket indictment of accused for enumerated types of unsoldierly conduct. Specifically, the court was informed not only that accused was a poor soldier, but that he was one who

(a) almost burlesqued military courtesy;
(b) did not respond promptly to orders;
(c) did not keep his area clean; and
(d) acted in a surly manner to his non-commissioned officers.

> "On a prosecution for making disloyal statements to the effect that he was pro-German, several witnesses testified that there were

'ideas' and rumors to the effect that accused had paraded the streets of the town with a Mexican flag, shouting 'Viva Mexico'; that he had sung German songs in the company street; that he had put something in the food which had made the men sick; and that the men were afraid he would poison them. Such testimony did not relate to the acts charged, and was wholly incompetent and necessarily prejudicial. With such testimony in the case it was impossible for the court to give impartial consideration to the testimony upon any issue which was really disputed. The error was prejudicial to his substantial rights. C.M. 125607 (1919)". (Dig.Ops. JAG, 1912-1940, sec.395(7), p.201).

In the case under consideration, though it be conceded that the preponderance of the evidence tends to establish accused's guilt, it cannot be denied, without wholly discrediting accused's testimony, that substantial evidence was introduced, which, if believed, would have at least raised such reasonable doubts as to have precluded his proper conviction:

(a) As to Charge I and its Specification, the prosecution's evidence was circumstantial except for Karshnock's testimony and Karshnock was shown to be an admitted thief and to have made previous statements - contradicted by his testimony - exonerating accused. Accused testified under oath that he did not commit the offense charged.

(b) As to Specification 1, Charge II, Karshnock testified that he accompanied accused to the Horseshoe Pub at about 7:30 or 8 o'clock on the night in question; two other witnesses testified that they saw him there, one at about 8, the other at about 9. One of these other witnesses' account differed materially from his written statement of the episode, signed and sworn to prior to the trial. Two defense witnesses testified to facts which would have precluded accused's being at the pub prior to 8:30 p.m., although one of them testified contrary to her own previous sworn written statement. Accused denied being there, or off the restricted area at all, on the night in question.

(c) Accused's guilt of the offense described in Specification 2, Charge II, depends on his guilt of the two other specifications, for unless he was guilty of at least one of them, the statement attributed to and admitted by him as the basis of Specification 2, Charge II, was not a false statement.

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In a former Board of Review holding,

> "Accused was charged with entering a dwelling without breaking with intent to commit an assault and with an assault upon a woman. The evidence as to the identity of the guilty individual was sharply conflicting. Over objection by the defense, testimony was erroneously admitted that accused was addicted to the use of liquor or drugs, that he had been disorderly at times, and that he had committed other assaults. Accused did not offer any character testimony. In view of the conflict in the evidence, the previous character of accused was calculated to have very great influence upon the minds of the court in determining the controverted question as to the identity of the woman's assailant, and the erroneous admission of the testimony as to such character cannot have failed to affect injuriously the substantial rights of accused. Record not legally sufficient. C.M. 151028 (1922)" (Dig.Ops.JAG, 1912-1940, sec.395(7), p.201).

There were no issues in the case under consideration which might properly be regarded as really undisputed. The defense introduced testimony, other than accused's, having some tendency to bolster and corroborate accused's own testimony, which clearly raised material issues as to his guilt or innocence of each offense charged. The inadmissible character evidence adduced from Lieutenant Cohn was certainly calculated to undermine accused's testimony and destroy, through the prejudice invoked thereby, any disposition to give it credence which might otherwise have existed in the minds of members of the court. The situation presented is in many respects analagous to the situation discussed in a recent case, wherein the Board of Review, with the Assistant Judge Advocate General, European Theater of Operations, concurring, held:

> "The fate of the accused in the instant case is not to be determined by the simple expedient of separating the legal evidence from the illegal evidence and then evaluating the legal evidence as to its sufficiency to sustain the findings. * * * A reviewer in considering the record of trial to determine whether the 'legal evidence of itself substantially compelled a conviction' cannot ignore the impact upon the mind of the court of the illegal evidence. * * * In the opinion of the Board of Review (the legal) evidence is not 'of such quantity and quality

as practically to compel in the minds of conscientious and reasonable men the finding of guilty' * * * It is the repercussion of (the) illegal evidence, * * * upon the other, * * * evidence of the prosecution that would influence the court in its weighing and consideration of the other evidence. It was this influence that substantially prejudiced the rights of the accused". (CM ETO 1201, Pheil).

Similarly, in the case under consideration, the substantial rights of accused were injuriously affected by the erroneous admission of Lieutenant Cohn's highly prejudicial testimony damning him as a soldier.

7. The charge sheet shows that accused is 22 years, eight months of age and that, with no prior service, he was inducted 7 August 1942, to serve for the duration of the war plus six months.

8. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General, with the European Theater of Operations. 8 SEP 1944 TO: Commanding General, VIII Air Force Composite Command, Army Air Force Station 113, APO 639, U. S. Army.

1. In the case of Private DONALD G. ROBILLARD (32384072), Headquarters and Headquarters Squadron, 4th CCRC Group, attached to 12th Station Complement Squadron, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, in which holding I concur. The holding of the Board of Review and my concurrence therein automatically vacate the findings and sentence (AW 50½; CM 152122, Ind. by Hull, Acting The JAG to WD, 20 July 1922).

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

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3213. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3213). In the event there is a rehearing, the order will not be published until after appellate review of the record of the second trial.

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

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

BOARD OF REVIEW NO. 1

6 OCT 1944

CM ETO 3234

U N I T E D S T A T E S	V CORPS
v.	Trial by GCM, convened at Headquarters V Corps, Rear Echelon Command Post, 1½ mile southwest of Trevieres, Department of Calvados, France, 19 July 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private JAMES E. GRAY (34263972), Battery D, 460th Antiaircraft Artillery Automatic Weapons Battalion.	

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

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Private James E. Gray, Battery D, 460th AAA AW BN, did, at Yeovil, Somerset, England, on or about 15 June 1944, desert the service of the United States by quitting and absenting himself without proper leave from his organization and place of duty, with intent to avoid hazardous duty and shirk important service, to wit: participation in the oversea invasion of the enemy occupied European continent, and did remain absent in desertion until he was apprehended at Yeovil, Somerset, England on or about 18 June 1944.

He pleaded guilty to the Specification, except the words "desert the service of the United States by quitting and absenting himself without proper leave from his organization and place of duty, with intent to avoid hazardous duty and shirk important service, to wit: participation in the oversea invasion of the enemy occupied European continent, and did remain absent in desertion", substituting therefor, respectively, the words, "absent himself without proper leave from his organization and did remain absent without proper leave;" of the excepted words, not guilty, of the substituted words, guilty. Of the Charge: not guilty of a violation of the 58th Article of War, but guilty of a violation of the 61st Article of War. At the conclusion of introduction of the prosecution's evidence he withdrew the aforesaid plea and substituted a plea of not guilty to the Charge and Specification. Two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by special courts-martial for absence without leave, for 20 and three days, respectively, in violation of the 61st Article of War. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 25 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Prosecution's evidence summarizes as follows:

Major Donald L. McMillan was commanding officer of 460th Anti-aircraft Artillery Automatic Weapons Battalion. He assumed such command on 16 May 1944, and was such commander during all times relevant to this case (R18). On or about 31 May 1944, accused, a member of Battery D of that battalion, was under sentence of a special court-martial for absence without leave, which sentence included confinement at hard labor for six months and forfeiture of two-thirds of his pay per month for a like period (R18-19; Pros.Ex.D). On that date Major McMillan called accused into his office. He read to accused a letter from Headquarters V Corps, dated 21 April 1944 (Pros.Ex.B), paragraph 106 which provided in pertinent part as follows:

"a. Desertion Facts.

(1) Any person who 'deserts' or 'attempts to desert' the service of the United States in time of war shall suffer 'death' or such other punishment as a court-martial may direct. (AW 58).

* * *

(3) Any person who quits his organization or place of duty 'with intent to avoid hazardous duty' or 'to shirk important service' shall be deemed a deserter. (AW 28).

* * *

(5) Confinement in a United States Penitentiary is authorized for desertion committed in time of war. (AW 42)

(6) Anyone dishonorably discharged or dismissed for deserting the military service of the United States in time of war forfeits his United States citizenship. (Section 401g, Nationality Act of 1940, as amended by Public Law 221, 20 January 1944)

b. Each and every one of you is hereby notified:

(1) That your organization is now under orders to participate in the oversea invasion of the enemy occupied European continent.

(2) That your organization is now alerted for this operation and that the operation is imminent.

(3) That this operation will be both hazardous duty and important service within the meaning of the provisions of AW 28 as above stated.

(4) That a careful morning report record will be kept showing the fact of the presence of each of you at this time and of the fact that the foregoing information was revealed to you.

(5) That any absence without leave by any of you from now on will be deemed desertion to avoid this duty and will subject you to being tried by general court-martial as a deserter.

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(6) That proof of your unauthorized absence together with morning report proof of the foregoing information being given you, in connection with further proof of the fact that your organization is now under orders and alerted for participation in the imminent oversea invasion operation against the enemy, will authorize a court-martial to infer that your unauthorized absence was with intent to avoid such duty and therefore to find you guilty of such desertion.

(7) Court-martial sentences adjudging, in such desertion cases, along with dishonorable discharge and total forfeitures either the death penalty or confinement at hard labor for the natural term of life or for some definite period of time up to fifty (50) years will not be deemed inappropriate. Where death is not adjudged it is contemplated that confinement will be served by imprisonment in a designated United States penitentiary."

In the course of the interview with accused Major McMillan explained the meaning of the foregoing communication, and also read to him parts of the Manual for Courts-Martial pertaining to desertion and the punishment therefor (R20). Major McMillan testified in relating the circumstances of this interview that he

> "told the man any further AWOL would be considered desertion. He promised he would not go AWOL, I told him I would suspend the six months and allow him to go back to his unit and to be a good soldier and be a benefit to his battery commander" (R20).

At that time the battalion "had been given a dead line to be alerted preparatory to movement" (R20). The forward echelon of the battalion under command of Major McMillan left the concentration area in or near Yeovil, Somersetshire, England, on 7 or 8 June 1944, in its oversea movement (R7,8,20). Prior to that date the battalion personnel had been billeted in 200 private homes in the town but upon movement of the forward echelon the residue of the battalion were transferred to one or two large buildings in camp. Battery D was quartered in one barracks (R8). In preparation for departure there had been no difference in the treatment of the men who were included in the forward

echelon and those who were in the residue. All had "turned in" their blouses, overcoats, overshoes and extra material. All personal equipment of the soldiers and officers had been accumulated and "sent away" The battalion was engaged in water-proofing its vehicles and it was "more or less standing by waiting to go" (R21).

Battery D of the battalion was at that time under the command of Captain Jack Lacey (R6), who accompanied the forward echelon (R13) on its oversea invasion. After the departure of the forward echelon on 7 or 8 June, the residue of Battery D, which remained in camp, was under the command of Staff Sergeant James H. Thompson, as acting first sergeant. The residue consisted of men who were "not actually needed in caring for and firing the guns", and its principal work consisted in water-proofing the balance of the trucks. In addition the daily schedule of activities of the battery required infantry drill or calisthenics for 30 minutes or an hour in the mornings and two "hikes" in the afternoons (R8,12). During the period from 8 June through 18 June, three-day passes were not issued, but only daily after-duty passes valid from 5 p.m. to 10:30 p.m. (R11,13). Passes valid for all day were issued on Sundays, but the men were under orders to remain in the proximity of camp and "to leave word where they were going so they could be located easy" (R13). On Sunday, 18 June, men were out on pass. On that day, orders were received to make ready for departure and to examine all vehicles. Thompson and another soldier (Private Bales) personally notified the men who were out on pass and assembled them (R12). Between 8 and 15 June, Thompson had received instructions that the members of the battery under his command must be ready to move within four to six hours after receiving orders from battalion headquarters to move. At formation he personally conveyed this information to his battery personnel (R12).

Accused was a member of the residue of the battery. He spent the night of 14 June at the dispensary where he was undergoing treatment for a throat affliction (R8,14,15). When he went to the dispensary he took with him his blankets, mess-kit and toilet articles (R9,15,17). About 10 a.m. 15 June, accused informed Thompson that further throat treatment was necessary. Thompson authorized him to return to the dispensary (R9). He remained at the dispensary on the night of Thursday, 15 June, and apparently was there the next day, 16 June, for a throat treatment (R15).

Thompson did not see accused from the time of his meeting with him on 15 June, until late in the evening of Sunday, 18 June. He was absent from his battery during this period without authority or permission (R9). On 18 June, accused was seen by Private Herbert M. Mingo, Medical Detachment of the battalion, on Wyndom Hill next to the motor park. Mingo had previously been informed accused was absent without leave and reported accused's whereabouts to Major Lewis, "commander of the battalion of the residue", who directed Mingo to accompany the military police sent to apprehend accused (R15). Upon arrival at the place where accused was

first seen by Mingo it was discovered that he had departed. He was found on the opposite side of a hill at a place known as Nine Springs, which adjoined the town of Yeovil. He was then engaged in conversation with a girl (R16). Mingo identified accused to the military police when about 35 or 40 feet from him. The police and Mingo approached accused who left the girl and walked towards a bench upon which two soldiers were seated. After he had proceeded about 35 or 40 feet he was overtaken by the military police who "walked a little faster than he did". He did not run. Mingo believed accused saw the police approach him (R17). He did not have a pass. After his "dog tags" were checked, he was taken to battalion headquarters (R16) and was thereafter removed to the dispensary (R9). Thompson received orders to send accused's blankets to the dispensary, but accused had not returned his blankets to the billet. Thereafter during the evening of 18 June, Thompson and accused conducted a search for the blankets (R10). Accused was kept under guard at battalion headquarters on Sunday night and was returned to the battery residue on the afternoon of Monday, 19 June. The residue departed from its camp at Yeovil for the marshalling area at 4:20 pm on that date. Accused accompanied the unit (R10-11). Thompson testified that while on the boat en route to France accused

> "told me if he had seen the M.P. in time he would have tried to get away. They closed in so fast he didn't have a chance" (R11).

A copy of the letter from V Corps dated 21 April 1944, which Major McMillan read and explained to accused on 31 May, was introduced in evidence as Pros.Ex.B without objection from the defense. Also an extract copy of the morning report of Battery D for 15 June and 18 June was admitted in evidence as Pros.Ex.C without objection from defense (R7). The relevant entries were as follows:

"15 June 1944
34263972 Gray Pvt.
Dy to AWOL time 1100"

"18 June 1944
34263972 Gray (AWOL) Pvt.
AWOL to dy time 1700"

4. The accused elected to be sworn as a witness on his own behalf. He testified in substance as follows:

On 14 June he was part of the residue of Battery D stationed at Yeovil, England (R22). The forward element of the battery had moved but no statement had been made to him with respect to the movement of the residue. He developed tonsilitis about 1 June and was undergoing treatment for the affliction. He was marked quarters from 1 June to the time he moved to France. He went to the dispensary on Wednesday, 14 June, and took with him his blankets, mess-kit and gas mask. He slept at the dispensary on the night of 14 June. On the morning of 15 June he intended to return to his billet in town. He met Sergeant Thompson and

informed him that he (accused) must return to the dispensary at 11 am for another treatment. Thompson gave his consent. Accused had left his blankets at the dispensary (R23). He went to the dispensary at 11 am. He insisted that he slept at the dispensary for two nights -- "I think it was the 15th, the last time I was up there" (R23,24). He kept his blankets, mess-kit and gas mask at the dispensary (R27).

Thereafter accused went to the town of Yeovil (probably on the morning of 16 June). He left the dispensary at 11 am intending to return at 6 pm. In town he commenced drinking. He met a girl and remained with her two days and two nights (R24,27). On Friday, 16 June, accused saw a truck driver from Battery C, and on Saturday 17 June he saw Corporal Lusk and Private Tuttle of his battery. He did not discuss with any of them the movement of his organization. At all times he intended to return to his battery (R24). He knew his battery was moving on short notice, and he saw some members of it each day he was absent. He was only about one-half mile from the billets and the battery (R25).

On Sunday, 18 June, accused was on Wyndom Hill, also known as Nine Springs. A member of Battery C saw him between 4 pm and 4:30 pm and ordered him to report back to his billet. He started down the hill. At the bottom of the hill a corporal of the "medics" and two military policemen arrived about two minutes after accused had stopped to talk to a girl. He recognized the corporal. He left the girl and started to walk in the direction of two soldiers who were sitting on a bench. The corporal asked him for a pass. He had none, but showed him his "dog tags". The corporal directed accused to accompany him and they entered the jeep (R25). He was held at battalion headquarters over night and was returned to his battery the next day (19 June) between 3pm and 4 pm. On the boat en route to France he was held under guard, but on shore he was released to regular duty which he had been performing ever since (R26). When he started down the hill he was intending to return to his billet but was "picked up" by the military police (R25,26).

Accused was 24 years of age and had been in the army two years and eight months. He had been absent without leave "quite a few times". Most of the absences were in the United States, on which occasions he went home. He had a mother and a small sister about whom he worried because his allotment was only $37.00. He usually "turned himself in". He left the United States on oversea duty on 22 February 1944.

Accused asserted that he never intended to be absent from his organization when it moved across the channel for duty (R26). He knew of the invasion of the European continent on 6 June and had been informed of plans for it prior to that date. He had intended to return to the dispensary at 6 pm on the first day he was absent (R28, 29). He was drinking the next day but had intended to return on that day. On Saturday night his money was exhausted and he "had to return Sunday". He stayed on Nine Springs Hill practically all day

Sunday and after the man from Battery C notified him that he was to report to his billet he was in the process of returning when he was apprehended by the military police (R30). After the Battery C man spoke to him he did not return immediately to his billet, although it was only one-half mile from the hill. He stopped at the bottom of the hill with the girl. The police took him into custody at 5:15 pm (R31).

In April and May the 28th Article of War was read to the men two or three times and he knew he could be tried for desertion if absent from his organization (R28). When Major McMillan talked to him on 31 May he understood his statement regarding absence without leave and knew it applied to him (R29). The V Corps letter of 21 April (Pros.Ex.B) was read and explained to him (R32). When the forward echelon moved he knew that the property of the men of the residue was half packed, that the trucks were in course of being water-proofed, and that all equipment was packed (R29). No one told him when the residue was to move but he knew that "three-day passes" were not issued and only passes valid until 10:30 pm were given the men (R29). Accused denied he informed Thompson while on the boat en route to France that the military police were too quick for him or he would have got away (R32).

> "I told him if I wanted to I could have got away from the M.P's. They didn't have arms at all. I saw them before they saw me"(R32).

5. Accused is charged with deserting the service of the United States by absenting himself from his organization and place of duty without leave with intent (a) to avoid hazardous duty and (b) shirk important duty, to wit:

> "participation in the oversea invasion of the enemy occupied European continent."

The pleading of both specific intents under the 28th Article of War in one specification was proper and left the prosecution free to prove either or both of the intents alleged (CM ETO 2432, Durie; CM ETO 2481, Newton).

Accused's absence without leave from his organization and place of duty from 15-18 June 1944, terminated as alleged, is clearly established by the evidence. The question for determination, therefore, is whether the record contains substantial evidence of each of the three other elements of the offense charged, namely:

> (1) That accused's unit "was under orders or anticipated orders involving either (a) hazardous duty or (b) some important service" (MCM, 1921, par.409, p.344);

(2) that notice of such orders and of imminent hazardous duty or important service was actually brought home to him; and

(3) that at the time he absented himself he entertained the specific intent to avoid hazardous duty or shirk important service (CM ETO 2368, Lybrand and cases therein cited).

(1) On 31 May 1944 accused's battalion had been notified of a "dead line" to be alerted preparatory to movement involving participation in the oversea invasion of enemy occupied Europe. Moreover, the declaration contained in the "Desertion Letter" dated 21 April 1944 (par. 1b(1)(2)) from Headquarters V Corps (Pros. Ex. B) is adequate proof that his unit was on 15 June "under orders or anticipated orders" of the nature above described (CM ETO 2481, Newton; Cf: CM ETO 2396, Pennington; CM ETO 2432, Durie).

(2) The element of notification to accused of the orders and of imminent hazardous duty or important service involved therein was proved not only by the prosecution's evidence but also by accused's admission in his sworn testimony that the "Desertion Letter" from Headquarters V Corps was read and explained to him on 31 May and that he knew of preparations in his organization for the overseas operations. Therefore the defects in proof considered by the Board of Review in CM ETO 455, Nigg, do not arise in the instant case.

(3) The only question remaining for consideration is whether there is in the record sufficient evidence of the last element of the offense, namely, that at the time accused absented himself on 15 June he entertained either of the specific intents to (a) avoid hazardous duty or (b) shirk important service. The Board of Review has rejected the proposition that such specific intent may be inferred from evidence, without more, that accused was absent without leave after his unit had been alerted for overseas service and he had received the warning notice contained in the letter of 21 April 1944 from Headquarters V Corps (CM ETO 2396, Pennington; CM ETO 2432, Durie; CM ETO 2481, Newton). As in those cases, it becomes necessary to seek elsewhere in the record, evidence of accused's specific intent to avoid hazardous duty or to shirk important service.

The additional facts appearing in the record are that accused spent the night of Wednesday, 14 June, in the dispensary undergoing treatment for a throat affliction, that he spent the next night (15 June) in the dispensary, and without authority on the morning of 16 June, leaving his blankets, mess-kit and toilet articles at the dispensary, went to the nearby town of Yeovil, Somersetshire, where, according to his unrebutted testimony, he commenced drinking and met a girl with whom he passed

two days and two nights (16, 17 June). He testified that he saw members of his organization on each of these days. Although three-day passes were not issued by his organization, daily passes valid after duty hours from 5:00 pm to 10:30 pm and passes valid for all day Sunday were being freely issued to members thereof who were cautioned to leave information as to their whereabouts and to remain in the proximity of the camp so that they could be assembled readily. He was recognized by a member of his battalion on a hill adjoining Yeovil on the afternoon of Sunday, 18 June, while engaged in conversation with a girl and was thereupon apprehended by military police but did not attempt to escape nor was his behavior otherwise unusual. He accompanied his unit to France on 19 June. The acting first sergeant of the unit testified that en route to France accused told him that if he had seen the military police in time he would have eluded them but they "closed in" too rapidly. Accused's version of this statement was that if he wanted to get away from them he would have done so because they were unarmed and he saw them before they saw him.

The foregoing evidence has no value for the purpose of proving that accused intended to avoid the hazardous duty or to shirk the important service of participation in the imminent oversea invasion of Europe (CM ETO 2481, Newton). Conversely, the inference, as in the Durie, Newton and Pennington cases, supra, is that he entertained no such purpose. Had accused secured a pass or passes authorizing his absence from his organization and place of duty on the evenings of 15, 16 and 17 July and during the whole Sunday 18 July, as he might properly have done so far as the record shows, his interim unauthorized absences most clearly would not have warranted the inference of either of the requisite specific intents. His behavior was no different from what it would have been had his entire absence been authorized. He was in daily contact with members of his organization. He did not conceal himself and was in the immediate proximity of his place of duty throughout the whole period of his absence. His conduct upon apprehension betrayed no evasive or otherwise improper intent on his part. Even assuming the truth of the acting first sergeant's version of his conversation with accused en route to France, the statement of accused that he would have eluded the military police if possible proves no more than that he was not yet ready to return to his camp at the time of his apprehension and wished to remain absent longer, albeit without leave. It does not even tend to prove any more culpable purpose on his part. The mere fact that accused had no pass, in view of the foregoing circumstances, constituted merely additional evidence that his absence was without leave but fell far short of proving that he intended to evade duty with his organization.

The prosecution's proof failed on the vital element of accused's specific intent either to avoid hazardous duty or to shirk important service (CM ETO 2481, Newton). The Board of Review is therefore of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings that accused did, at the time and place alleged, absent himself without leave and remained absent without leave until he was apprehended at the time and place alleged, in violation of

Article of War 61, and legally sufficient to support the sentence.

6. (a) The evidence that accused actually sailed with his unit is immaterial to this holding because the evidence of his apprehension precludes the inference that he did so voluntarily (CM ETO 2368, Lybrand).

(b) Accused testified that on shore in France he was released from guard and restored to regular duty, in which he was thereafter engaged. In the absence of proof that such restoration was directed by competent higher authority, there is no basis for the defense of constructive condonation of accused's offense (CM ETO 2212, Coldiron and authorities there cited).

7. The charge sheet shows that accused is 24 years eight months of age and was inducted 11 March 1942 at Fort McPherson, Georgia, to serve for the duration of the war plus six months. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial except as herein specifically noted.

9. Penitentiary confinement is not authorized by Article of War 42 for the offense of absence without leave (CM ETO 2432, Durie; CM ETO 2481, Newton). Confinement should accordingly be in a place other than a penitentiary, Federal correctional institution or reformatory (ibid).

Ellwood W. Sargent Judge Advocates

Malcolm C. Sherman Judge Advocates

Edward L. Stevens, Jr. Judge Advocates

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 6 OCT 1944 TO: Commanding General, V Corps, APO 305, U. S. Army.

1. In the case of Private JAMES E. GRAY (34263972), Battery D, 460th Antiaircraft Artillery Automatic Weapons Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings that accused did, at the time and place alleged, absent himself without leave and remained absent without leave until he was apprehended at the time and place alleged, in violation of Article of War 61, and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. For the reasons stated in the holding the designated place of confinement should be changed to a place other than a penitentiary, Federal correctional institution or reformatory. This may be done in the published general court-martial order.

3. In view of the reduction of the grade of the offense, I believe there should be a substantial reduction in the period of confinement. The average period of confinement imposed for absence from actual combat on conviction under the 75th or 58-28th Articles of War is 20 years. This offense is less serious and I suggest a reduction to ten years confinement in Disciplinary Training Center #2912, with dishonorable discharge suspended until the soldier's release from confinement.

4. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3234. For convenience of reference please place that number in brackets at the end of the order (CM ETO 3234).

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

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

BOARD OF REVIEW NO. 2

21 AUG 1944

CM ETO 3250

U N I T E D S T A T E S)	82D AIRBORNE DIVISION.
)	
v.)	Trial by GCM, convened at Division
)	Headquarters, APO 469, U. S. Army,
Private CHARLES W. RITTER)	28 July 1944. Sentence: Dishonor-
(33089462), Headquarters)	able discharge, total forfeitures,
Company, First Battalion,)	and confinement at hard labor for
504th Parachute Infantry.)	five years. Eastern Branch, United
)	States Disciplinary Barracks, Green-
)	haven, New York.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Private Charles W. Ritter, Headquarters Company, First Battalion, 504th Parachute Infantry, did, without proper leave, absent himself from his organization at Bagnoli, Italy, from about 4 April 1944, to about 10 May 1944, thereby evading a secret, seaborne movement with his organization for which it had been alerted.

Specification 2: In that * * * did, without proper leave, absent himself from his organization at Leicester, Leicestershire, England, from about 22 June 1944, to about 6 July 1944, when he was apprehended, after having evaded the effort of First Lieutenant G. P. Crockett, 504th Parachute Infantry, his superior officer, on 30 June 1944, to

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return him to military control.

He pleaded not guilty to and was found guilty of the Charge and specifications. Evidence was introduced of one previous conviction, by summary court-martial for absence without leave from 12 August to 24 November 1943, in violation ofArticle of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The prosecution called as its witnesses: First Lieutenant James D. Gauntt, Headquarters Company, First Battalion, 504th Parachute Infantry (R6,7), Second Lieutenant Fred W. Harris, 504th Parachute Infantry (R9), and First Sergeant Regis J.Pahler, of accused's company. Their testimony, including a stipulation, showed that accused, a private, Headquarters Company, First Battalion, 504th Parachute Infantry (R6,7,13), absentedhimself from his organization at Bagnoli, Italy, from about 4 April to about 10 May 1944 (R6,7,13,14), at which time he was "returned to military control" (R9), and that this absence was without leave (R7,8). The prosecution's evidence further showed that accused absented himself without leave from his organization then stationed at Camp Stoughton, Leicester, Leicestershire, England, from about 22 June until 6 July 1944 (R8), at which later date he was apprehended and returned under arrest to his command (R9,10).

4. No evidence was introduced in behalf of accused. He was represented by the duly appointed assistant defense counsel who, at the end of the prosecution's case, stated that the defense had "nothing more to present". Accused did not testify, but after his rights as a witness were explained by the court announced his wish to remain silent (R12).

5. The evidence thus introduced fully proved every element of the offense of absence without leave committed by accused on two occasions, as alleged in Specifications 1 and 2 of the Charge, in violation of Article of War 61.

6. Accused is 31 years old. He was inducted 5 August 1941 to serve for the duration of the war plus six months. There was no prior service.

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

8. Confinement for five years is less than the maximum sentence authorized upon conviction under Article of War 61. The designation

of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended).

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 21 AUG 1944 TO: Commanding General, 82D Airborne Division, APO 469, U. S. Army.

1. In the case of Private CHARLES W. RITTER (33089462), Headquarters Company, First Battalion, 504th Parachute 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. On the occasion of accused's first unauthorized absence, his company was in a staging area alerted for a secret seaborne movement. Accused knew of this and left his command six days before his ship sailed (R7,13). During his second absence he was arrested by one of the officers of his company but effected an escape (R10,11). The second absence was terminated by a further arrest. During this absence his division was in combat in Normandy. The two absences involved in this Charge amounted to a total of 52 days. The record shows one previous conviction by summary court-martial for absence without leave for 104 days.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3250. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3250).

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

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

BOARD OF REVIEW NO. 1

12 SEP 1944

CM ETO 3253

U N I T E D S T A T E S v. Privates ARCHIE S. BOWMAN (33745034) and JOSEPH GLOVER, JR. (33789480), both of 307th Port Company, 509th Port Battalion, Transportation Corps.	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS successor in command to WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Newport, Monmouthshire, South Wales, 14 June 1944. Sentence: Each accused, dishonorable discharge, total forfeitures and confinement at hard labor for life. U.S. Penitentiary, Lewisburg, Pennsylvania.

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

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

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

BOWMAN

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Archie S. Bowman, 509th Port Battalion, did, at or in the vicinity of Sully, Glamorgan, South Wales, on or about 2 June 1944 between 1630 and 1730 hours forcibly and feloniously, against her will, have carnal knowledge of Mrs. Kathleen Elsie Thomas, 21 Birch Grove, Barry, Glamorgan, South Wales.

GLOVER

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Joseph Glover, Jr., 509th Port Battalion, did at or in the vicinity of Sully, Glamorgan, South Wales, on or

about 2 June 1944 between 1630 and 1730 hours forcibly and feloniously, against her will, have carnal knowledge of Mrs. Kathleen Elsie Thomas, 21 Birch Grove, Barry, Glamorgan, South Wales.

Accused, in open court, consented to be tried together. Each pleaded not guilty and, all members of the court present at the time the vote was taken concurring in each instance, each was found guilty of the Charge and Specification preferred against him. Evidence was introduced against accused Bowman of one previous conviction by summary court for absence without leave for seven days in violation of the 61st Article of War; and against accused Glover of two previous convictions, one by summary court for absence without leave for 11 days and one by special court-martial for absence without leave for 15 days, both in violation of the 61st Article of War. All members of the court present at the time the vote was taken concurring in each instance, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be hanged by the neck until dead. The reviewing authority, the Commanding Officer, Western Base Section, Communications Zone, European Theater of Operations, approved the sentence as to each and forwarded the record of trial for action under Article of War 48. With respect to each accused, the confirming authority, the Commanding General, European Theater of Operations, confirmed only so much of the sentence as provided that he be hanged by the neck until dead, but, owing to special circumstances, commuted the sentence, as confirmed, to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the natural life of accused, designated the U.S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution is as follows:

The victim of the alleged offenses, Mrs. Kathleen Elsie Thomas, of 21 Birch Grove, Barry, Glamorgan County, South Wales, was a married woman and the mother of a five-year-old boy (R9). About two years prior to the offenses in question (2 June 1944) she contracted tuberculosis, was admitted to a sanatorium and was thereafter transferred to Sully Hospital (Glamorgan County), where she underwent three or four operations involving the collapsing of one of her lungs (R10,16). Having spent about 18 months in this hospital, she was released therefrom just over three weeks prior to 2 June (R10), on which date she was in the process of undergoing recurrent treatments consisting of pumping air into her chest for the purpose of keeping the lung in a collapsed condition (R16).

(a) Mrs. Thomas testified that on the morning of the day in question she returned to Sully Hospital for one of the fore-mentioned treatments. About 4:30 p.m. she left the hospital and proceeded to Cliff path leading to Sully Village, on her way home (R9,11). She chose this route, a narrow footpath overgrown on the sides with bramble bushes taller than herself,

rather than the road, because her condition was such that the dust from the road rendered her breathing difficult (R10,13). After walking very slowly (R10,14) for about a half hour (R14) she reached a point on the pathway "not very far" from the main road, near a police station and in the vicinity of an American camp (R13), when she heard a shout, turned her head and saw two colored American soldiers. One was descending a bank on the left side of the path and the other was crossing a stone wall behind him. She started to run and they pursued her. Her testimony as to the details of the ensuing rape follows:

"A. Well they were coming along, one behind the other. One caught me by the shoulders from behind, turned me around to face him. I tried to push him off as best I could, but he caught me by the collar of my blouse and pushed me down on my back.
Q. Is that man in the courtroom?
A. The second one there. (indicating Accused Bowman)
Q. Continue.
A. He pushed me down and he dropped to his knee on my stomach. When he got there I shouted. He covered my mouth with his hand and he said, 'He'd knock the daylights out of me if I made another sound. He moved his hand on to my throat and continued the assault.
Q. What did he do?
A. He picked my clothes up and then had intercourse with me.
Q. Did he inject his private parts into your private parts?
A. Yes sir.
Q. After he committed this act of intercourse, what occurred?
A. Well I tried to struggle up, but he pushed me down again and held me there until the second man, who was standing behind him, came and did the exact same thing.
Q. Is the second man in this courtroom?
A. Yes sir.
Q. Will you point him out?
A. This one. (witness points to Accused Glover)
Q. What did the second man do?
A. Exactly the same thing; he had intercourse with me also. I couldn't struggle at all, by then I was completely exhausted.
Q. Did he insert his private parts into your private parts?
A. Yes sir.

Q. When the first man attacked you what resistance did you put up?
A. I tried to push him off. I couldn't do very much because I had no breath left to walk. I lifted my arms to try to push him off and I'm afraid thats about all I could do, and after that he kneeled on me.
Q. What is the condition of your lungs?
A. Well I have only one lung working, and thats not very good. The other one is collapsed. Thats the purpose for which I was in the hospital that day, to pump air into my chest.
Q. Did you resist these attacks to your utmost?
A. To the best of my ability I did.
Q. After the second attack and the acts of intercourse had been completed, what occurred?
A. They pulled me up to my feet by my arms, and the man who attacked me first tried to brush down the dirt of me, and then he picked up my coat and mackintosh and threw them at me in my arms and said, 'Get going, we don't want to have any of this left here.' Then he gave me a push and sent me on my way" (R10-11).

She had a good opportunity to observe the face of her first assailant (Bowman) but did not notice any scars thereon. She also observed her second assailant (Glover) because he was standing up behind the first (R13). The attack occurred at 5:00 p.m. or shortly thereafter and seemed to the victim to last "a long time". When she was released she had "hardly no breath at all left to walk" (R11,14), but hurried as fast as possible along the path and out along the main road to where she met three Auxiliary Territorial Service girls. She ran into the arms of one of them, told her what had happened and requested the girl to help her to the police station. At the Sully Police Station Mrs. Thomas reported the assault to "the constable" (Police Inspector Arthur Morris, Barry Dock, Glamorgan County (R18)), who appeared about 20 minutes after her arrival. Accompanied by Inspector Morris and another police official (Sergeant John Sullivan, Cardoxton, Barry (R19)), she returned to the scene of the attack and pointed it out to them. She identified a silver bracelet which she found at the scene as her own, which she was wearing at the time of the attack (R11-12; Pros.Ex.1). With one of the police officers (Inspector Morris (R20)), she then returned to the police station where she remained until her father (James Arthur Clare (R17)) and Detective Sergeant Norman Davies (Barry Dock (R21)) arrived. Thereupon her father drove her to the office of Dr. James Lucius O'Flynn of Barry, her doctor, who examined her, and she then went home (R12). Later in the evening at her home she gave Sergeant Davies a description of her assailants (see par.4(a), infra). Her statement was reduced to writing, read and signed by her, at a time when she had regained her composure. She later signed another statement concerning identification (R13-14).

On 3 June, the day following the rape, at 2:00 p.m. Mrs. Thomas saw a small group of men in the Barry Dock Police Station. Neither of accused was present in the group. About 5:30 p.m. at the camp at Sully several hundred men were brought before her in groups of four or five each in such a way that she had a good opportunity to observe them. After observing about 100 men she identified the larger of accused, Bowman. Thereafter she saw "a hundred or so" more when "the second man" (Glover) appeared whom she identified after asking him to remove his helmet, put on his woolen cap and show her his teeth, which she had noticed to be peculiarly sharp. Later the same day she a gain identified each accused outside, among 15 or 20 men in two rows. The following colloquy with respect to the certainty of Mrs. Thomas' identification occurred:

"Q. Is there any doubt in your mind that these two accused are the persons who attacked you on the second of June?
A. No, there is no doubt in my mind at all.
Q. Considering the fact that these men could be sentenced to death in the event that the court should find them guilty, do you still say with equal certainty that these are the men?
A. Yes sir, I still say with equal certainty that these are the men" (R12).

(b) Corroborative of the victim's testimony, prosecution adduced the following evidence, in summary:

(1) Testimony of two of the three Auxiliary Territorial Service girls that about 5:25 p.m. on the day in question they met Mrs. Thomas near the footpath, about five or ten minutes' walk from an army camp, that she rushed across the road and grasped one of them, Corporal Joan E. Trigg, that Mrs. Thomas appeared "very nervous and practically in a state of collapse", her hair was dishevelled, stockings twisted and "laddered", her skirt twisted and her blouse unfastened; she was "genuinely distressed". Her first words to the girls were "Please, please help me". They attempted to pacify her, but she glanced over her shoulder as if someone were following her and stated she had been attacked by two black men. She exclaimed, "You don't understand because I've been raped". As they assisted her to the police station, she complained and repeated "What will happen to me, don't leave me I can't go home on my own" (R14-15,24-25).

(2) Testimony of Police Inspector Morris that about 5:50 p.m. Mrs. Thomas reported to him at the police station that she had been raped by two colored American soldiers "down the path", where she led him and Police Sergeant Sullivan and where the bracelet (Pros.Ex.1) and two rubber preventives were found. The scene, which was about 250 yards from the police station, 227 yards from the nearest houses and 200 yards from Ridge Camp, exhibited "signs of a struggle". The very small path was bordered by dense overgrowth and bushes about nine feet in height (R18-19).

(3) Testimony of Police Sergeant Sullivan that when he saw Mrs. Thomas about 5:50 p.m. at the police station she was in a very distressed state, pale and slightly red about the neck and mouth (R19-20). He corroborated Morris' testimony concerning the scene of the attack and articles found there. He testified that the "earth was disturbed" there (R20).

(4) Testimony of Detective Sergeant Davies that when he saw Mrs. Thomas about 6:30 p.m. a stimulant was being administered to her, she appeared to be distressed, her hair was untidy, she was pale, agitated and hesitant and nervous in her speech. He corroborated the testimony of Morris and Sullivan concerning the scene of the attack (R21). On 9 June he took four photographs of the scene, which are also corroborative of the victim's testimony concerning the same (R21-22; Pros.Exs.2,3,4,5).

(5) Testimony of Dr. O'Flynn, "The Towers", Holton Road, Barry, that he examined Mrs. Thomas about 7:30 p.m. and found her very distressed both mentally and physically, her clothes and hair dishevelled. She complained that she had been assaulted. The examination revealed signs of recent scratches on her right elbow and dried mud on her left elbow. There were "signs of redness" on both upper arms, around her throat and over her mouth. Her vagina was red and inflamed. There was sticky mucus or foul smelling fluid in the vagina and saturating the fork of her knickers. There was, in his opinion, evidence of recent penetration - within two or three hours; she had been recently subjected to sexual intercourse. Her strength would be limited by her breathing capacity and by the ravishings of her illness. In his opinion, she had little or no running power and little or no power to resist an assault such as the one described to him. Her resistance would be the same as that of a child about five or six years of age (R15-16).

(6) Davies further corroborated Mrs. Thomas' testimony concerning the identification of accused. He testified that she did not identify either in a detail of 20 American soldiers presented to her in four groups of five each, all of whom she observed at the first parade at Barry Dock Police Station at noon on 3 June. At a parade at the officers' mess of the 509th Port Battalion, Sully, Ridge Camp, at 5:30 p.m., where colored American soldiers were paraded in groups of four or five each, she identified the 535th man, Bowman, as one of her assailants. The 552nd man, in compliance with her requests, removed his helmet, opened his mouth and grinned, whereupon she identified him as the other of her assailants (Glover) (R23). After she had seen 751 men, she expressed the wish to see in daylight the two men she had identified, especially Glover. She immediately identified Glover and Bowman in the order mentioned. Her only hesitation in the identification occurred when she asked Glover to remove his helmet and grin at her; otherwise the identification was immediate and positive (R24).

(7) Further corroboration of the identification was furnished by the victim's father, James Arthur Clare, of the same address as the victim,

whose testimony paralleled that of Davies concerning the parade at the camp at Sully. Clare added that the hut was well lighted. She first identified Bowman without hesitation (R18). She tentatively identified Glover and then asked him to remove his helmet. He also removed a woolen cap which he was wearing beneath the helmet, and she asked him to don it again. She then asked him to show his teeth and grin. Her positive identification of Glover followed. The men were dressed in a "Khaki outfit of some kind" (R17).

4. (a) For the defense, it was duly stipulated that if Detective Sergeant Davies were again present on the stand, he would testify that Mrs. Thomas on 2 June made the following statement concerning the identity of accused:

> " I would describe the men as (1) about 5'11", very broad shoulders, full round face, thick lips, broad nose. He was not absolutely black, but had a very dark brown colour. He was clean shaven and was wearing a steel helmet. There were no markings on it as far as I remember. He also had a field jacket on and I believe a blue stripe on the arms. He had a Khaki uniform and not a fatigue dress. He had a deep thick voice; a throaty thickness. This man said, 'I will kick the light out of you if you struggle.'
>
> (2) About 5'5" broad but not so big as the other one. He was lighter in colour, I would describe it as greeny-yellow complexion. He had a beaky nose, slit like eyes and a longish pointed nose. He had the same sort of dress but I can't be sure about his hat. I did not notice any stripes or anything, any other distinctive marks. His face was angular and complexion wrinkled or pock marked. The first one had a rather smooth complexion" (R25).

(b) After their rights were explained to them, each accused elected to testify under oath (R25).

(1) Accused Bowman testified in substance that about 4:00 p.m. 2 June he was writing a letter in his tent which he continued until 5:00 p.m. When the whistle blew he went to chow, after which he washed Sergeant Brown's mess kit, finished his letter and wrote another. He did not leave the camp area that afternoon (R29). He corroborated Mrs. Thomas' identification of him at the parade and testified that he asked Glover "What they do to you to you pick you out too?". His reason for asking Glover was that the latter "was in so long and he came out looking mad" (R30).

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(2) Accused Glover testified in substance that he spent the time from 4:00 p.m. on, shooting crap in a Sergeant Bradley's tent, went to chow sometime after 5:00 p.m., washed his mess gear and around 6:00 p.m. returned to Bradley's tent where he shot more crap. He denied leaving camp that afternoon or evening, but stated that he shot crap in the evening. Bowman asked him if he (Glover) had been picked out at the identification parade (R26-28). On 5 June he voluntarily signed a statement, substantially similar to his testimony and corroborative of Mrs. Thomas' identification of him at the parade (R27; Pros.Ex.6).

(c) The defense called nine additional alibi witnesses, all members of accuseds' company. The cumulative substance of their testimony is that both accused were present on 2 June at the evening chow line, although the times at which the witnesses estimated seeing them range from 4:55 p.m. (R32) to 5:15 p.m. (R36) and "no later than" 5:20 p.m. (R42). Their testimony varies considerably as to the various activities in which accused were engaged at different times. Private Sherman Brown stated in a sworn statement dated 8 June 1944, read into the record and reaffirmed by Brown in his testimony, that he recalled speaking to both accused "right after chow" at about 1730 hours (R40-41; Pros.Ex.7).

5. (a) Rape is defined as

> "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.149b, p.165).

The highly credible, uncontroverted and well corroborated testimony of the victim established the commission by two colored American soldiers, at the time and place alleged, of bestial rapes upon her person. Each assailant forced himself upon her and had sexual intercourse with her without her consent. Her testimony is clear that she resisted to the utmost of her unhappily limited physical capacity. Her testimony as to penetration is clearly corroborated by Dr. O'Flynn's testimony. The use of force and lack of consent are amply corroborated by the testimony as to her nervous, exhausted condition, the dishevelled condition of her hair and clothing, the redness on her arms, throat and mouth, the inflamed condition of her vagina, and her complaints immediately following the attack. The commission of the offenses was fully established (CM ETO 3375, Tarpley and authorities there cited).

(b) The substantial question in the case arises from the attempt of the defense to prove an alibi on behalf of each accused. Both accused testified that they were in their camp during all the period when the evidence indicates the crimes were committed (generally between 4:30 p.m. and

5:25 p.m., and more specifically between 4:55 p.m. and 5:10 p.m.). The nine other alibi witnesses failed to establish that either accused was at any particular place at any time during the period mentioned. Mrs. Thomas' positive identification of each accused, both at the identification parade at the camp and at the trial, and her full description of each accused read to the court at the trial where the members had full opportunity to check it against its own observations formed a substantial body of evidence that accused were the assailants. The evidence for the defense created an issue of fact for resolution by the court, its determination against accused of the factual issue of their identity as the assailants, in its findings of guilty, will not be disturbed by the Board of Review upon appellate review (CM ETO 3375, Tarpley and authorities there cited).

(c) The admissibility in evidence of the testimony concerning the victim's nervous and physical condition and complaints of the assault immediately following its perpetration is not open to question (CM ETO 3375, Tarpley and authorities there cited).

(d) The evidence in the record of this case exhibits the depths of depravity and bestiality to which the human animal can sink. The record is utterly devoid of the slightest evidence of mitigating circumstances. Congress' reason for authorizing the extreme penalty of death as one of the punishments for the crime of rape is emphasized in a case such as this. The Board of Review is emphatically of the opinion that the evidence fully supports the findings of guilty as to each accused.

6. The charge sheets show that accused Bowman is 22 years three months of age and was inducted 16 July 1943 and that accused Glover is 19 years seven months of age and was inducted 9 July 1943. The service period of each is governed by the Service Extension Act of 1941. No prior service of either accused is shown.

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

8. The penalty for rape 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 (AW 42; sec.278, Federal Criminal Code (18 USCA 457). 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).

J. Franklin Bates — Judge Advocate

Edward H. Longsett — Judge Advocate

Edward L. Stevens, Jr. — Judge Advocate

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1st Ind.

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

1. In the case of Privates ARCHIE S. BOWMAN (33745034) and JOSEPH GLOVER, JR. (33789480), both of 307th Port Company, 509th Port Battalion, Transportation Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence, which holding is hereby approved.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3253. For convenience of reference please place that number in brackets at the end of the orders: (CM ETO 3253).

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

(Sentence as commuted ordered executed. GCMO 69, 70, ETO, 22 Sep 1944)

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

BOARD OF REVIEW NO. 1

CM ETO 3255

15 SEP 1944

U N I T E D S T A T E S v. Private WILLIE DOVE (34063985), 13th Replacement Control Depot, formerly assigned to 2004th Quartermaster Truck Company (Aviation), 1515th Quartermaster Truck Battalion (Aviation) (Special).	IX AIR FORCE SERVICE COMMAND. Trial by GCM, convened at AAF Station 402, APO 149, U. S. Army, 12 July 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Willie (NMI) Dove, 13th R.C.D., formerly assigned to 2004th QM Trk Co (Avn). 1515th AM Trk Bn Avn (Sp) did, near Nether Wallop, Hants, England, on or about 23 June 1944, commit an assault upon one Annie Mae Howe, a female with intent to have carnal knowledge of her forceably and against her will.

Specification 2: In that * * * did, near Nether Wallop, Hants, England, on or about 23 June 1944, with intent to do bodily harm, commit an assault upon one Annie Mae Howe, a female by threatening her with a dangerous weapon, to-wit, a carbine 30 cal. M 1.

Specification 3: In that * * * did near Nether Wallop, Hants, England, on or about 23 June 1944, with intent to do bodily harm, commit an assault upon one Cpl. Mark Womersley, RAF, By threatning him with a dangerous weapon, to-wit, a carbine, 30 cal. M 1.

He pleaded not guilty to and was found guilty of the Charge and all specifications thereunder. Evidence was introduced of one previous conviction by summary court for absence without leave of unstated duration in violation of the 61st Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 25 years. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, total forfeitures and confinement at hard labor for 20 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. (a) Credible, uncontradicted testimony of the two victims of the alleged assaults establishes in summary that, at the time and place alleged, accused approached them, stated "I want a woman", pointed his rifle in their direction, fired a shot into the ground near them, forced Corporal Womersley to direct L.A.C.W. Howe to lie down upon the ground and forced her to do so by threats to shoot them both if they did not comply or if she screamed (R5-8,10,12-13). Thereupon accused lay down beside the girl, removed his penis from his trousers and lifted her skirt about a foot (R7,8,10,12-13). The accomplishment of his purpose was thwarted only when Womersley jumped upon him, knocked him away, seized the rifle and scuffled with accused. The girl escaped during the interval (R8,10,12). Accused thereafter "threatened" Womersley if he "did not get out of his way" (R8).

(b) After his rights were explained to him, accused elected to remain silent. The defense introduced no evidence (R15).

4. The evidence supports the findings that accused at the time of the assaults upon his two victims entertained the specific intent to rape L.A.C.W. Howe (Specification 1), to do her bodily harm by shooting her with a rifle unless she complied with his unlawful demand to submit to him and desist from screaming (Specification 2), and to do bodily harm to Corporal Womersley by shooting him with a rifle unless he complied with accused's unlawful demands first to direct the girl to lie down and later "to get out of his way" (Specification 3). It is well established that an assault is committed where the assailant purposes to inflict injury unless a condition, which he has no right to impose, is complied with by the person assailed (4 Am.Jur., sec.8, pp.131-132; 6 CJS, sec.61, p.916). The findings of guilty of each Specification were fully warranted (Specification 1: CM ETO 2500, Bush; CM ETO 3093, Romero; CM ETO 3163, Boyd, Jr.; Specifications 2 and 3: authorities cited supra; Cf: CM ETO 764, Copeland and Ruggles, Bull. JAG, Vol.II, No.11, Nov 1943, sec.451(12), p.428).

5. The charge sheet shows that accused is 21 years five months of age and was inducted at Fort Benning, Georgia, 10 September 1941 to serve for the duration of the war plus six months. He had no prior service.

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

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

7. (a) The maximum penalty for assault with intent to commit rape includes confinement at hard labor for 20 years (AW 93; MCM, 1928, par.104c, p.99); the maximum penalty for assault with intent to do bodily harm with a dangerous weapon includes confinement for five years (Ibid). The sentence to confinement for 20 years is authorized as punishment for the act of accused in its most important aspect, to wit, assault with intent to commit rape (MCM, 1928, par.80, p.67; CM 232656, Brinkerhoff, 19 B.R. 151 (1943), Bull.JAG, Vol.II, No.4, April 1943, sec.451(2), p.142; CM 231710, Beardon et al (1943), 18 B.R. 277, Bull.JAG, Vol.II, No.5, May 1943, sec.428(5), p. 187).

(b) Confinement in a penitentiary is authorized for the crimes of assault with intent to commit rape and assault with intent to do bodily harm with a dangerous weapon (AW 42; sec.276, Federal Criminal Code (18 USCA 455)). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B. Franklin Riley Judge Advocate

Edward H. Lazarus Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 15 SEP 1944 TO: Commanding General, IX Air Force Service Command, APO 149, U.S. Army.

1. In the case of Private WILLIE DOVE (34063985), 13th Replacement Control Depot, formerly assigned to 2004th Quartermaster Truck Company (Aviation), 1515th Quartermaster Truck Battalion (Aviation) (Special), 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 3255. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3255).

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

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

BOARD OF REVIEW NO. 2

2 SEP 1944

CM ETO 3280

U N I T E D S T A T E S	FIRST UNITED STATES ARMY.
v.	Trial by GCM, convened at First Army Stockade, near Formigny, France, 20 July 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years. The United States Penitentiary, Lewisburg, Pennsylvania.
Private DANIEL BOYCE (42049385), 3193rd Quartermaster Service Company.	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Daniel Boyce, 3193rd Quartermaster Service Company, did in the vicinity of Mosles, France, on or about 7 July 1944, with intent to commit a felony, viz: rape, commit an assault upon Germaine Gautier by willfully and feloniously throwing the said Germaine Gautier to the ground and placing his hands on her throat.

He pleaded not guilty to the Specification, "but Guilty of a violation of the 96th Article of War, of indecent abuse and maltreatment of a child under 18 years of age under Section 814, District of Columbia Code 1901, Title 6, Section 37, D. C. Code", and not guilty to the Charge, but guilty of a violation of Article of War 96. He 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 allpay and allowances due or to become due,

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and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Evidence introduced by the prosecution showed that on 7 July 1944 accused, a private, 3193rd Quartermaster Service Company, was with his company in the vicinity of Mosles, France (R6,7,8). At about 2100 hours on that day, Germaine Gautier, a 14-year old girl, and her father, Arthur Gautier, were walking on the road near their home in Mosles, France. Accused walked up to them and pointed a rifle, which he carried, at the father. Monsieur Gautier "rushed to get an officer, an American officer who was out in the field" (R7,8,12,13). Accused then took Germaine by the hand and pulled her, "brought" her, about 20 meters, across a ditch, which evidently bordered the road. There, accused "tried to twist" the girl's hands, but she got away. She said: "Then the soldier wasn't holding me and I ran away from him. When he was holding me I tried to escape and defend myself and then is when I ran away". Accused ran after her, "grabbed" her again and pulled her back in the ditch. He "made" her fall down and hurt her back. This time he had her down on her back and was kneeling beside her, holding her hands. He was "laying down" beside her. She started screaming and then he put his hands on her throat. While she was still on the ground, "not long", and while accused was trying to choke her and she couldn't "take" her breath, "officers came around there and the soldier saw them and he took off and so the officers shot at him" (R8-11). The shot was fired over accused's head, while he was running away, by First Sergeant Leonard G. Simms, of accused's company, who "went down there to get" accused, after the girl's father arrived at the orderly tent and raised the alarm (R19,22-24). Captain Harry T. Watts and First Lieutenant John R. Brennan, both of the 3193rd Quartermaster Service Company, were at the bivouac area when Germaine's father "rushed" in to summon assistance for his daughter. With Sergeant Simms, they followed Monsieur Gautier "across the road into an adjacent field" and there, according to Lieutenant Brennan, saw accused "lying on the prone form of this little French girl, Madamoiselle Gautier". When accused saw them he got up and fled. Accused at first escaped but later was found "hiding in the ditch" where he was apprehended (R16,17,19,20,22). Captain Watts and Lieutenant Brennan identified accused as the soldier who was with the girl when they first arrived at the scene, and Sergeant Simms said that after they "got in the field", they saw accused begin to run (R17, 19,20,22). On examination by the court, Lieutenant Brennan was asked if he saw accused and the girl together. His answer was: "Definitely, sir. He got up off of her body when we interrupted him. * * * He was laying down on top of her" (R21). When accused was arrested, "every button on his pants was open" (R22). At the time of his arrest, accused talked in a belligerent manner and "he had been drinking" (R18,20, 25). Captain Watts said accused, at that time, was in possession of his mental faculties (R25), and Lieutenant Brennan said accused knew what he was doing (R20).

4. After his rights as a witness were explained to him, accused elected to remain silent (R27). By cross-examination, the defense elicited the following evidence: That accused was staggering before he reached Monsieur Gautier and his daughter (R11,15); and that the girl's father was away from her for about 10 minutes (R15). First Sergeant Simms testified that when accused was caught "he acted like he was drunk" (R23).

5. The evidence shows beyond doubt that accused assaulted Germaine Gautier at the time and place alleged in the Specification. It is clear that accused dragged the girl off the road to a spot nearby; that she struggled to get away and in fact did escape once; that accused caught her and dragged her back; that she screamed and that he choked her and was in fact on top of her when timely assistance arrived; that when apprehended his trousers were entirely unbuttoned. From this evidence the inference is inescapable that accused intended to have sexual intercourse with Germaine, that she did not consent but resisted, and that he intended to overcome her resistance and to accomplish his purpose by the use of force. In seeking the motive of human conduct, the court is not limited to the direct evidence. Inferences and deductions may be drawn from human conduct when they flow naturally from the facts proved (Bull. JAG, Vol.II, No.5, May 1943, sec.451(2), p.188 (CM 233183, Gray, 19 B.R. 349)). This inference of accused's intent, furthermore, is justified in part, at least, by accused's plea of guilty of indecent abuse and maltreatment of this child in violation of Article of War 96.

> "Assault with intent to commit rape", the offense charged in this case, "is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished" (MCM, 1928, par.149l, p.179).
>
> "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.148b, p.165).

The evidence shows the presence of every element of assault with intent to commit rape, as thus defined.

There is some testimony that accused was under the influence of liquor at the time of the offense. But the evidence shows that the degree of his intoxication, if any, was not such as to render him unable to know what he was doing. He knew he was doing wrong, as evidenced by the fact that he ran when the officers approached. And he was in possession of his physical faculties to the extent that he ran so well as to escape at first. After this temporary escape his mind operated sufficiently clearly to cause him to attempt to hide. The court on this evidence was justified in rejecting the suggested defense of intoxication on the ground that accused's condition was not such, in any event, as to affect his mental capacity of entertaining the specific issue involved: the intent to have sexual intercourse through the use or employment of force as a means of overcoming resistance (MCM, 1928, par.126, p.135).

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6. The testimony of Captain Watts to the effect that he had to restrain his "noncoms and First Sergeant" to keep them from killing accused, at the time of his arrest (R18) was improper. This error was not prejudicial since the competent evidence was of such quantity and quality as to practically compel in the reasonable mind the finding of guilty (Bull. JAG, Vol.III, No.5, May 1944, sec.395(2), p.185, (CM 245724)).

7. Accused is 19 years old. He was inducted at New York City, New York, 25 October 1943. There was 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. Confinement at hard labor for twenty years is authorized, on conviction of the offense of assault with intent to commit rape, by the Table of Maximum Punishments (MCM, 1928, par.104c, p.99). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (AW 42; sec.276 Federal Criminal Code (18 USCA 455); Cir.229, WD, 8 Jun 1944, sec.II, pars. 1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 SEP 1944 TO: Commanding General, First United States Army, APO 230, U. S. Army.

1. In the case of Private DANIEL BOYCE (42049385), 3193rd Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3280. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3280).

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

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

BOARD OF REVIEW NO. 2

CM ETO 3283

31 AUG 1944

U N I T E D S T A T E S	)	2ND ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Headquarters 2nd Armored Division, 21 July 1944.
Private DAVID E. MASSEY (14047270), Battery "A", 92nd Armored Field Artillery Battalion.	)	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private David E. Massey, Battery "A", 92nd Armored Field Artillery Battalion, did, near le Pont Dillaye, Normandy, France, on or about 14 July 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with a ewe, the same being a beast.

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 wrongfully appropriating a truck and absence without leave for an hour and 20 minutes, in violation, respectively, of Articles of War 94 and 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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3. The uncontradicted evidence for the prosecution shows:

That accused is in the military service of the United States and was stationed with his unit in camp near the village of le Pont Dillaye, Normandy, France, on 14 July 1944. About six-thirty in the evening of that day (R4,9,10,11), he was discovered behind the barn of a farmhouse near the camp (R4,7) lying on top of a young female sheep (R5,7,8,10,12), which was on its back with its four feet in the air. Accused's head was "touching the chin of the sheep", and he was going through all the motions of intercourse. Technician Fifth Grade Sidney D. Gurnick, of accused's unit, approached within 20 yards and told accused to get off but accused "just waved me away" (R5). Because of the grass he could see accused only from the waist up (R6). "It looked as if he had been drinking because when he motioned me away his hand wasn't steady * * * his head waved from side to side" (R5). Madame Yvonne Rosalie, living in the farmhouse, through an interpreter, testified that on this day she saw a group of soldiers in the backyard and on going out to investigate, found accused,

> "his pants were open and he was holding the sheep in a position that was disgusting and the sheep was bleeding * * *. The sheep was more or less almost in a lying position and he was laying over the sheep in a position that would indicate that he was intending to perform sexual intercourse with the sheep. * * * The sheep had very much blood on the head and some over the wool and I don't believe the sheep had any on the back end."

She could not see the lower portion of accused's body (R7). Staff Sergeant Ollie C. Johnson, of accused's unit, at the same time of day, was driving down the road and saw a motion in the grass. On investigating, he found accused laying down beside a sheep and about 15 feet away three or four fellows were standing around. Before he got to accused a woman arrived who kicked accused. The sheep got up. He got accused up with difficulty. "He seemed to just want to lie there". His trousers were unbuttoned. Accused said he was ashamed and didn't want to go back to the battery and it was with considerable difficulty that he was put in the truck and returned to camp. He had been drinking but was not drunk (R12) and got out of the vehicle by himself (R13). There was a dark spot or stain on the front of his trousers about two inches below his belt which looked like dirt, and he was described by a witness who saw him at this time as "mildly drunk" (R10-11). He was placed in arrest at nine-thirty that evening (R13). At that time liquor could be smelled on his breath but he appeared sober (R14).

4. On being advised of his rights as a witness in his own behalf, accused stated that he desired to remain silent (R14).

5. "Sodomy consists of sexual connection with any brute animal" (MCM, 1928, par.149k, p.177). Penetration alone is sufficient. The direct evidence is complete except as to actual penetration. Accused lay on top of the female sheep, which was on its back, his trousers were unbuttoned and he was going through the motions of sexual intercourse. Blood was seen on the sheep's head and a dark stain was observed on the front of accused's trousers. He stated at the time that he was ashamed to return to his battery. The offense of sodomy, including penetration, requires strict proof, but circumstantial evidence may be sufficient (CM 191413, LaPointe, et al; CM ETO 705, Malone). Proof of the act of penetration need not be direct; such proof must be established beyond reasonable doubt, but this may be done by circumstantial evidence (CM 249224 (1944), Bull.JAG III (April), sec.450, p.147).

> "When evidence is of sufficient probative force, a crime may be established by circumstantial evidence, provided that there is positive proof of the facts from which the inference of guilt is to be drawn and that that inference is the only one which can reasonably be drawn from those facts" (People v. Razczicz, 99 N.E.557,564).

> "Whatever may be established by direct, may be established by circumstantial evidence in criminal cases. Only few convictions could be had if direct testimony of eye-witnesses were required and the rule is one of necessity" (20 Am.Juris.273).

However, though apparently there were numerous spectators and when accused arose from the ground his trousers were unbuttoned, none saw his person exposed. Madame Rosalie was close enough to administer a kick to accused. She described the appearance of the sheep as having blood on its head and wool, but she saw none on its back end. She states that their position would indicate that he intended to perform sexual intercourse with the sheep, which got up while both she and Sergeant Johnson were at the scene. There was a stain on the front of accused's trousers but it looked like dirt. The evidence is compelling that accused attempted to commit sodomy with the sheep. There is no direct evidence that he succeeded in doing so and the circumstances established, while susceptible of being construed as indicating that he did actually succeed in his attempt, are not such as to preclude a reasonable infer-

ence that he did not.

In the opinion of the Board of Review, the evidence supports only a finding of the lesser included offense of attempting to commit sodomy.

6. The charge sheet shows accused to be 21 years of age. Without prior service, he enlisted at Fort McPherson, Georgia, 25 February 1941, to serve for three years.

7. The court was legally constituted and had jurisdiction of the person and offense. Except as above 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 a finding of guilty of an attempt to commit sodomy in violation of Article of War 96.

8. Confinement for five years, not in a penitentiary, is authorized for an attempt to commit sodomy (CM 209651, Palmer-Morrell; CM 212056, Smith; CM ETO 2717, Quenn).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 31 AUG 1944 TO: Commanding General, 2nd Armored Division, APO 252, U. S. Army.

1. In the case of Private DAVID E. MASSEY (14047270), Battery "A", 92nd Armored Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support findings of guilty of the lesser included offense of attempt to commit sodomy, in violation of Article of War 96, and the sentence of confinement for five years in a place other than a penitentiary, 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 Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, should be designated as the place of confinement.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3283. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3283).

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

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

BOARD OF REVIEW NO. 2

23 SEP 1944

CM ETO 3292

U N I T E D S T A T E S)	WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	
First Lieutenant EDWARD FELIX PILAT (0-1001877), 584th Army Postal Unit, Adjutant General's Department.)	Trial by GCM, convened at Chester, Cheshire, England, 26 June 1944. Sentence: Dismissal.

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

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

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

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

Specification: In that First Lieutenant Edward F. Pilat, AGD, 584th Army Postal Unit, did, at Swansea, Glamorganshire, South Wales, on or about 15 February 1944, wrongfully take from the mail of the United States, a sealed package addressed to The Chief Quartermaster, ETO, containing one (1) field jacket, one (1) bush jacket, and one (1) trench coat.

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

Specification: In that * * * did, at Swansea, Glamorganshire, South Wales, on or about 15 February 1944, wrongfully take and withhold

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from the rightful possession of the owner thereof, without his consent, one (1) bush jacket, one (1) trench coat, and one (1) field jacket, of the value of about forty-five dollars ($45.00), the property of the United States.

He pleaded not guilty to and was found guilty of the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding Officer, Western Base Section, Communications Zone, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, disapproved so much of the findings of guilty of the Specification of Charge II as finds the property wrongfully taken and withheld to be of a value of about forty-five dollars ($45.00), confirmed the sentence but remitted that portion thereof adjudging forfeiture of all pay and allowances due or to become due, and withheld the order directing the execution of the sentence pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution, in substance, shows: That at the time mentioned in the specifications, accused was a First Lieutenant in the Adjutant General's Department and commanding officer of the 584th Army Postal Unit located at Swansea, England (R8-9,11-12,18). Technician Fifth Grade Francis J. Barrett, of the same unit, was a truck driver in charge of the unloading of mail at the docks and checking the incoming mail from the states (R11). On 15 February 1944, "incoming mail from the states" was being unloaded from a ship at APO 584. Out of the hold came a package that was not in a mail sack. This was "the first time" that Francis J. Barrett, a witness, who had been with the 584th Army Postal Unit about a year, "had ever seen any come that way". According to Barrett it was an "outside piece" and "the only address that was visible on it" was "To the Port Postal Officer"; and "Usually a package coming off the ship has a double label on it and is addressed to someone; I mean a unit designation or a code number, and this one was just to the port postal officer" (R11-13). Barrett again saw this package in accused's office "the next day or a day or two later", at which time the wrapping had been removed from it (R12).

Technician Fifth Grade George H. Newcomb, who had been a member of the 584th Army Postal Unit since its activation in June 1943, testified that sometime during the period 15 February to 1 March, while he was working in the post office, accused came "out on the floor with what seemed to be a trench coat" and showed it to witness. It was too big for accused and was a coat witness had not seen before. He also observed in accused's office during this period a carton containing some articles of clothing, one of which "seemed to be a short jacket, fur-lined" (R14). "* * * on the carton was the address of a General Littlejohn, and on the wrapper, it was a label, several inches long,

not square, but oblong, and it was, I think, 'To Postal Officer, Port of Embarkation'." It was a printed wrapper with "U. S. Mail" on it. Witness identified a label shown to him as "either that label or one identical to it", except the "white paper wrapper wasn't pulled loose", just enough torn to show an address, about two inches of the middle of the label had been torn down. The address under the label readable at that time was, "Chief Quartermaster, APO 887". The name "General Littlejohn" was stencilled or on a label also on the carton. He remembered the name because of its being unusual. He identified an article of clothing shown him as one he had seen "in the box" he had just testified about (R15) and which he had once seen accused wearing. Witness was positive he had seen the name "General Littlejohn" on the top of the carton itself (R16-17).

The court took judicial notice of the fact that Major General Robert M. Littlejohn was and has been since 8 June 1942, "Chief of Quartermaster, ETO", and also of War Department Memorandum No. W340-28-43, dated 25 April 1943, entitled, "Disposition of Articles Found Loose in the Mails and the Contents of Undeliverable Parcels", and of Postal Circular No. 33, dated 13 May 1943, or so much thereof as deals with disposition of articles found loose in the mails and the contents of undeliverable parcels (R17).

Colonel M. D. Woodworth, Inspector General's Department, Western Base Section, on 27 May 1944, upon investigating a report received, that accused had removed some clothing from the mails at "APO 584", found accused in bed in his quarters because of a severe cold. He testified that he informed accused of his mission and of the allegations of which accused "readily admitted the truthfulness" and stated he had the clothing in question in his possession, pointing out two garments which, with others, were lying over a chair and appeared to have been just recently removed. He stated the other garment was hanging on a clothes rack at the foot of his bed (R18). Prior to being questioned, accused was warned of his rights. He then told of the arrival of this package, that not knowing what to do with it, it being addressed only to the Postal Officer, he opened it and found these three articles of wearing apparel. He kept the package around the office for a couple of weeks, when, having a cold, he decided to and did wear two of the garments, the trench coat and the field jacket, from that time until the date of the interview, 27 May. He admitted he did not report the incident to either the army or postal authorities or to anyone. He didn't know what to do with the garments but similar parcels since received he had sent to the sorting shed. He stated that he opened the parcel and tried the garments on and found them to be his size and had made no effort to find or deliver them to the rightful owner. Witness identified Prosecution's Exhibit No. 2, consisting of a piece of brown wrapping paper, a War Department envelope or white piece of paper bearing the penalty clause on it, and a label indicating "U. S. Mail, U. S. Army Forces", as having been first described to him by accused and delivered to witness by accused's company clerk Barrett. The label, "U. S. Mail" was firmly pasted down all over.

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Accused stated he knew he should have sent the parcel to some higher office for delivery and admitted he had not ordered "such garments". One of the garments bore "what might be termed the manufacturer's tag inside, the Philadelphia Quartermaster Depot". He admitted the articles resembled officer's wearing apparel but had not thought of their being government property (R19-20). Witness identified Prosecution's Exhibit No. 1 as a "U. S. Army" officer's trench coat, which he had seen on a chair in accused's room on 27 May 1944, as well as the field jacket, Prosecution's Exhibit No. 3, and the garment accused called a "bush jacket", which he had seen hanging on the clothes rack in accused's room on the same occasion. The label in the pocket of Exhibit No. 4 reads, "Philadelphia", abbreviated, "Quartermaster Depot. Inspected by B" (R21). Exhibits No. 1 and No. 3 were soiled and appeared to be "much the same condition as when I first saw" them. The label was torn away when witness first saw it (R22). Accused stated he had no excuse to offer for his acts other than ignorance. In the opinion of witness, the parcel could not be handled without seeing the upper label without being negligent (R23).

Second Lieutenant Alverne Stanley Anderson, First Group Regulating Stations, testified that accused had been in his office several times during the latter part of February wearing a jacket "different from any other one that I had seen", and stated to witness that "someone in Washington, D. C. had sent it to him" (R24-25).

Staff Sergeant Walter D. Calnan, 584th Postal Unit, testified that he had seen accused wearing a fur-lined jacket during the latter part of February, similar to Prosecution's Exhibit No. 3, as well as a trench coat similar to Prosecution's Exhibit No. 1 (R26).

First Lieutenant Harry A. Landon, Quartermaster Corps, Headquarters, Western Base Section, testified that he had been a quartermaster officer since 18 June 1943, prior to which time he had for 15 years been a clothing manufacturer and had manufactured clothing for the army during 1942 and had worked in the Philadelphia Quartermaster Depot as clothing inspector and supervising the contracts of clothing there (R26-27). That the trench coat (Pros.Ex.1) had a liner of wind-resistant poplin "definitely government material" and that the coat was of a type "similar to those made by the government"; and that Prosecution's Exhibit No. 4 was a "jacket, field, M-1943 * * * one of the latest garments made to government specifications for the army * * * definitely government property" (R26,27).

4. For the defense, Lieutenant Colonel R. E. Hartigan, commanding officer of First Base Post Office for two years, and of accused, testified that he observed the mail daily, and that he had never before seen a package come in addressed in the manner evidenced by Prosecution's Exhibit 2. He said that if he had received the package he would have sent it to the Chief Quartermaster, "ETO", or would have opened it to see if there was any invoice on the inside. He said: "We get a lot of mail addressed to commanding officers * * * and we have the authority toopen the mail in an effort to locate the

proper addressee". He also said there was nothing on the label, including the number thereon, which would give a "lead" where the package was to go. He testified that accused had served under him for "approximately a month and a half" as a postal officer and that he rated him excellent. Four other officers who had known accused for periods ranging from two to six months, testified, in similar capacity, for accused. He carried out his duties as Assistant Adjutant of the First Base Post Office in a proficient manner (R30). There was no reason to doubt his honor or integrity (R28,31). He was an asset to his organization (R31). As Class A agent for the finance disbursing officer for his area accused handled approximately $4,000 per day and his accounts were in order (R31-32). Accused's immediate superior had known him for six months and testified that his reputation for integrity was beyondreproach (R33,34).

Accused, after being advised by the court as to his rights as a witness, testified that in civilian life he had been a postal clerk at Chicago, Illinois, for about seven years. He entered the army 16 March 1942. After completion of his basic training he rose to first sergeant, attended officer candidate school, and was commissioned 24 February 1943. He related that about the middle of February (1944), a ship pulled into Swansea harbor, and being the closest postal officer it was his duty to see that the mail was forwarded to the sorting shed (R35,36). He continued:

> "During the course of unloading the mail, an outside parcel appeared. An outside parcel is a parcel that is not sacked. This parcel was the first parcel of its kind that had come over. I had handled about a half-dozen ships previous to that time, and all the mail in those previous ships was in sacks. That was the first time an outside parcel had appeared, and it stumped me. When the net was coming up with this parcel on top, I stopped the net and took the parcel off and examined it superficially. One of the mates was checking the mail off the ship at the same time that one of my men was there. I asked this mate if he knew anything about the disposition of this parcel. He said, 'No,' he didn't. I checked the waybills which accompany every shipment of mail, and there was no indication on those waybills of the disposition of this parcel. The address was not clear to me. I took the parcel to the APO and opened it, hoping to find a better address on the inside. Unable to do so, I let the parcel stay in my office, hoping that some instructions would come for it. None came. About two weeks later, I got a terrific cold. And in a loose moment,

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> I took this field jacket, and I wore it for a few days. Nothing had happened up to that point as to the proper disposition of the parcel" (R 36).

Accused said he held on to the carton for about two weeks.

> "There was no label on it. There was some writing on it. Writing that had obviously been used in the States for forwarding the package from station to station. There were several addresses that had been written over and scratched out again and again" (R36).

With reference to Prosecution's Exhibit 2, accused said he had not been able to read "Chief Quartermaster, ETO, APO 887" on the label when he had the package "back in February". He held on to the label intending to forward the parcel when instructions came in (R36,37). He opened the parcel in the presence of two persons, he believed (R37). On cross-examination, accused identified Prosecution's Exhibits 1, 3 and 4 as "the garments that came out of the package in question" (R37, 38). He admitted that he could read the "ETO" on the label and the words in front of that partially. He knew the package had a destination and that he had told someone that the garments had been sent to him by someone in the Quartermaster in Washington. He admitted he knew that the parcel was United States mail (R37-38). He said he "suspected" that the garments or some of them were government property (R39). He asserted that it was Lieutenant Colonel Woodworth who tore back the top label enabling him to read the complete address on the label underneath (R40). He destroyed the carton after about two weeks as "it was gathering dust in my office and occupying a lot of space" (R38).

5. From the undisputed evidence it appears that a parcel arrived at accused's APO station on 15 February 1944, that this package was marked "Deliver to Postal Officer", and it was delivered to accused as such. He opened it publicly, and found therein three garments the property of the United States. On the carton, under the wrapper, was the name of a "General Littlejohn". After two weeks accused commenced wearing two of these garments. He retained all three until the last of May. From the testimony and from Prosecution's Exhibit No. 2 itself, it does not appear that there was any complete visible address of definite character on the parcel, other than that of "Postal Officer", to enable proper disposition, but there was enough of a partially covered address visible above the top of the label to give notice to one handling the parcel unless they were negligent. War Department Memorandum No. W340-28-43, dated 25 April 1943, covers the disposition of articles found loose in the mails and the contents of undeliverable parcels. It reads, in part, that such parcels,

"if undeliverable to the addressee, the Post Office Department has granted authority to the Army Postal Service at points outside the continental United States to turn over to the ranking special service officer of the theater involved the following, except when the articles or contents are of unusual value:

* * * * *

b. Contents of ordinary undeliverable parcels".

Postal Circular No. 33, dated 13 May 1943, and in force at the time of the incident herein, covers, among other things, the disposition of articles found loose in the mails and the contents of undeliverable parcels. It calls the attention of all postal officers to Memorandum No. W340-28-43, dated 25 April 1943, and provides that

"In order to centralize the work of recording and disposing of the articles and parcels described in the cited memorandum, all APOs will dispatch such matter to 1st Base Post Office", (underscoring supplied)

and also that

"Postal officers will give this subject close attention to the end that strict compliance is had with these instructions".

6. The Specification of Charge I alleges that accused wrongfully took from the mail of the United States a sealed package addressed to the Chief Quartermaster, European Theater of Operations, containing certain specified wearing apparel. As postal officer in charge, his original receipt of the parcel was not a taking from the mail. His duty was to forward such mail to the First Base Post Office on failure or inability to deliver it to an addressee. When he removed the garments from the package and used them, his custody and possession as a postal officer ceased and such act became a wrongful taking from the mails of the United States, a breach of official trust and properly punishable under Article of War 95 (Winthrop's Military Law and Precedents, Reprint, p.714). The reference to the package as "sealed" in the Specification, Charge I, was obviously a mere matter of description. The fact that the proof shows that accused may have unsealed the package before wrongfully abstracting it from the mail involves no essential variance between allegation and proof. It is unnecessary to decide whether the parcel was under the control of the United States Post Office Department or of the Army Postal Service. The statements of accused to Colonel Woodworth were properly admitted and accused stated he never doubted that the package was United States mail. In either case, he was not misled by the specification and his guilt would be the same. The Board of Review is of the opinion that the evidence fully supports the finding of guilty of Charge I and its Specification.

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7. The Specification of Charge II alleges that accused "wrongfully took and withheld" from the owner, without permission, certain property of the United States worth $45.00. This states an offense in violation of Article of War 96, the article under which the charge is laid (Dig.Ops.JAG, 1912-1940, sec.451(40), p.325, CM 193315, Rosborough, 2 B.R. 83). The offense charged is not larceny, since there is no allegation of an intent to permanently deprive the owner of the possession of the property. Nor is the offense embezzlement since the specification contains no averment of any fiduciary relationship in respect to the property (Dig.Ops.JAG, 1912-1940, sec.451(16), p.316, CM 115684). The offense alleged was proved without dispute, except that no evidence was offered as to the value of the garments. However, they were new when wrongfully taken. They were before the court and, although the court was not justified in finding them to be of specific value, it could have been inferred, under the circumstances, that they were of some value (Dig.Ops. JAG, 1912-1940, sec.451(42), p.326, CM 199285, Branum, 3 B.R. 349). The confirming authority by his action disapproved so much of the findings of guilty of the specification as finds the property wrongfully taken to be of the value of $45.00. No other value was substituted. However, the property was alleged and proved to have been property of the United States. It was obviously of some value. Furthermore, since the offense of taking United States personal property with intent to convert to accused's own use, in violation of section 46 of the United States Criminal Code (18 USC 99), does not depend upon the property being of any value (Donegan v. U.S., 287 F 641; Jolly v. U.S., 170 U.S. 402), it follows that an offense similar in nature but of less gravity, not involving the intent to permanently deprive, does not require any allegation or proof as to the value of the property taken.

8. Accused is 31 years old. He was inducted 16 March 1942. He was commissioned Second Lieutenant 24 February 1943 and promoted to First Lieutenant 11 October 1943. He had no prior service.

Attached to the record of trial is a plea for clemency signed by four of the seven members of the court present when accused was tried. This plea comments on accused's character prior to the instant occurrence as "excellent" and on his military record as indicating "a consistent demonstration of diligence and efficiency", and recommends that the total forfeitures be remitted.

The Staff Judge Advocate, Western Base Section, in his review recommended that the reviewing authority write the confirming authority "urging that the sentence be reduced to provide for the forfeiture of $75.00 per month for six months only and that the findings of guilty to Charge I, AW 95, and the Specification thereunder, be disapproved".

9. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial, except as noted

above. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of dismissal of an officer is mandatory upon conviction of an offense under Article of War 95 and may properly be imposed upon a conviction under Article of War 96.

C. Fitzhugh Van Buren Judge Advocate

Sick in Quarters Judge Advocate

Benjamin R. Sleeper Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 23 SEP 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of First Lieutenant EDWARD FELIX PILAT (O-1001877), 584th Army Postal Unit, Adjutant General's 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, 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 3292. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3292).

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

(Sentence ordered executed. GCMO 88, ETO, 12 Oct 1944)

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

(171)

BOARD OF REVIEW NO. 2

CM ETO 3300

1 SEP 1944

U N I T E D S T A T E S	)	IX TACTICAL AIR COMMAND
	)	
v.	)	Trial by GCM, convened at Headquarters, IX Tactical Air Command, APO 595, 17 July 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 50 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private CECIL H. SNYDER (35404299), 64th Airdrome Squadron.	)	

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

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

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

CHARGE: Violation of the 64th Article of War.

Specification 1: In that Private Cecil H. Snyder, 64th Airdrome Squadron, IX Tactical Air Command, did at Site # A-7, Fontenay-Sur-Mer, France, on or about 28 June 1944 strike Captain Tobe S. Eberley, his superior officer who was then in the execution of his office, on the head with his fist.

Specification 2: In that * * * did at Site # A-7, Fontenay-Sur-Mer, France, on or about 28 June 1944 lift up a weapon, to wit a rifle, against Captain Tobe S. Eberley, his superior officer who was then in the execution of his office.

Specification 3: In that * * * having received a lawful command from Captain Tobe S. Eberley, his superior officer, to go to his tent, did at Site # A-7, Fontenay-Sur-Mer, France, on or about 28 June 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and specifications. Evidence was introduced of two previous convictions by special court, one for striking a noncommissioned officer on his face with his fist, and failing to obey a lawful order given by a first lieutenant, in violation of Articles of War 65 and 96, and one for stealing a bicycle, in violation of Article of War 93. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 50 years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that, while it was still daylight, at about 10:30 p.m. 28 June 1944, Captain Tobe S. Eberley, Squadron Surgeon, 64th Airdrome Squadron, returned to his squadron's bivouac area, in a jeep with three enlisted men (R7). Before any of them alighted, and while Captain Eberley was examining a weapon, accused walked up to the jeep and "offered some kind of greeting" (R7-8). Captain Eberley was preoccupied and "didn't particularly" respond. Then, according to the Captain's testimony, accused inquired "if I were going to be a man or a prick as I had always been. * * * Then he raised his rifle in his hands and pointed it at me. I got out of the jeep and asked him if he realized what he was doing. He said he didn't give a damn what he was doing" (R8).

> "I told him definitely to put the gun down. At this juncture he said he wasn't going to take any orders from any officers and was particularly going to shoot Captain Duvall, Sgt. Pocernich and myself /all members of accused's organization/ * * * At that time I noticed him flip the safety off the gun with his right thumb. * * * It was pointed directly at me /for three or four minutes/. I told him several times to put the gun down which he did not do immediately. All the time during this time he was cursing the officers of the organization and the mess sergeant who was his immediate superior non-commissioned officer.... that he was overworked and that he was so overdone and that he wasn't going to do anymore work."

When he finally laid the gun on the ground and approached Captain Eberley, the latter "told him at this juncture to go to bed and I would see him in the morning".

> "I started toward my tent and he followed me. He started swinging his fists wildly and struck me several times. I told him definitely I wasn't going to hit him and told him to go to bed again. Private DiBattista walked up to the rifle and was working the bolt with his feet and kicking the cartridges out. Private Snyder saw this and turned and rushed toward Private Dibattista and picked up the rifle again and told him he would kill him too" (R9).

> * * *

> "At that juncture I walked up because Pvt DiBattista was unslinging his rifle and I told him to back away that I thought I could handle the situation. Private Snyder worked the bolt rather fumblingly several times and I didn't know whether there was a shell in the chamber or not as he had the face of the gun in this position. I couldn't see whether he had a shell in the chamber or not. I told him at that juncture again to put the gun down. He dropped the gun and started after me again, swinging his fists and this time hitting me in the head and knocking my headgear to the ground. * * * (R9-10)

> "I saw no signs of acute alcoholism....just a swaggering gait and slurring speech" (R10).

According to the testimony of Captain Russell R. Duvall, however, accused was obviously drinking fifteen or twenty minutes earlier, when Captain Duvall summoned accused to reprimand him for firing a gun in the vicinity of the supply tent. "I told him to put the gun away and and go to his tent and sleep it off", Captain Duvall testified. On cross-examination he elucidated, "I don't know whether he was drinking heavily....but he was drinking some. He was cursing loudly." Captain Duvall had known accused for more than a year and normally he was "definitely not" that loud (R12-13).

While Captain Eberley testified that he did not tell accused where to go to bed but "just told him to go to bed", other witnesses testified that the Captain told accused to go to his tent, as alleged (R24,26). Captain Eberley's testimony is uncontradicted and is corroborated, in all essentials, by the testimony of various unimpeached

eyewitnesses to one phase or another of the encounter between Captain Eberley and accused, during the course of which all the offenses charged were committed (R11-27).

4. No evidence was presented on behalf of the defense and accused, after due explanation of his rights, elected to remain silent (R27-28).

5. Specifications 1, 2 and 3 of the Charge allege, respectively, that accused (1) struck, (2) lifted up a weapon against and (3) willfully disobeyed his superior officer. Each offense was established by clear and uncontradicted testimony. While each offense undoubtedly constituted a phase of what was substantially one transaction, involving a relatively prolonged outburst of violent insubordination on the part of accused, sufficient doubt existed as to which phase presented the most serious aspect of accused's insubordination on the occasion in question to warrant making the "one transaction" the basis of the three specifications (MCM, 1928, par.27, p.17). The evidence supports the findings of guilty. As for the sentence, it is less than the maximum authorized upon conviction of any one of the three specifications and the Charge.

6. After Captain Eberley had testified to previous trouble with accused (R10-11), the court improperly sustained the prosecution's objection to defense counsel's question propounded to Captain Eberley for the purpose of eliciting from the witness a brief statement of "the occurrences which provoked this trouble".

> "In the criminal action instituted on a charge of assault and battery * * * It is proper, also, to ask the prosecuting witness as to the motive for the assault, and the defendant himself may testify as to his own motive. On questions of intent and motive, courts admit evidence of former difficulties, but the rule varies as to the circumstances of such difficulties. Thus, in some jurisdictions, while the fact of a former difficulty is relevant, the circumstances are excluded, but a larger number admit the circumstances as well. On the defense, the accused may give evidence of declarations of ill-will by the prosecutor before the assault, and of his former difficulties with him" (Wharton's Criminal Evidence, sec.250, pp.295-296).

In view of the manifestations of rank and violent insubordination involved in the offenses charged in the instant case, in time of war and in an active theater of operations, the Board of Review is of the opinion that the record does not show that any substantial right of accused was injuriously affected by the error noted.

6. The charge sheet shows that accused is 33 years and one month of age, and that, with no prior service, he was inducted at Columbus, Ohio, 18 May 1942, to serve for the duration of the war and six months.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General, with the European Theater of Operations. 1 SEP 1944 TO: Commanding General, IX Tactical Air Command, APO 595, U. S. Army.

1. In the case of Private CECIL H. SNYDER (35404299), 64th Airdrome Squadron, 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 sentence, under the circumstances shown by the record of trial, appears excessive in comparison with sentences recently approved in similar cases. Accused was drinking and his three offenses constituted separate phases of what was substantially one transaction. This case will be re-examined in Washington, and the sentence, I believe, considerably reduced. In order to comply with instructions from the Commanding General, European Theater of Operations, with reference to uniformity of sentences, directing me to take action to forestall criticism of this theater for returning prisoners to the United States under sentences deemed there to require the exercise of immediate clemency action by the War Department, I recommend that you reconsider the sentence with a view to reducing the term of confinement. If this be done, the signed action should be returned to this office to be filed with the record of trial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3300. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3300).

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

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

BOARD OF REVIEW NO. 1

CM ETO 3301

24 AUG 1944

UNITED STATES	1ST INFANTRY DIVISION.
v.	Trial by GCM, convened at Bricquesville, Calvados, France, 17-18 July 1944.
First Lieutenant ELLSWORTH F. STOHLMANN (O-379484), 26th Infantry.	Sentence: Dismissal, total forfeitures and confinement at hard labor for 30 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 75th Article of War.
Specification 1: In that First Lieutenant Ellsworth F. Stohlmann, 26th Infantry, did, in the vicinity of Le Repas, Calvados, France, on or about 7 July 1944, while before the enemy, by his misconduct endanger the safety of his company which it was his duty to defend, in that, he left his company, which was in a defensive position, and remained absent for several hours.
Specification 2: In the * * *, did, in the vicinity of Le Repas, Calvados, France, on or about 7 July 1944, while before the enemy, by his misconduct endanger the safety of his company which it was his duty to defend, in that he transported and brought a quantity of intoxicating liquor into his Company area and made said intoxicating liquor available to the enlisted men under his command.

CHARGE II: Violation of the 85th Article of War.
Specification: In that * * *, was, in the vicinity of Le Repas, Calvados, France, on or about 7 July 1944, found drunk while on duty as a company officer of Company B, 26th Infantry.

He pleaded not guilty to and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was originally 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. On the day following trial, 18 July 1944, the court re-convened "on motion of the President", for the purpose of correcting its previously announced sentence. The court revoked the former sentence and, three-fourths of the members of the court present when the vote was taken concurring, sentenced accused to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 30 years. The reviewing authority, the Commanding General, 1st Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, d esignated 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 the provisions of Article of War 50½.

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

On 7 July 1944 the 4th (weapons) platoon, Company B, 26th Infantry, 1st Infantry Division, was stationed near Le Repas, France. The platoon, which moved into its position the previous evening, was composed of 36 men divided into a mortar section and a light machine gun section. Accused, who had been a member of Company B for approximately two weeks prior to 7 July, formerly commanded the platoon but was relieved of command on 7 July by First Lieutenant Herbert H. Zollweg (erroneously named Zollman, (R5)). Zollweg was directly responsible for the "supporting weapons" of Company B, and accused was second in command of the platoon (R5-6,10-11,17,22). The company was in a defensive position and in direct contact with enemy troops who, at the nearest point, were 75-100 yards away. The men were subjected to enemy artillery, mortar and machine gun fire, and "anyone that was foolish enough to move would get shot at". The platoon "occupied an area about 100 yards wide for the mortars", which were set back about 900 yards from the enemy. The machine guns "were about 600 yards and our observation post was 200 yards away" (R6,19). The company sector ran in a south-north direction and the observation post to which reference was made in the evidence, was on the right side of this sector. Lieutenant Zollweg when questioned testified that in his opinion the limitations of the observation post area were about "500 yards outside the company boundary". Captain Charles W. Seton, Company B, 26th Infantry testified that in his opinion the limitations of the observation post area were

"Not more than 200 yards to the left and not more than 300 yards to the right as we faced the enemy" (R8,18-19).

Lieutenant Zollweg first saw accused on the morning of 7 July (about 10:00 a.m.) when the latter returned from the observation post where he "had gone to zero in the mortars". He told Zollweg that the telephone was not operating. Zollweg later went to the observation post "to zero in the mortars" and met accused coming down the trail with a runner, Private First Class Irving R. Levitt, Company B, 26th Infantry. Accused said he was going to look for a new observation post (R7). He was on duty during the day and had no permission to be off duty except to look for the new post. After he departed, he did not at any time report to Zollweg the location or establishment of a new observation post (R10). Zollweg made no effort to stop accused and felt that if the latter desired to look for a new observation post "it was all right" (R9). About 1:30 p.m. the platoon sergeant reported to Zollweg that accused and the runner "were not in the chow line at 12:30" and that they had not returned to the area (R8).

After meeting Zollweg about 10:00 a.m., accused and Levitt left to seek the new post. After proceeding a certain distance accused said that there was a village 1000 yards to their left. The two men entered the shell-torn village (Livry), and inspected several buildings. They remained in the town three or four hours during which time no effort was made to find an observation post. Accused remarked that he was looking for something to drink and a search for liquor was conducted. In one of the buildings they found a barrel containing an intoxicating liquor. Levitt testified that

"It was much stronger than any whiskey that I ever tasted. * * * I believe it was cognac or Calvados. I think that is what the French call it".

They found a clay jug of about a three-gallon capacity and filled it. No liquor was consumed on the spot - "Not more than to taste it and to find out what it was." Accused started to carry the jug on his shoulder, but they later "put a stick through it" and carried it between them. They returned to the company area and the jug was placed in the weapons platoon area, near the area of the mortar section. Levitt testified that in his opinion accused was not drunk when they returned, and witness "couldn't say that he was drunk" when he next saw him in the area about 8:00 p.m. Levitt believed the town was outside the 1st Division area because he saw in its vicinity some members of the 5th Armored Division, and there were no armored units in his area (R12-16).

About 3:00 p.m. Captain Seton called the weapons platoon, asked if accused had returned, and upon being informed that he "had just shown up", Seton directed the operator to have accused report to him at the command post. Accused, in reply to Seton's inquiry, said that he had been

"off to the left of the company sector" and pointed on a map to a town which was "definitely to the left front of our position and which the enemy held". Seton told him "to look again" and accused pointed to the town of Livry. Upon further questioning, Seton discovered that accused had passed through the 2nd Armored Division area and that the town "had been gone through by American troops". Livry was not in the 1st Infantry Division sector and was about one and three-quarters miles from accused's organization. The nearest American troops were one and one-half miles from the town. Seton testified that he smelled intoxicating liquor on accused's breath and that his actions indicated that he was under the influence of liquor because

> "When he pointed out the town he had been to on the map, he seemed very clumsy and didn't seem to know".

Seton took no action and sent accused back to his position. His condition was such that Seton would not have given him a tactical order (R17-18,23-24).

About 4:00 p.m. accused and Levitt were seen bringing the jug into the platoon area (R30,37-38). When the jug was put on the ground several men were standing around. Accused said that the jug contained cognac, asked the men if they wanted a drink and told them to take what they wanted (R31,33). "Quite a few" of the men accepted the offer and the job remained in the area two or three hours (R31-32,38). A number of bottles were around the jug (R34-35). One witness testified that the liquor

> "tasted like cognac or applejack . . . strong applejack" (R31).

> "At first it was straight and then it was too strong and we started to mix it" (R33).

Another testified that the liquor was "very strong" (R35), and a third testified that it was stronger than whiskey (R37). Accused was pouring the liquor and offering drinks to the men (R32), and was seen to take some drinks himself (R31-32,35,37-38). Three soldiers became intoxicated. The condition of a Corporal Carr was "Very sad" and such that one witness doubted that Carr was able to perform his duties. Carr poured some liquor into a bottle and wanted accused to drink with him in Carr's dug-out. The corporal could not walk straight. "We wouldn't let him go to chow that night because the company commander might have seen him". A Private Bear "went out like a light. They put him in his hole". A Private Plucow also became intoxicated (R32,35-36,38). About 6:30 p.m. accused was staggering and he spoke with "quite a drawl" (R32-33). Asked if he would have obeyed any tactical orders which may have been given by accused, one witness testified

> "If it meant my having to take a risk on my life, I wouldn't. I would have checked further. * * * I doubt if his mind would have been very clear" (R33).

When accused was called away the jug was taken to his quarters (R33).

About 7:00 p.m. he approached Lieutenant Zollweg who was working on his fox hole, said that there was mail to censor and asked who was to do it. Zollweg ordered accused to censor the mail but he refused to do so and said that he would censor half of it. "This led to an argument about who would censor it" and Zollweg finally told him to forget it and to see him the next day (R7). Accused took half of the mail, threw the rest on the ground and walked away unsteadily (R29). His breath smelled of liquor and he talked louder than usual (R7,11,29). He was normally quiet and co-operative and Zollweg testified that in his opinion accused had been drinking and was under the influence of liquor because he was so argumentative (R7-8,10). Zollweg further testified that accused

> "knew what he was doing and he certainly knew what he was saying. To me he appeared as though he had been having a few drinks. It was not to the degree that he was perfectly out" (R11).

Asked whether accused could have followed out any order given him, Zollweg testified:

> "That depends on the nature of the order.
> Q. What do you mean by that.
> A. Considering the position we were in, I would not have given him any order. I don't believe he could have carried them out the way I wanted them c arried out.
> Q. If a fire mission had come in, would you have turned it over to him?
> A. No, sir." (R11).

Zollweg did, however, order him to censor the mail (R10).

Accused then approached Captain Seton and First Lieutenant Edgar Simon, both of Company B, and told Seton of his argument with Zollweg about the censorship of the mail. Seton replied that accused was to obey orders given him by Zollweg and ordered him to censor the mail. Accused's breath smelled of liquor. His face was flushed, his eyes were bloodshot and he seemed to be in an argumentative mood. His speech was thick.

> "He spoke in a slow, stumbling speech in a way of a man who had to think of every word he was going to say".

Simon told him to send him "the disputed part" of the mail and said that he (Simon) would censor it. Accused replied that he was not a runner and said "I won't discuss it with you. You think I am drunk, don't you". Simon replied "No. I don't think you are drunk. * * * I can smell your breath and you are not being rational". Seton then told accused he would see him in the morning (R19-21,23,25-28).

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Seton testified that in his opinion accused was drunk, and that in order to censor mail accused should be in full possession of his faculties. Although he ordered accused to censor the mail, Seton differentiated "at that time" between an administrative and a tactical order. He believed accused was able to censor mail because "he had censored half of the mail at the time that he wanted to straighten it out" (R20-21,23). However, Seton did not believe accused was capable of performing his duties in the weapons platoon,

> "he wouldn't be able to give any comprehensive orders in case of a fire order. He would not be able to give any orders to get the ammunition that we require up to the mortars. The fact that he had been drinking was leading him to be belligerent rather than normal" (R20).

Simon testified he would not say accused was drunk but that he was under the influence of liquor. He was not capable of performing his duties in the weapons platoon.

> "Any of his men would know that he had been drinking. The men must trust their officers and I believe that they would not like to take orders from an officer whom they could not trust completely".

Asked if accused was capable of performing a fire mission or of taking care of any tactical situation which might have arisen, Simon testified that he did not think accused could do it as capably "as he could if he had been sober" (R26). He believed accused capable, however, of censoring the mail (R27).

Accused was on duty during the entire period concerned, had no permission to be off duty, and was not authorized to leave the organization section or go to Livry. He had not been relieved of any of his duties (R8-10,20-21,23). No members of the company had ever been to Livry before, but no orders were issued restricting the men to the company area. Seton did not authorize him to introduce liquor into the organization, although no order was issued forbidding the bringing of liquor into the area (R22,24).

4. For the defense, Staff Sergeant James Cunningham, Company B, 26th Infantry, who lived in the same dug-out with accused, testified that he observed him in the area when men were drunk. He saw him two or three times between 2-5:00 p.m. and last saw him about 9:30 p.m. He appeared to have "had a little to drink but I couldn't be sure", Cunningham "wouldn't say he was drunk" (R39-40).

Accused, after being warned of his rights, testified that he was not satisfied with the location of the observation post and reported his

reasons to the platoon leader (Lieutenant Zollweg). Accused asked Levitt to accompany him on the search for the new post, later met Zollweg and informed him where he was going. Zollweg replied "All right", and suggested that they might be forced to establish the post "in a draw" (R41-42). Accused and Levitt departed, inspected two houses on the road but as they were unsuitable for use as an observation post, they went on and inspected the whole area. He finally concluded that the best observation post was in the area where the organization was situated. He saw a town about 1000 yards to the left and suggested to Levitt that they "take a look at it". Upon inquiry, troops of the 2nd Armored Division assured accused the town was in friendly hands. They arrived there about 11:00 a.m; investigated several buildings and did not return for the noon meal to the organization area which was not more than 1500 yards away (R42-43). He knew his organization was not engaged in action with the enemy. There was intermittent shelling only, and if the mortars began to fire he could hear them and would be able to run back to the area in a few minutes. When investigating the cafes in the town they found some bottles containing soda water and took six of them. They also found in a building a barrel containing liquor, and he "merely tasted it" with his tongue. They filled the jug and carried it back to a spot near his dug-out in the area where they arrived about 3:00 p.m. (R43-44). A few men were present and accused said "Let's have a drink". He filled his canteen cup with soda water about half to three-quarters full and "We all drank from the same cup". He then told those who wanted a drink to get their cups. He watched them pouring the liquor and when he thought they had sufficient he said "Hold it". He let them mix it with the soda water but

> "with all those men, the six bottles wouldn't last very long so we started to mix the drink with the lemon juice powder that we got in our K rations. * * * no man took any liquor from that jug without my knowing it while I was in that area." (R44).

Captain Seton then summoned him to the command post and asked him where he had been. When accused pointed to a town on the map, Seton said it was the wrong town. When accused looked again at the map, he realized he was mistaken and then pointed to the town of Livry. He was told that the next time he "went for a walk" he should let them know about it so that they would not worry about his falling into the hands of the enemy. He returned to the platoon area and during the afternoon moved the jug to a place right outside the door of his dug-out, placed a cover over it and went to dinner "No man had access to that jug without my knowing it." (R44-46).

After dinner he returned to his dug-out and found the jug had disappeared. A sergeant told him he had put it away (R47). Accused then conferred with Zollweg who told him to censor all the mail. He replied that he would censor half of it, that they were both of the same rank and should be co-operative. He censored half the mail, and asked Zollweg about the rest of it. He replied that he did not care what happened to it. When accused reminded him that it was his (Zollweg's) platoon and

that he would have to take care of it, Zollweg said "Aw get the -- out of here." Accused remarked that if they could not straighten out the matter between themselves he would see Seton, whereupon Zollweg told him to get out and see him tomorrow. Accused then saw Captain Seton and Lieutenant Simon, and told Seton about the mail situation. Seton told accused that Zollweg was made platoon leader the day before, that accused was assigned to the platoon and could gain something by working with Zollweg who "had seen a lot of action". Seton further stated that he "considered it was a direct order to censor the mail". Accused replied that he respected Zollweg's service and that he also "had a good deal of service myself". When Simon told accused to bring the other half of the mail to him and that he would censor it, accused replied that he was not a runner and that a runner should be sent for the mail. Simon asserted "This is a fine way to be coming into an outfit" and accused replied "This is a fine way to be received". Seton then told accused he would see him in the morning (R45). He was sent to the battalion that evening, taken to the regiment the next morning and placed under arrest (R46). He did not notice the three men who became intoxicated (Carr, Bear and Plucow). He was with the jug all afternoon except when he was at the command post and at "chow". The men were not drinking the liquor "straight" and he did not believe it possible for the men to get drunk on "that little which they had" (R49).

Accused further testified that he joined Company B on 14 June and was placed in command of the weapons platoon. He was relieved of command at noon on 6 July. "At that time they were rotating platoon leaders." However, the company commander did not inform accused that he was relieved of command. At 8:00 p.m. (6 July) they moved forward into the area and began to relieve Company K. Accused did not know that he had been relieved of command of the platoon by Zollweg until they arrived in the new area and he was informed of this fact by the platoon sergeant (R48-49).

5. It was alleged that accused was found drunk while on duty as a company officer of Company B, 26th Infantry, in violation of Article of War 85 (Charge II and Specification). Winthrop, in his discussion of Article of War 38, the forerunner of the present Article of War 85, states:

> "there are yet some instances recognized by the authorities, where officers * * * by reason of the peculiar nature of their * * * duty, are considered to be continuously, * * * on duty * * *. Again, <u>in time of war</u>, and especially in the field before the enemy, the status of being <u>on duty</u>, in the sense of this Article, may be uninterrupted for very considerable periods. * * * 'an officer, when his regiment is in front of the enemy, is at all times <u>on duty</u>'" (Winthrop's Military Law & Precedents - Reprint, 1920, par.948, pp.613-614)

"drunkenness upon any occasion of duty properly devolved upon an officer * * * by reason of his office, command, rank or general military obligation"

is a violation of this Article of War (Ibid., par.947, p.613) (Last underscoring supplied).

"any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article (AW 85)" (MCM, 1928, par. 145, p.160).

Accused was second in command of a weapons platoon, a component of Company B. The company was in a defensive position and in direct contact with enemy troops who at the nearest point were only 75-100 yards away. The organization was subjected to enemy artillery, mortar and machine gun fire and "anyone that was foolish enough to move would get shot at." The testimony that accused was on duty at all times during the period concerned is clearly supported by evidence of the tactical situation. About 3:00 p.m. when accused appeared before Captain Seton, his breath smelled of liquor, and when he pointed on the map to the town which he had supposedly visited, he selected a position which was in the hands of the enemy. He "seemed very clumsy and didn't seem to know". At that time his condition was such that Seton would not have entrusted him with a tactical order. About 6:30 p.m. accused was staggering and spoke with "quite a drawl." One soldier testified that if accused had given him a tactical order which involved risking the witness' life, he would have checked the order. About 7:00 p.m. accused was very argumentative when he talked with Zollweg about censorship of the mail. Zollweg testified that although accused knew what he was doing and saying, he appeared to have had "a few drinks." The platoon leader was of the opinion that accused was under the influence of liquor and he would not have entrusted him with a "fire mission". Accused threw part of the mail on the ground and walked away unsteadily. When he appeared before Seton and Simon, his breath smelled of liquor, his face was flushed, and his eyes were bloodshot. He spoke slowly, thickly and "in a way of a man who had to think of every word he was going to say." He was again decidedly argumentative. Seton was of the opinion accused was drunk, and would not have entrusted him with any tactical order. Simon considered that accused was under the influence of liquor and that he was not capable of performing his duties. The issue of drunkenness was one of fact for the sole determination of the court and the Board of Review is of the opinion that the findings of guilty are supported by competent, substantial evidence (CM ETO 970, McCartney; CM ETO 1065, Stratton; CM ETO 1267, Bailes).

6. In Specifications 1 and 2 of Charge I (violation of AW 75) it is alleged that accused did, while before the enemy, by his misconduct endanger the safety of his company which it was his duty to defend

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"in that, he left his company, which was in a defensive position, and remained absent for several hours." (Specification 1).

"in that he transported and brought a quantity of intoxicating liquor into his Company area and made said intoxicating liquor available to the enlisted men under his command." (Specification 2).

In paragraph 141a, Manual for Courts-Martial, 1928, page 156, it is stated that:

"Whether a person is 'before the enemy' is not a question of definite distance, but is one of tactical relation".

It was clearly established by the evidence that the tactical situation was such that accused was before the enemy within the meaning of Article of War 75 and further comment on this point is deemed unnecessary. The phrase "which it was his duty to defend" may be treated as surplusage inasmuch as the remaining allegations in the specifications state facts clearly sufficient to constitute an offense under the clause of the Article which declares that "any officer or soldier who, before the enemy, misbehaves himself" is guilty of an offense (CM ETO 1249, Marchetti; CM E) 1109, Armstrong).

"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 offence, 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 offence as if he had deliberately proved recreant" (Winthrop's Military Law & Precedents - Reprint, 1920, par.963, 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).

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The evidence shows that accused knowingly brought back into the platoon area liquor which he knew to be highly intoxicating, and that he offered drinks to soldiers of his command. "Quite a few" soldiers accepted his offer. The jug remained in the area for two or three hours and accused assisted in pouring the drinks. He drank with the soldiers; accused, a noncommissioned officer, and two other soldiers became seriously intoxicated. It may be inferred from the evidence that several more soldiers felt the effects of the liquor. This action by accused, considering the tactical situation and the proximity of the enemy, could easily have resulted in consequences of disastrous proportions not only to members of accused's platoon but also to others. The evidence showed that the whole company was in direct contact with the enemy, in a defensive position, and subjected to enemy fire. Zollweg was responsible for the "supporting weapons" of the company. An enemy attack would call for a maximum of coordinated, disciplined effort by accused's organization, and if directed against the company at a time when members of the weapons platoon were incapacitated by liquor, might well have resulted in not only a tactical loss but also in a serious loss of life. The same results were possible had a sudden attack on the enemy by accused's company become necessary. That accused endangered the safety of his company is obvious. The Board of Review is of the opinion that in view of the foregoing authorities the evidence is legally sufficient to sustain the findings of guilty of Specification 2, Charge I. (CM ETO 3081, Smith; CM ETO 1109, Armstrong; CM NATO 240, Stojak).

It is alleged in substance in Specification 1 that accused by his misconduct endangered the safety of his company in that he left the company, which was in a defensive position, and remained absent for several hours. The evidence showed that accused and his runner, Levitt, were absent for about four or five hours on an unauthorized visit to Livry. The question presented for consideration is whether accused was guilty of such "misconduct" as to constitute a violation of Article of War 75. As has been stated by the foregoing authorities, the term "misbehavior" is not confined to acts of cowardice but is a general term. It makes culpable any conduct by an officer or soldier not conformable to the standard of behavior before the enemy "set by the history of our arms". The conduct denounced by the Article may take the form of gross negligence or inefficiency, or consist of a culpable failure by the officer or soldier to do his whole duty while before the enemy.

The misbehavior of accused was plainly of such a character. In the event of an enemy attack or an attack by our forces, Zollweg, who was directly responsible for the supporting weapons of the company which was in a defensive position, would necessarily be largely dependant upon accused, his second in command. In the face of a tactical situation which was decidedly crucial, accused took a runner away from his duties, left his division sector, went to a town which was almost two miles away and in a sector occupied by another division, and consumed several hours on a venture of his own looking for something to drink. He was supposed to be looking for a new observation post. Had the enemy attacked, Zollweg would have been deprived entirely of the services of accused and the runner

Levitt, and it is not difficult to envision the resultant effect of their absence upon the safety of the entire company. The conduct of accused reflected a shocking disregard of his responsibilities as an officer and was clearly of the character stigmatized by the Article and the foregoing authorities. The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty of Specification 1, Charge I.

7. The charge sheet shows that accused is 26 years and six months of age, that he was commissioned a second lieutenant, Infantry Reserve, 5 June 1939, and that he was called to active duty 1 March 1940.

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

9. The penalty for violation by an officer of Article of War 75 is death or such other punishment as a court-martial may direct. A sentence of dismissal is mandatory upon the conviction of an officer of being found drunk on duty in time of war, and he shall suffer such other punishment as a court-martial may direct (AW 85). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir. 210, WD, 14 Sep 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 24 AUG 1944 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of First Lieutenant ELLSWORTH F. STOHLMANN (O-379484), 26th 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 3301. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3301).

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

(Sentence ordered executed. GCMO 73, ETO, 23 Sep 1944)

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

BOARD OF REVIEW NO. 2 25 AUG 1944

CM ETO 3302

U N I T E D S T A T E S)	4th INFANTRY DIVISION.
v.)	
Second Lieutenant RALPH E. PYLE, Jr. (O-1325319), Company "I", 22nd Infantry.)	Trial by GCM, convened at Blosville, France, 18 July 1944. Sentence: To be dismissed the service.

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

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that 2d Lieutenant Ralph E. Pyle, Jr., 22d Infantry, was, near Hau Gallis, France, on or about 20 June 1944, found drunk while on duty as commander of a rifle platoon.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, 4th Infantry Division, approved the sentence with the recommendation that its execution be suspended during the pleasure of the President. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but withheld the order directing the execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 20 June 1944, accused was a platoon leader, Company "I", 3rd Battalion, 22nd Infantry. Following an apparent withdrawal of the enemy, the third battalion made

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an approach march in the vicinity of Hau Gallis, France. Major (then Captain) Glenn W. Walker, of accused's organization, directed accused to take his platoon and search ahouse, known to be occupied by enemy soldiers. Accused appeared sober at the time and his physical condition perfectly normal (R6-7; Ex.A). He conducted his platoon as directed in a search of the house which resulted in the capture of four Germans. The platoon sergeant then formed the platoon on the road, putting the prisoners "up ahead", and, late in the afternoon, started back "to the point where Captain Walker issued the orders about a mile up the road". The sergeant marched at the head of the platoon and, he testified, "That was the last time I saw him /accused/ that day." (R4; Ex.A). Between 8 and 8:30 p.m., 1st Lieutenant John R. Mullens, Jr., Communications Officer of the third battalion, discovered accused in a drunken condition near the battalion command post (R5-6). Major George M. Goforth saw him an hour or two later lying behind a hedge in the same vicinity, as did Major (then Captain) Walker. At that time, according to Major Goforth's testimony, corroborated by Major Walker's:

> "I went over to the accused with Capt. Walker and one other officer. Capt. Walker and I helped him to his feet shook him quite roughly in an effort to bring him around so that we could talk to him, but we were unable to get any answers from him. At that time he staggered and could not stand up. His eyes were bleary and he could not talk coherently and the odor of alcohol was very evident."

Accused's condition was such as to preclude performance of duty. His organization was then in contact with the enemy (R7-8; Ex.B).

4. The only evidence for the defense was the testimony of accused. His rights were explained to him; he elected to take the stand under oath; then testified, in substance, as follows:

He served three and a half years as an enlisted man, during which time he faced neither court-martial nor company punishment. After a year in the Aleutians, he was "sent back to go to OCS". He joined the 4th Division in England 18 May 1944, was assigned to Company I "with the over-strength" and reported to his regiment on D-Day plus three. For nine years in civilian life he was a bank-teller. According to his testimony with reference to the offense alleged,

> "We were told by Captain Walker that in a Chateau down to the right there were fifteen Germans. We were told to go down and get those Germans and bring them back. There were two Frenchmen with us as guides to show us where the Germans were. When we got down there all we could flush out were four Germans, and I started the platoon out with the four Germans."

He left the rear of his platoon's extended column to investigate a purported American soldier, reported by his French guides to be wounded and in the vicinity. He was conducted to the bedside of a man garbed in civilian clothes who "didn't speak American nor have dog tags or anything", whereupon he proceeded to a road intersection where he expected to rejoin his platoon. It was not there and he inquired in vain of the civilians and soldiers who were there as to its whereabouts. The civilians were celebrating with cognac, to which accused had never before been "subjected", despite which he took six or eight drinks, with no intention of getting drunk. He then hailed a jeep and proceeded to battalion headquarters. "I don't know whether it was my physical condition or the Cognac", he testified, "but it just hit me like that * * * I remember speaking to some officers and their telling me I was under arrest and * * * to stay right where I was" (R8-10).

5. The specification alleges that accused was found drunk while on duty as platoon commander, in violation of Article of War 85, which provides that,

> "Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct * * *."
>
> "In time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article." (MCM, 1928, par.145, p.160).

According to accused's own testimony, his mission, on the afternoon in question, was not only to "get those Germans" but also to "bring them back". He had not brought them back when he imbibed too freely of the (to him) novel intoxicant proffered by the civilian celebrants. His organization was in contact with the enemy when he was found drunk. The circumstances disclosed by the record were such that all members of the command must be considered as being continuously on duty within the meaning of the Article; and the evidence is amply sufficient to sustain the findings of guilty.

6. The charge sheet shows that accused is 31 years of age and that he served as an enlisted man with the 53rd Infantry Regiment, from 29 January 1941 to 26 September 1943, andas an officer with the 406th Infantry Regiment and the 22nd Infantry Regiment from 27 September 1943 to 1 July 1944.

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 confirmed. Dismissal is mandatory upon conviction of an officer of a violation of Article of War 85 in time of war.

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 AUG 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant RALPH E. PYLE, Jr. (O-1325319), Company "I", 22nd Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3302. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3302).

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

(Sentence ordered executed. GCMO 74, ETO, 27 Sep 1944)

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

BOARD OF REVIEW NO. 1

CM ETO 3303

26 AUG 1944

U N I T E D S T A T E S	V CORPS.
Second Lieutenant MEREDITH W. CROUCHER (O-1109218), 112th Engineer (Combat) Battalion, Corps of Engineers.	Trial by GCM, convened at Headquarters V Corps, Rear Echelon Command Post, 1½ miles southwest of Trevieres, Calvados, France 13,16 July 1944. Sentence: Dismissal.

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

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

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 95th Article of War.
Specification 1: In that Second Lieutenant Meredith W. Croucher, Headquarters, 112th Engineer Combat Battalion, was, in the vicinity of Couvains, France, at about 0045 hours, on or about 30 June 1944, grossly drunk and disorderly, at a point beyond the outpost line of the 115th Infantry and near the enemy line, and thereafter during his being taken back under custody.
Specification 2: (Finding of Not Guilty).

CHARGE II: Violation of the 96th Article of War.
Specification: In that * * *, did, in the vicinity of Couvains, France, on or about 30 June 1944, strike Staff Sergeant Charles W. Bury, Company F, 115th Infantry, a noncommissioned officer in the execution of his duty, on the jaw with his fist.

He pleaded not guilty, and was found not guilty of Specification 2, Charge I but guilty of the other charges 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, V Corps, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, although deemed inadequate, but remitted that portion thereof adjudging forfeiture of all pay and allowances due or to become due, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Prosecution's evidence summarizes as follows:

The accused on 29-30 June 1944 was a member of the 112th Engineers (Combat) Battalion (R6,18).

Staff Sergeants Charles W. Bury and George T. Sparwasser, Company F, 115th Infantry, between 12 midnight, 29-30 June 1944 and 12:15 a.m. 30 June 1944 (R6,14) had concluded inspection of outposts of their platoon (R7) in and near Couvains, France (R18,19). There had been an attack by the enemy in that area early on the morning of 29 June, but it had receded by 9:30 or 10 o'clock that night (R16). Company F, 115th Infantry was in support of an armored division. The enemy was across the St.Lo road from Company F (R18). Bury's and Sparwasser's platoon filled a gap in the American line with a series of outposts facing the enemy (R18,19). At a point on the St.Lo road one of the outpost sentinels called to Bury and Sparwasser as they passed and indicated that he was experiencing difficulties with a stranger (R7,10), who had been halted by the sentinel and asked for the pass-word, but was unable to give it (R7). Bury crossed the road to the sentinel. Sparwasser stood "covering" Bury (R10). The stranger held his hands above his head and his rifle and helmet were on the ground. Bury brought the stranger back to Sparwasser (R7). It was dark. The stranger's mumbling speech could not be understood by Bury and Sparwasser. He desired to go toward the enemy which was located a short distance along the road. He spoke in a loud tone of voice. He made an effort to display his identification card and was finally able to state he was a "Yank" (R7). He wore a field jacket and "OD's" (R17). Sparwasser, in court, definitely identified accused as this stranger (R8). Concluding that the conversation was too noisy and dangerous because of the near proximity of the enemy, Sparwasser and Bury decided to take accused to the company command post (R5). The three men proceeded in single file with Sparwasser in the lead, making the path. About three paces behind him accused walked with his hands in the air (R10,11). Bury, two or three paces behind accused, brought up the rear. He was armed with a pistol and carried accused's rifle - an M-1 (R10).

On the way to the company command post, during which movement the platoon headquarters was passed, accused continued to talk in a loud voice. Noise of breaking twigs and limbs of bushes was audible. The sergeants

attempted to silence accused. The party came to a barbed-wire fence and as Sparwasser was about to pass over it and hold the wires, accused struck Bury in the face. The two men fell into a scuffle during which Bury hit accused. They became entangled in the wire fence and Sparwasser separated them (R8,11,12). Accused and the two sergeants resumed their travel towards the company command post. It was necessary to pass through an outpost of another company. Accused, continuing his loud talk, protested the direction of his movement and insisted on returning in the direction whence he came in spite of efforts of Sparwasser and Bury to silence and control him (R8). Accused's words at that time were thick and could not be easily understood (R12). There was an odor of alcohol on his breath and he exhibited definite signs of excessive alcoholic indulgence (R14). While the tones of his voice were high and loud, his words were thick and muffled and could not be understood by Sparwasser (R11-13), although on one occasion he yelled, "I am all right. I am all right. I want to go back to the outfit" (R14).

Arriving at the company headquarters at about 1:15 a.m. 30 June, Bury secured the presence of the company commander, Captain Jack De Sevrey (R9). Accused continued to expostulate in a loud tone of voice. Bury again attempted to silence him and a second scuffle occurred, during which both men fell into the doorway of the command post (R9,12,13,19). Upon gaining their feet accused "lunged" at Bury, who knocked him down, but accused arose and again "lunged" at Bury (R19). Bury knocked him down the second time (R20). Accused yelled, "I want to see the captain, I want to see the captain". Bury put a hand over his mouth (R9,19). Accused asserted he was a first lieutenant. Captain De Sevrey at first believed he was either drunk or an enemy agent (R19,22) but Bury stated he was an American (R20). When Captain De Sevrey learned that fact he concluded accused was either drunk or "doped". His actions were peculiar; he may have been in a stupor resultant from consumption of either wood or grain alcohol (R22). It finally appeared that accused could only be controlled by physical force (R20). Captain De Sevrey ordered Sparwasser and Bury to escort him to the battalion command post (R9) and on this part of the journey Sparwasser and Bury held accused in an arm-lock (R9). He continued his loud talk and noise-making (R9). At the battalion command post, Lieutenant Dunn ordered the two sergeants to take accused to the regimental headquarters (R9). While waiting at the truck pool for a jeep he talked loudly but finally sat down, commenced to cry and lapsed into silence (R9,12). During the trip in the jeep, he remained silent and there was no further difficulty with him (R9, 12). Upon arrival at the regimental command post at about 2:15 a.m. on 30 June, accused was delivered to Second Lieutenant Albert J. Gates, Regimental Headquarters, 115th Infantry, duty officer. Accused then had a bandoleer of ammunition and an M-1 rifle (R9,23,24). Lieutenant Gates testified that accused's speech was thick and blurred and that he was under the influence of liquor but was not "dead drunk". He talked loudly and Lieutenant Gates asked him to be quiet. His answers to questions were surly and not well-mannered. He asserted he was going to join his outfit but gave no definite answer to questions pertaining to the identity of his outfit or its location (R23,24). He went through his bill-fold five times trying to find

his identification card (R24). He showed no marks of injury. Lieutenant Gates believed he understood the questions propounded to him (R23,24).

During the attempt to identify accused at the company command post, his identification card, "dog-tags" and two or three pictures dropped to the floor, where they were found the next morning (R9,10,16). His helmet was found the next morning in the platoon area (R10).

4. Accused elected to remain silent, but the defense presented the testimony of three witnesses whose testimony summarizes as follows:

Technician Fifth Grade Joseph S. Romansky, Company A, 112th Engineer Combat Battalion, in company with accused, Private First Class Samuel Bachman, Company A, and Private Howard M. Gerbitz, Headquarters and Service Company, both of 112th Engineer Combat Battalion, left the battalion area near La Mine, France, at about 8:30 or 9:00 p.m. on 29 June 1944. They rode in a peep. (Gerbitz was driver (R40)). Accused sat in the front seat with him and Romansky and Bachman were in the rear seat. Romansky spoke the Polish language. The party intended to visit the place of abode of three Polish women about 8 or 10 miles distant from the battalion area in the 29th Division Sector. The Polish women were in the services of a French "mistress". Bachman had visited the place previously (R30,33). The purported purpose of the visit was to obtain laundry work by the women (R26,30,32). The men arrived at their destination about 10:00 p.m. Accused, Romansky and Bachman were with the Polish women in the same room of the house. Gerbitz remained in the peep but finally entered the house (R40). After arranging for the laundry work the men engaged the women in conversation (R30). Cider was served to the men (R30) but Romansky did not see accused imbibe (R26,37) although it was possible for him to have partaken (R32).

At about 11:30 p.m. (R30,31) accused, Romansky and Bachman left the house (R26,30) and proceeded in the peep with Gerbitz driving. They lost their way (R27) but in the course of their travel discovered a peep parked by the side of the road (R26,27). Accused and Bachman alighted and inspected the peep and identified it as belonging to their company. It had been ambushed and lost about ten days previously (R27). Accused wanted to take the peep in tow and bring it back to camp, but the vehicle could not be moved (R27). He exchanged his carbine for Gerbitz's M-1 rifle (R29) and instructed the three soldiers to meet him at the next cross-roads at five o'clock a.m. on 30 June. Romansky "guessed" it was about 12:30 a.m. 30 June and it was dusky - between twilight and dark (R26, 28-29,31). Accused spoke in a clear tone of voice walked in normal fashion and Romansky did not detect the odor of liquor on his breath (R28). The three soldiers proceeded in the opposite direction from accused (R28) and reached camp about 1:30 a.m. (R28,29,31).

Private First Class Samuel Bachman testified to facts which substantially corroborated Romansky's testimony. However, he fixed the time arrival at the French woman's house at about 8:30 p.m. and time of departure

at 11:00 p.m. With respect to the consumption of beverages, he testified that cider was served and that he saw accused consume a glass of cider and about one ounce of cognac brandy during the evening. The cider was of the same alcoholic strength as English cider (R33,34). A bottle of cognac was placed in the jeep but it remained unopened (R34). After losing their way on the return trip to camp, the party came upon the lost peep at a point about ten miles from the battalion area (R35,38), and about 4 or 5 miles from the French woman's house (R38). When accused left the three soldiers he did not stagger. He appeared sober to Bachman and his speech was not garbled (R35). It was about 12:15 a.m. when accused left the party (R37).

Private Howard M. Gerbitz testified that he was the driver of accused's peep on the night of 29 June on the trip from the battalion area to the French woman's house eight miles distant (R39,40). They were accompanied by Romansky and Bachman (R40). After reaching the house witness remained with the peep until called into the house by accused. He saw accused drink some kind of liquid from a small glass but did not know what it was (R40). Gerbitz drank cider (R41). The party left the house at 9:00 p.m. (French time; 11:00 p.m. British war time). Bachman placed a bottle of cider or beverage of some kind in the peep driven by witness, but it was not opened. Accused did not take it with him when he left the soldiers after discovery of the abandoned jeep (R43). He then spoke clearly (R40,43). When he left them he walked in a direction away from the French woman's house (R42).

5. It was clearly established that accused fraternized with enlisted men of his command and consumed intoxicants with them in the presence of civilian women of undefined social status. Thereafter, he was discovered in a deplorably drunken condition and was noisy and disorderly beyond the outpost lines of Company A, 115th Infantry, in the vicinity of Couvains, France. He attempted to enter the lines. When stopped by a sentinel, he protested loudly. The enemy was in near proximity. Accused by such conduct, might easily have attracted the enemy's attention and he thereby imperiled the safety of the personnel of Company A and its tactical position. He continued his drunken, disorderly, noisy actions while being escorted to higher commands by Sergeants Bury and Sparwasser in spite of warnings and protests of the sergeants. Twice he engaged Bury in a fight.

Accused's unit was bivouacked ten miles from the outpost lines which he attempted to enter. He had no proven military duties to perform at that latter location. Without any reason except a tenuous explanation that he was going to "investigate" the abandoned peep and the area thereabouts, he dismissed the three soldiers with directions to meet him at a cross-roads at 5 o'clock that morning.

The seriousness of accused's conduct, thus summarized, is beyond doubt, but the question arises as to whether it constitutes "conduct unbecoming an officer and a gentleman" under the 95th Article of War. Winthrop comments thus:

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> "'Conduct unbecoming an officer and a gentleman' may thus be defined to be:- Action or behaviour in an official capacity, which, in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman; Or action or behaviour in an unofficial or private capacity, which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms." (Winthrop's Military Law & Precedents - Reprint, p.713).

There is no difficulty in condemning accused's conduct as "dishonoring or otherwise disgracing the individual as an officer", but does it "seriously compromise(s) his character and standing as a gentleman"?

Further, Winthrop writes:

> "Acts indeed which are discreditable to the officer can scarcely fail to involve the reputation of the individual as a gentleman; * * *. To constitute therefore the conduct here denounced, the act which forms the basis of the charge must have a double significance and effect. Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents. * * *.
>
> The quality, indeed, of the conduct intended to be stigmatized by this provision of the code is, in general terms, indicated by the fact that a conviction of the same must necessarily entail the penalty of dismissal. The Article in the fewest words declares that a member of the army who misconducts himself as described is unworthy to abide in the military service of the United States. The fitness therefore of the accused to hold a commission in the army, as discovered by the nature of the behavior complained of, or rather his unworthiness,

> morally, to remain in it after and in view of such behavior, is perhaps the most reliable test of his amenability to trial and punishment under this Article (Winthrop's Military Law & Precedents - Reprint, pp.711-713).

Accused's actions and conduct on the night in question involved (a) fraternizing with enlisted personnel and consuming intoxicants with them; (b) drunkenness of a gross character before inferiors; (c) disorderly and riotous conduct before inferiors; (d) fighting with a noncommissioned officer who was obviously acting in the performance of his duties and, (e) attempting to enter American outpost lines without the proper password and engaging in noisy demonstrations within the proximity and hearing of the enemy. He is charged, however, with being

> "grossly drunk and disorderly at a point beyond the outpost line of the 115th Infantry and near the enemy line and thereafter during his being taken back under custody".

The question of his guilt will be considered within the narrow limits of these allegations.

Proof of mere drunkenness, unaccompanied by any unseemly behavior, violence or disorder, will not in general sustain a conviction under the 95th Article of War, but will support a conviction under the 96th Article of War only (CM 227651, Hess; CM 228053, Peterson, 16 B.R. 59; CM 228585, Howard, 16 B.R. 267; CM 230026, Bullard, 17 B.R. 279; CM 233766, Nicholl, 20 B.R. 121; CM ETO 580, Gorman; CM ETO 439, Nicholson). However, it has long been recognized that proof of

> "Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused" (Winthrop's Military Law & Precedents - Reprint, p.717)

will sustain a charge of "conduct unbecoming an officer and a gentleman" (CM 229228, Griffin, 17 B.R. 85; CM 227651, Hess, Supra; CM ETO 1197, Carr). The fact that the officer's drunken condition and disorderly conduct are observed only by military personnel does not ameliorate the offense since

> "it is a mistaken notion that the army can be disgraced or discredited by the misconduct of one of its members only if that misconduct is seen by outsiders" (CM 202846, Shirley, 6 B.R. 337).

The evidence is clear and convincing that accused at about midnight 29-30 June 1944 while in close association with enlisted personnel and under their observation was in a highly intoxicated condition on and near the outpost lines of Company F, 115th Infantry, and within a comparatively short distance from the enemy. At such time and place his drunkenness was accompanied by disorderly conduct which was of an aggravated nature because of the peril it created in the face of the enemy. While under proper escort of noncommissioned officers to higher commands he continued his disorder and became embroiled in fights with one of the escort, a staff sergeant who was performing his duty. Under these circumstances and conditions he committed the offense denounced by the 95th Article of War. The record is legally sufficient to support the findings of accused's guilt of Charge I and Specification 1 thereunder.

6. Accused is also charged with a violation of the 96th Article of War in that he struck Staff Sergeant Bury in the face with his fist while Bury was in the execution of his duty (Charge II and Specification). The evidence shows that when accused, Sparwasser and Bury arrived at the barbed wire fence, Sparwasser held the wires so that accused and Bury could pass through the fence. Without cause or provocation accused struck Bury in the face with his fist. The two sergeants were manifestly performing their duty in escorting accused to their company commander. Accused was guilty of a violation of the 96th Article of War (CM ETO 763, Morley).

Although accused's action in striking Bury was directly involved in the charge of his misconduct under the 95th Article of War the offenses were not the same. The conviction of an officer under both Articles on the same facts is not illegal (CM ETO 1197, Carr; McRae v. Henkes 273 Fed. 108, Certiorari denied 258 U.S. 624, 66 L.Ed., 797).

The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of accused's guilt of Charge II and its Specification.

7. The charge sheet shows the accused is 25 years and 11 months of age and that he was inducted 30 April 1942 at Chicago, Illinois for the duration of the war plus six months. He was discharged as enlisted man 19 January 1943 and was commissioned a second lieutenant 20 January 1943. He served in 1936 for six months in the National Guard.

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

9. Dismissal is mandatory upon conviction of a violation of the 95th

Article of War and is an authorized punishment for an officer convicted of a violation of the 96th Article of War.

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 26 AUG 1944 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Second Lieutenant MEREDITH W. CROUCHER (O-1109218), 112th Engineer (Combat) Battalion, Corps of Engineers, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty, and the confirmed 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 3303. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3303).

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

(Sentence ordered executed. GCMO 81, ETO, 2 Oct 1944)

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

BOARD OF REVIEW NO. 2

25 AUG 1944

CM-ETO 3304

UNITED STATES	9th INFANTRY DIVISION.
v.	
Second Lieutenant JEROME O. DeMOTT (0-1303473), Company "D", 60th Infantry.	Trial by GCM, convened at Flamanville, Normandy, France, 4 July 1944. Sentence: Dismissal.

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

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that 2nd Lt. Jerome O. DeMott, 60th Infantry, was, near Vasteville, France, on or about June 20, 1944, found drunk, while on duty as Platoon Leader, Company "D", 60th Infantry, and while said organization was engaged with the enemy.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service with the unanimous recommendation of the court to the reviewing authority to consider the excellent record of accused as an enlisted man and an officer and that every consideration be given to retaining him in the service as a commissioned officer. The reviewing authority, the Commanding General, 9th Infantry Division, approved the sentence and forwarded the record of trial for action pursuant to the provisions of Article of War 48. The confirming

authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50½.

3. The uncontradicted evidence for the prosecution shows that accused is in the military service of the United States (R6) as Second Lieutenant, Platoon Leader of the machine gun platoon, Company "D", 60th Infantry. On the afternoon of 20 June 1944, his company was moving by truck forward from Vasteville, France, into defensive positions. Accused was on duty as platoon leader with his company, then engaged in operations against enemy forces (R7,8,9). They were not in actual contact with enemy ground troops but had been under shell fire less than thirty minutes before the beginning of the occurrences resulting in the charge herein and were moving in the direction of the enemy forces (R7,9,10,17). His company commander was in the front vehicle and when he went over to accused, who was in the vehicle just behind, to give him some instructions, he found accused drunk (R7,10,11,13-15). This was at approximately four o'clock in the afternoon. Two hours before he had been "completely sober". He was ordered to go to the command post and lay down (R8). Accused said he had been drinking (R9). He was examined by the Assistant Battalion Surgeon for the express purpose of determining his condition and on questioning informed the Surgeon that he was drunk and had been drinking cognac. The surgeon pronounced him drunk (R11). He was sent back to the regimental command post in arrest, where he sat down under a tree and "passed out". He had to be "bodily lifted" into a jeep and was sent back to the Service Company and placed in arrest of quarters (R13). At eight o'clock that night when he was moved to the command post of the 9th Division he was "still quite drunk" (R15). He could hardly sit up in the vehicle and had to be held. His speech was rambling and rather "thick" (R16).

4. As a defense witness, the commanding officer of accused's company testified that the unit had gone for approximately a week without any actual rest, that accused had been in his company for nearly a year and his character "was honorable and his ability the best I have seen in the Company". However, accused had a "proneness to drink" but not excessively and he would welcome his return to the company. His combat conduct was entirely satisfactory and he evinced no more than the usual nervousness (R17-18). This opinion of accused was corroborated by his battalion commander (R18). His honorable discharge showing continuous service as an enlisted man from 24 September 1929 to 10 December 1942, was admitted in evidence (Exhibit 1); it showed five discharges with character "Excellent" and no time lost under Article of War 107.

As a witness for himself, accused read his statement to the effect that he believed that physical exhaustion and the nervous strain caused from the shelling encountered that afternoon, were contributing factors to his collapse and that "it was not caused by drink alone". He admitted taking several drinks of cognac and a small drink of cider that day, and that he did not consider when taking the drinks that the fatigue might render the alcohol more effective than under ordinary circumstances. He admitted being unable to recall what happened that afternoon (R20-21).

5. Article of War 85 provides that

> "Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct * * * *."

The essential elements of the offense are that accused was on a certain duty and that he was found drunk while on such duty. The record clearly shows and the court found both of these requirements fully established. It was further charged as a matter of aggravation and fully proved that the offense was committed while his unit was engaged with the enemy.

6. The charge sheet shows accused to be 34 years six months of age and that he entered on extended active duty 11 December 1942. His honorable discharge, Exhibit 1 attached to the record, shows enlisted service from 24 September 1929 to 10 December 1942, during most of which time he was a non-commissioned officer and with five "excellent character" indorsements.

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. Sentence of dismissal is mandatory upon conviction of an offense under Article of War 85.

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 AUG 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant JEROME O. DeMOTT (O-1303473), Company "D", 60th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3304. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3304).

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

(Sentence ordered executed. GCMO 79, ETO, 30 Sep 1944)

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

BOARD OF REVIEW NO. 2

CM ETO 3305

9 SEP 1944

U N I T E D S T A T E S	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE.
v.	
Private BENJAMIN R. NIGHELLI (11034084), Detachment 10-A, 92nd Station Complement Squadron (Sp).	Trial by GCM, convened at Headquarters BADA, ASC, USSTAF, AAF-590, APO 635, 19 July 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for seven years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification 1: In that Private Benjamin R. Nighelli, Detachment 10-A, 92nd Station Complement Squadron (Sp), AAF Station 582, APO 635, BADA, ASC, USSTAF, U. S. Army, did, without proper leave, absent himself from his command at AAF Station 582, APO 635, from about 3 June 1944 to about 5 June 1944.

Specification 2: In that * * * did, without proper leave, absent himself from his command at AAF Station 582, APO 635, from about 6 June 1944, to about 25 June 1944.

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

Specification 1: In that * * * having been duly placed in confinement in the Station Guardhouse, AAF Station 582, APO 635, on or about 25 June 1944, did, at AAF Station 582, APO 635, on or about 25 June 1944, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that * * * having been duly placed in confinement in the Station Guardhouse, AAF Station 582, APO 635, on or about 25 June 1944, did at AAF Station 582, APO 635, on or about 30 June 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that * * * did, at AAF Station 582, APO 635, on or about 25 June 1944, wrongfully take and use, without proper authority, a certain motor vehicle, to-wit: a truck, ¼-ton 4 x 4, property of the United States of a value of more than $50.00.

Specification 2: In that * * * did, at AAF Station 582, APO 635, on or about 30 June 1944, wrongfully take and use, without proper authority a certain motor vehicle, to-wit: a truck, ¼-ton 4 x 4, property of the United States of a value of more than $50.00.

Specification 3: In that * * * did, at AAF Station 582, APO 635, on or about 30 June 1944, wrongfully take and use, without proper authority a certain aircraft, to-wit: a C-64 monoplane, property of the United States of a value of more than $50.00.

He pleaded not guilty to and was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by summary court for absence without leave from guard with intent to abandon same, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for seven years. The reviewing authority approved the sentence, designated th Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that, while still a "new man" with his organization, accused was assigned to duty with the Red Cross Aero Club, whence he absented himself at about 10 p.m., on Saturday, 3 June 1944, before his night's duty was complete. Learning of his absence, Major Joseph T. Lyons, commanding accused's detachment, searched the area but could not find him. On Sunday, Major Lyons "followed through again", with another unsuccessful search, to ascertain whether accused had returned. At about 6 p.m. on Monday, accused reported to Major Lyons that he had the permission of the Director of the Red Cross to "take off" on Sunday. Complying with the Major's orders, accused thereupon resumed his duties at the club. On Tuesday he was directed to report to the first sergeant every hour until he should receive instructions "as to what we were going to do in reference to his absence without leave". He reported at 1 and 2 p.m., but between 2 and 3 p.m. he again went absent without leave, leaving behind him a letter addressed to Major Lyons, "stating that he had left this area and intended to make the invasion with the invasion force" (R5-7, 10-11; Exs. 1,2,3). His second absence without leave terminated at 1500 hours, 25 June 1944, at which time he was confined in the station guardhouse (R7,11; Ex.4), whence, two hours later, he escaped (R13-15). He found an unoccupied jeep, assigned for the day to Major Morris D. Goodfriend, parked in the rear of the enlisted men's mess hall, commandeered it, and drove it off the post. It was the identical motor vehicle described in Specification 1, Charge III. He was apprehended, that same night, at a house in Southport, again remanded to the guardhouse (R17-20), and again, between midnight and 0300 hours, 30 June 1944, escaped as alleged in Specification 2, Charge II (R21-22). Again commandeering a jeep - this time the identical vehicle described in Specification 2, Charge III - accused eluded military policemen posted on the highway for the purpose of stopping him. These policemen, after firing at accused's jeep as it sped past, pursued it in theirs, until, having driven a few miles, they found it stalled and empty with motor running, lights burning, a bullet-punctured tire, and a bullet hole through its back (R23-36).

At 1344 hours, 30 June 1944, the airplane described in Specification 3, Charge III, left the flying field at AAF Station 582, without authority or permission, and without clearing through the flight control officer on duty, in accordance with regulations (R37-38). It landed at an Army flying field in North Wales, the same afternoon; accused alighted, "kind of kissed the ground", admitted to the operations officer that he had no clearance, and stated that he was disgusted with the whole situation and was going to fly to France (R39-42).

The value and ownership of the jeeps and aircraft involved, as alleged in Specifications 1, 2 and 3, Charge III, were established by competent evidence and stipulation (R34,43).

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4. For the defense, Captain Firestone, Medical Corps, accused's station, testified that he, the witness, was "principal psychiartrist for BADA" (R43). He gave accused, on 15 July 1944, the

> "usual type of psychiartrical examination /which/ consists of obtaining as much history as possible from the patient, and those who associate with him, those with whom he has been indirect contact".

In the witness' opinion, accused was entirely responsible for his actions, although he did not possess the same degree of "admonition" and carefulness normally found in a man of his age. "I found him to be an imaginative individual for his stage of chronological age", Captain Firestone testified, "he has the average or better intelligence, further, he is capable of distinguishing between right and wrong". His judgment "would be more or less that of a younger man", probably in the class of "an adolescent or something" (R44-45).

Sergeant Thrush, Detachment 13, 96th Station Complement Squadron, testified that about four months prior to the trial, accused was in his (witness') detachment. On 30 June 1944 (the date accused escape from the guardhouse, Specification 2, Charge II), witness saw accused when he "went through the barracks waking up the men and he was in bed there and he spoke to me and I spoke to him sir". The sergeant did not then know that accused had been in the guardhouse (R45-46).

First Lieutenant Lewis A. Malone handled such personal problems of enlisted men at accused's station as the "assignment of enlisted men, and the applications that are made for change of classification and spec numbers" (R46). He several times received from accused a request for a different assignment. Accused had been in his office, off and on, for the last four or five months, nearly always trying to get into flying status. He requested assignment to combat work "just about every time I saw him", Lieutenant Malone testified, and was sincere in these requests. As for Lieutenant Malone's undertaking to get him transferred in compliance with his requests, the officer testified,

> "Well I dont know whether he understood about it or not, but requests for transfers go through channels to a higher headquarters, and at the time he made his request they were frozen, and I suggested he went to his orderly room and have a regular letter of transfer made out, and that never did go through, and shortly after that time these requests were frozen" (R47).

5. After his rights were explained by the law member, accused elected to make an unsworn statement, in which he asserted that he enlisted 1 July 1942, eager to fly and to get into action. He was grounded for "hedge hopping", volunteered to go overseas, was assigned to military police duty in England and found it involved "picking up cigarette butts, K.P. and picking up empty coke bottles from the tables of the aero club". He asked for combat 19 times. Although qualified, each time he was turned down. On June 3, he received letters from home advising that of

> "five people who had been with me since I was two or three years old that had been killed in combat, then my cousin had come back from the South Pacific with two legs shot off, shot in action, then my other cousin was reported missing in action, and my brother was reported missing in the South Pacific" (R48).

He brooded, until, impelled by his overwhelming desire to fight, he left camp and made three frustrated attempts to cross the channel. In the guardhouse after apprehension, he evolved the plan of stealing an airplane and flying to France. He took the plane, got lost, and descended in Wales. "I wanted to fly to France", he insisted, "I still want to fight * * * and I ask the Court that I be given that chance" (R49).

6. Competent uncontradicted evidence establishes every element of each offense described in the specifications, Charges I, II, and III. Accused's unsworn statement virtually admits them all, as well, setting up, in extenuation, accused's burning desire to particpate in the invasion in the role of a combatant soldier. The medical testimony adduced by defense shows him to be sane, with a better-than-average intelligence. The adolescent impetuosity ascribed to his judgment is not such a mental defect as constitutes a legal defense in a trial by court-martial. The evidence sustains the findings of guilty.

7. The charge sheet shows that accused is 23 years of age. With prior service in the National Guard, 101st Engineers, from 4 October 1938 to 11 October 1940, terminated by discharge as private with very good character by reason of dependency, he enlisted at Westover Field, Massachusetts, 1 July 1942, to serve for the duration of the war and six months thereafter.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General, with the European Theater of Operations. 9 SEP 1944 TO: Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, AAF Station 590, APO 635, U. S. Army.

1. In the case of Private BENJAMIN R. NIGHELLI (11034084), Detachment 10-A, 92nd Station Complement Squadron (Sp), 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 3305. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3305).

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

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

BOARD OF REVIEW NO. 1

CM ETO 3309

28 AUG 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private EARNEST F. TAPP (34458618), 468th Amphibian Truck Company, Transportation Corps.	Trial by GCM, convened at Thatcham, Berkshire, England, 7,12 July 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private Earnest F. Tapp, 468th Amphibian Truck Company, Transportation Corps, did, at Bedham Manor, Sussex, England, on or about 22 May 1944, with intent to commit a felony, viz., rape commit an assault upon Miss Mary Barlow, by willfully

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and feloniously striking the said Miss Mary Barlow in the face. with his fist, pulling her forcibly across a road and placing himself on top of her on the ground against her will.

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 18 days in violation of the 61st Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved only so much of the sentence, as provided for dishonorable discharge, total forfeituresand confinement at hard labor for ten years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution, in substance, shows that Miss Mary Barlow, a housekeeper of Collins Marsh Farm, Wisborough Green, Sussex, England, at 9.50 p.m. on 22 May 1944 boarded a bus in Billingshurst. At Hawkhurst Cross-Roads she left the bus in company with a white farm worker who preceded her afoot. She remained for a short time at the bus stop to inquire about a Lieutenant Hicks. Thereafter she overtook the farm worker and accompanied him a distance and then they parted. At this point a colored man who was sitting by the roadside, called to her, "How far do you have to go?". Ignoring his advances, she walked up a hill. The colored man approached her from the rear and grasped her shoulder. Miss Barlow screamed "I'm frightened, I'm frightened". The man seized her throat and said, "I'll kill you." He dragged her into bushes at the side of the road and hit her twice(R13,14). She fell to the ground. He fell on top of her, holding her throat (R13). She became unconscious. When she regained consciousness he was gone (R14). Her clothing was intact but her knickers were wet (R14). She could not identify her assailant (R13).

Miss Barlow appeared at her home about 10.30 p.m. She was a "nervous wreck" and almost collapsed in her sister's arms. She had blood on her face and dead leaves in her hair. She wore no hat (R16). She exclaimed to her sister and uncle, "I have been attacked by a black man" (R17). The

next day the victim's uncle, James William Barlow examined the scene of the assault. He found Miss Barlow's hat on one side of the road and on the opposite side her glove and a soldier's hat. At this spot the bushes were trampled down "as if someone had been lying down in them" (R17).

Dr. C.W.Hope Gill, Rosehill, Billingshurst, Sussex, a medical practitioner, examined Miss Barlow at 11.05 p.m. on 22 May 1944. He found that she was suffering from shock and abrasions on her face. There was a bruised swelling over the left cheek bone and left side of her mouth and also a bruising and swelling of the neck. Her knickers were wet - probably due to urine. There was no bruising of her genital parts and no evidence of penetration (R11). An examination two days later showed scratches on her left thigh, not observed on first examination (R12).

Staff Sergeant John E. Darling, 17th Military Police Criminal Investigation Section, on the morning of 23 May 1944, upon receiving complaint from the British police, secured a "show down" inspection at accused's camp in order to find blood-stained clothing. A pair of trousers, field jacket (tunic) and shoes were discovered in accused's tent and were taken to the orderly room. They were eventually delivered to the civil police. When brought to the orderly room, Tapp admitted the articles were his property. At that time a blood-stained neck-tie and handkerchief were found in accused's pocket (R7,19).

Constable Harry Marchbank of Wisborough Green, Sussex was present at the inspection held on 23 May at accused's camp. Accused's field jacket, trousers and shoes were delivered to Marchbank. He was also present when the neck-tie and handkerchief were taken from accused's pocket (R19). The articles of clothing, neck-tie and handkerchief were delivered by Marchbank to the Metropolitan Police Laboratory at Hendon for examination and analysis (R20). Marchbank also secured from Miss Barlow her skirt, blouse and panties (knickers) which she wore when assaulted and also a sample of her blood. He delivered them also to the Metropolitan Police Laboratory at Hendon for examination and analysis. Without objection from the defense the written report of Dr. James Davidson, Director of the Laboratory, was introduced in evidence (Pros.Ex.7;R20, 21). The material statements of the report were:

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"Property labelled as belonging to Mary BARLOW:

Blood: This belongs to Group A1.

Fur Fabric Coat: Blood staining is present on the collar at the back, towards the right side. A small area of faint seminal staining is present on the inner lining, towards the left front, three inches from the lower hem.

Skirt: There are two small areas of blood staining on the outer surface of the front, and one at the back. Small areas of blood staining are present on the inner surface at the front.

Blouse: Extensive blood staining extends from the neck down the front on both sides. Blood-staining is also present on both cuffs. The blood belongs to Group A1.

Cami-knickers: There is blood staining on the front, near the fork, three inches from the lower hem. Slight seminal staining is present on the fork. One buttonhole of the fork band has been torn, and there is one button missing.

Property labelled as belonging to Pte. Ernest F. TAPP:

U.S.Army tunic: Blood splashing is present on the outer surface of both the right and left fronts, a short distance below the collar. There is blood staining on the inner and outer surface of the right cuff. Small blood-stains are present on the inner surface of the left sleeve, near the cuff, and also on the inner surface of the right armpit, and on the lining of the right side. The blood belongs to Group A1.

U.S. Army Trousers: Seminal staining is present on the lining of the right side of the fly opening.

Necktie: This shows extensive blood splashing on the front.

Handkerchief: Extensive blood staining is present" (Pros.Ex.7).

Identification tags alleged to have been those of accused were introduced in evidence over objection of defense (Pros.Ex.3; R10) in order to prove that his blood group was type "B". The tags bore accused's name and serial number. Also introduced in evidence were accused's field jacket, trousers and shoes (Pros.Ex.5; R19); and the neck-tie and handkerchief taken from accused's person (Pros.Ex.4; R19). Miss Barlow's fur fabric coat, skirt, blouse and panties were also introduced in evidence (Pros.Ex.6;R19). All of the articles of clothing were received in evidence without objection by the defense.

Sergeant Darling obtained from accused a written statement which was received in evidence as Pros.Ex.1 (R8) without objection. There was substantial evidence that it was a voluntary statement. The same is as follows:

" T/5 Tanner and myself left camp at about 6:30 p.m. on 22 May 1944 and went to a pub at Wisborough Green. We had two glasses of cider each and left the pub at about 8:00 p.m. and started back towards camp. We walked up the road to the front of the company mess hall. We saw a lady standing in the road about 125 yards away in front of the orderly room. I said to Tanner, 'Yonder stands a lady in front of the orderly room.' Tanner said, 'I think I'll go on in.' I replied, 'I'll be in in a few minutes.' Tanner left me and went towards his tent. I stood across the road from the mess hall and the lady passed me going south. I said to her, 'Mind if I walk with you?' She replied, 'No.' I then stepped out in the road and followed her with a distance of about 25 yards between us.

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I walked faster and caught up with her. I then asked her, 'How far do you stay?' She replied, 'I stay right up here.' I then put my arms around her and we walked towards the woods of the left hand side of the road. We went on in the woods and just at the edge of the woods she stopped. I pushed her with my open hand and she stumbled and fell to the ground. I went down on top of her and she started to scream and she managed to scream once before I hit her in the face with my closed fist. I only hit her once. I couldn't see whether she bled or not from the blow as it was dark. I'm sure she was not unconscious. I then saw a guard at the edge of the woods and I got scared and ran back to my tent. I left my cap on the ground at the place in the woods where I had the woman on the ground. It was about 10.30 p.m. when I got back to my tent. I first noticed the blood stains on my clothing at the show-down inspection held by the company officers this morning.

When I pushed the woman to the ground it was my intention to have intercourse with her but I did not do so.

The woman was about 5 feet 3 inches tall and I think she had a fur coat on. She was wearing a hat.

I have read my statement of 2 pages and it is true." (Pros.Ex.1).

Upon stipulation of the prosecution and defense that Technician Fifth Grade Frank E. Tanner, 468th Amphibious Truck Company, would testify as set forth in his written statement presented to the court, the same was admitted in evidence (R9-10; Pros.Ex.2). The pertinent part is as follows:

" At about 6:30 P.M. on 22 May, 1944, Pvt.Ernest F. Tapp and myself left camp and went over to the pub at Wisborough Green. We had two

glasses of cider there in the pub. At about 8:00 P.M. we left the pub and started back to our camp. We passed two British soldiers and three girls all together who were going in the opposite direction from us. We continued walking and when we reached a point on the road about opposite the mess hall we saw a woman coming down the road heading towards us. She was walking and Sgt. McCain of my outfit was walking several paces behind her. Tapp then said to me, 'There's a lady.' He stopped right there and I said that I was going on in to camp and go to bed and I left him then. The woman, I think, weighed about 140 pounds, about 5' 3" or 5' 4" in height, looked about 50 years old and she had on a fur coat that came just above her knees. She also had a hat on. I could identify her if I saw her again. It was about 9:00 P.M. when I left Tapp and I went right to my tent and took off my O.D.'s and changed to fatigues. * * * at about 10 P.M. Tapp, who also sleeps in my tent, came in about twenty minutes after ten P.M. I was awake when he came in. Tapp didn't say anything and when he took off his O.D. trousers that he had been wearing during the evening, he put them under his pillow instead of in his duffel bag where he usually puts them.

Pvt. Stanley Skipworth, who also sleeps in my tent, came in about quarter to eleven o'clock P.M. and he woke everybody up and started joking. Tapp usually joins in the joking but didn't do so last night. After about 10 minutes the joking stopped and we went to sleep" (Pros.Ex.2).

4. Accused elected to become a witness in his own behalf (R22). He denied he had ever seen Miss Barlow "around the camp" previously (R22), but on this occasion he saw her standing in front of the orderly room. Darkness was commencing (R22). He said, "Good Evening" to her, and she replied. Accused then asked her if she minded if he walked with her. She answered, "No. I don't mind." Together they walked down the road. He asked her "how far does she live and she said right up here. Then I put my arms around her." She was alone when accused first spoke to her (R23). He remembered the stain on his trousers. The stain "got there" when he on his furlough before he came overseas (R23).

He made his statement (Pros.Ex.1) before his company officers and there were about seven or eight people present. He dictated the statement; gave it of his own free will, "because it was the truth" (R23). Tanner's statement (Pros.Ex.2) was also true. When the police questioned him he admitted the clothing (Pros.Ex.5) belonged to him (R24).

5. (a) Over the objection of defense, identification tags (AR 600-35, 31 March 1944, sec.VI, par.85) bearing accused's name and serial number and carrying symbol of blood type "B" were admitted in evidence, without proof as to the manner they came into possession of the prosecution (R10). The purpose of this evidence was to prove accused's blood type. Such proof was relevant and material in the identification of accused as Miss Barlow's assailant. The legal point involved is of importance, but in view of the presence of other substantial evidence of identification the irregularity, if any, in the admission of the tags was not prejudicial. The Board of Review therefore specifically reserves for future consideration the question involved without either approving or disapproving the practice in this case.

(b) The report of Dr. James Davidson, Director of the Metropolitan Police Laboratory at Hendon (Pros.Ex.7) (pertinent part of which is hereinabove set forth) was introduced in evidence by the prosecution through the testimony of Constable Harry Marchbank without objection by the defense (R20). The report was hearsay as thus presented. Inasmuch as it was admitted without objection, the court was authorized to consider same and gave it the natural probative effect as if it were in law admissible (Diaz v. United States 223 U.S. 442, 450; 56 L. Ed. 500,503).

6. (a) The victim of the assault, Miss Barlow, was unable to identify accused as her assailant. However, accused's statement when considered with evidence that he was at or near the

scene of the crime at the time of the commission thereof; that blood on his clothing was of the same type as Miss Barlow's blood and that his cap was found at the locus in quo is substantial evidence of identity. Accused's testimony, insofar as it involved a denial of his complicity and attempted to establish an alibi, created an issue of fact, which it was the duty of the court to resolve. The court's finding that it was accused who attacked Miss Barlow, being supported by substantial evidence, will not be disturbed on appellate review (CM ETO 1621, Leatherberry; CM ETO 1673, Denny; CM ETO 2002, Bellot; CM ETO 2652, Jackson; CM ETO 2686, Brinson and Smith)

(b) The evidence clearly established that Miss Barlow at the time and place alleged was brutally attacked by accused and received painful although not serious injuries. Accused was charged with an assault with intent to commit rape. Proof of accused's specific intent to have carnal knowledge of his victim without her consent coexistent with the assault was a fundamental element of prosecution's case (MCM, 1928, par.149l, p.179).

The uncontradicted evidence shows that when Miss Barlow parted from her fellow traveler, the farm worker, accused saw her and inquired, "How far do you have to go?" He followed her and seized her from the rear, grasped her by the throat and dragged her into bushes at the side of the road. He struck her and beat her about the face and neck. When she offered resistance and screamed he threatened to kill her. The woman became unconscious. When she regained her consciousness accused was gone. Actual penetration of Miss Barlow's person was not accomplished. Accused in his statement admitted that he intended to secure sexual intercourse with his victim, and asserted that he desisted in his attempt because he saw a guard and became frightened. Seminal staining was found by Dr. Davidson on the fly of accused's trousers. The statement contained in People v. Moore, 100 Pac. (Cal) 688,689 and quoted in CM ETO 3093, Romero is pertinent:

> "In all such cases the intent with which an assault is committed is a fact which can only be inferred from the outward acts and surrounding circumstances. It is, in other words, a question of fact for the jury, and not a question of law for the court, except in a case where the facts proved afford no reasonable ground for the inference drawn"

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The Board of Review is of the opinion that there is substantial evidence to support the court's finding that accused entertained the specific intent to rape Miss Barlow at the time he assaulted her and that the record is legally sufficient to sustain the finding of accused's guilt of the heinous offense with which he was charged (CM ETO 1673, Denny and authorities therein cited; CM ETO 1954, Lovato; CM ETO 3093, Romero, supra). The fact that accused abandoned his attack before accomplishment of his purpose because of his fright on approach of the guard is no defense (MCM, 1928, par.149l, p.179; CM ETO 3093, Romero, supra).

7. The charge sheet shows the accused to be 23 years two months of age. He was inducted 23 October 1942 at Fort Bragg, North Carolina to serve for the duration of the war plus six months. He had no prior service.

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

9. Confinement in a United States Penitentiary is authorized upon conviction of the crime of assault with intent to commit rape by AW 42; sec.276, Federal Criminal Code (18 USCA 455). As the accused is under 31 years of age and his sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is authorized (Cir.229, WD, 8 June 1944, sec.II, pars.1a (1) and 3a).

B. Franklin Pitts Judge Advocate

Edward H. Hagen Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 28 AUG 1944 TO: Commanding General, Southern Base Section, Communications Zone, European Theater of Operations, APO 519, U.S. Army.

1. In the case of Private EARNEST F. TAPP (34458618), 468th Amphibian Truck Company, Transportation Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 3309. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3309).

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

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

BOARD OF REVIEW NO. 2 — 16 SEP 1944

CM ETO 3311

UNITED STATES	IX TROOP CARRIER COMMAND.
v.	Trial by GCM, convened at USAAF Station 480, 22 July 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private MERTON J. ENGLE (13027878), 305th Troop Carrier Squadron, 442nd Troop Carrier Group.	

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

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

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

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

Specification: In that Private Merton J. Engle, 305th Troop Carrier Squadron, 442nd Troop Carrier Group, did, without proper leave, absent himself from his station at USAAF Station 488 from about 15 May 1944 to about 6 July 1944.

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

Specification 1: In that * * * did, at Doncaster, Yorkshire, England, on or about 5 July 1944 feloniously take, steal and carry away four one pound (£1) notes British currency, value about $16.00, the property of Reginald Raymond Murr, RAF Station, Lindholme.

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Specification 2: In that * * * did, at Doncaster, Yorkshire, England, on or about 6 July 1944, feloniously take, steal, and carry away one suitcase, value about $4.00, one Kodak pocket camera, value about $4.00, and one bottle Calverts Mount Royal Canadian Rye Whiskey, value about $4.00, the property of John Edward Fagan, Bridge Inn, Castle Green, Sheffield, Yorkshire, England.

He pleaded not guilty to and was found guilty of all charges and specifications, except, in Specification 2, Charge II, the words "one Kodak pocket camera, value about $4.00, and one bottle Calverts Mount Royal Canadian Rye Whiskey, value about $4.00," of the excepted words not guilty. Evidence was introduced of one previous conviction by special court for larceny of government property of the value of about $83.75, in violation of Article of War 94. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for eight years. The reviewing authority approved the sentence but reduced the period of confinement to five years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that accused went absent without leave from his station at 0831 hours, 15 May 1944 (Pros. Ex.1). He was returned to military authority by civilian police at Doncaster on or about 7 July 1944 (R30). On 5 July 1944 he shared a double room at the Doncaster YMCA with Warrant Officer Reginald Raymond Murr, of the Royal Australian Air Force (R13-14). Murr habitually carried his wallet in the lefthand pocket of his tunic. Accused was in the room when Murr left it to go downstairs to wash, leaving his tunic hanging in the wardrobe with his wallet, containing four one-pound notes, in the accustomed pocket. He was gone approximately five minutes. When he returned, accused was still in the room but in a very few minutes took his departure. Murr donned his tunic, examined his wallet and found his four pounds missing. Shortly thereafter accused returned. Murr mentioned the fact that he had been robbed. Accused "said he was always careful about his money, that he always carried it about with him" (R13-15).

At about 20 minutes of 12, that same night, on the station platform at Doncaster, accused met John Edward Fagan, of the Royal Air Force. When the two visited the YMCA canteen for refreshments Fagan left on the platform his kit bag, suitcase and gas mask. Accused left the canteen two or three minutes before Fagan. When Fagan emerged, his suitcase was gone. He reported his loss to the station police (R9-10). Police Constable James N. Hall found accused in bed

at the Doncaster YMCA at about 8 o'clock the next morning, in the room which he was sharing with Murr (R15,18). Fagan's suitcase was in the same room. Hall asked accused if it was his property. "No," replied accused, "I found it in the corridor, it was open. * * * It was open in the corridor so I brought it into the room." Hall asked accused to get dressed and accompany him to the police station (R18-19).

In the meantime, Murr reported the loss of four pounds from his wallet (R15). At the police station, accused admitted to Hall that he was absent without leave and that he took the suitcase and the money (R20). Although accused denied to Murr "all knowledge of having anything to do with my money", he was present when the police sergeant handed Murr his four pounds, at which time accused remarked, "It's his money", and "You might as well get it back" (R15-16).

4. The only evidence for the defense was a stipulation, concurred in by the prosecution, that if Miss Josephine Baines were present in court, she would testify that she was constantly with accused in Doncaster from 10 a.m. until midnight, on an unidentified date. Accused was drinking heavily, as was an "RAF soldier" with whom accused fraternized while he and Miss Baines were together. The RAF soldier caught a train at the Doncaster station, and both Miss Baines and accused were surprised to find that he had left his suitcase behind. Accused carried it away from the station and told Miss Baines that he would open it to determine who the owner was (R35-36).

5. Accused, having been advised of his rights, elected to remain silent.

6. Accused's absence without leave, as alleged in the Specification, Charge I, is proved by competent uncontradicted evidence. The theft of the four pounds is established by strong circumstantial evidence and the inference of guilt arising therefrom is corroborated by accused's admission that the money was Murr's, at the time it was returned to Murr by the police sergeant. Judicial notice might have been properly taken in the case under consideration, tried, as it was, in the United Kingdom, of the exchange value of Murr's four pounds. The theft of Fagan's suitcase, alleged in Specification 2, Charge II, is adequately established by compelling circumstantial evidence. While there was no competent evidence of value, the court was authorized in assuming, under the circumstances shown, that the suitcase was of some value within the alleged amount of $4.00.

7. At page 29 of the record, the trial judge advocate announced "The prosecution will recall Airman Fagan". Thereupon, according to the record, the witness Murr was recalled and questioned as to the value of the suitcase which he reported missing. As it was Fagan, not Murr, who had, according to the evidence, reported a suitcase missing, it would appear that the testimony with reference to value on page 29 was elicited from Fagan rather than from Murr. In this particular instance, this error is not material.

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8. The charge sheet shows that accused is 21 years eight months of age and that, with no prior service, he was inducted 21 May 1941, at Philadelphia, Pennsylvania, to serve three years.

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

10. The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sep 1943, Sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General, with the European Theater of Operations. 16 SEP 1944 TO: Commanding General, IX Troop Carrier Command, APO 133, U. S. Army.

1. In the case of Private MERTON J. ENGLE (13027878), 305th Troop Carrier Squadron, 442nd Troop Carrier Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded 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 3311. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3311).

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

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

BOARD OF REVIEW NO.1

CM ETO 3335

-8 SEP 1944

U N I T E D S T A T E S)	VIII FIGHTER COMMAND.
v.)	
Second Lieutenant ROBERT E. WITMER (O-562368), Headquarters and Headquarters Squadron, 85th Service Group, Air Corps.)	Trial by GCM, convened at AAF Station F-341, 9 July 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 93rd Article of War.
Specification 1: In that 2nd Lieutenant Robert E. Witmer, Headquarters & Headquarters Squadron, Detachment "A", 85th Service Group, did, at AAF Station F-369, APO 637, on or about 1 June 1944, feloniously take, steal, and carry away about forty pounds (£40-0-0) in English currency, having an equivalence in United States currency of One hundred sixty-one dollars and forty cents ($161.40), the property of Master Sergeant William A. Hartman, Headquarters & Headquarters Squadron, Detachment "A", 85th Service Group.

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Specification 2: In that * * *, did * * * on or about 1 June 1944, feloniously take, steal, and carry away about ten pounds (£10-0-0) in English currency, having an equivalence in United States currency of Forty dollars and thirty-five cents ($40.35), the property of Sergeant Joseph M. Thomas, Headquarters & Headquarters Squadron, Detachment "A", 85th Service Group.

Specification 3: In that * * *, did * * * on or about 1 June 1944, feloniously take, steal, and carry away about thirty pounds (£30-0-0) in English currency, having an equivalence in United States currency of One hundred twenty-one dollars and five cents, ($121.05), the property of Corporal Unez W. Cates, 360th Fighter Squadron, 356th Fighter Group, then a member of Headquarters & Headquarters Squadron, Detachment "A", 85th Service Group.

Specification 4: In that * * *, did * * * on or about 1 June 1944, feloniously take, steal, and carry away about fifteen pounds (£15-0-0) in English currency, having an equivalence in United States currency of Sixty dollars and fifty-two cents ($60.52), the property of Private First Class Lloyd E. Strayer, Headquarters & Headquarters Squadron, Detachment "A", 85th Service Group.

Specification 5: In that * * *, did * * * on or about 1 June 1944, feloniously take, steal, and carry away about twelve pounds (£12-0-0) in English currency, having an equivalence in United States currency of Forty eight dollars and forty-two cents ($48.42), the property of Private George H. Weeks, Headquarters & Headquarters Squadron, Detachment "A" 85th Service Group.

Specification 6: In that * * * did, while acting as unit censor at AAF Station 112, APO 639, on or about 25 March 1944, feloniously take, steal and carry away one pound and ten shillings (£1-10-0) in English currency, having an equivalence in United States currency of Six dollars and five cents ($6.05), the property of Technical Sergeant Wilburn C. Farrell, 3rd Replacement and Training Squadron (Bomb).

CHARGE II: Violation of the 95th Article of War.
Specification: In that * * * being indebted to Private First Class Gerlando Quaglia, Headquarters & Headquarters Squadron, Detachment "A", 85th Service Group in the sum of twenty-five pounds (£25.0.0d.) in English currency, having an equivalence in United States currency of approximately One hundred dollars and eighty-seven cents ($100.87), said sum being loaned to said Second Lieutenant Robert E. Witmer by said Private First Class Gerlando Quaglia on or about 4 June 1944, at AAF Station F-369, APO 637, U.S. Army, said sum becoming due and payable on 15 June 1944, did, at AAF Station F-369, APO 637, U.S.Army on and after 15 June 1944, dishonorably fail and neglect to pay said debt.

He pleaded guilty to each Specification of Charge I, excepting from each Specification the words "feloniously take, steal and carry away", substituting therefor, respectively, the words "wrongfully take and use without authority", of the excepted words not guilty, of the substituted words guilty, and not guilty to Charge I but guilty of a violation of the 96th Article of War; guilty to the Specification of Charge II, except the word "dishonorably", of the excepted word not guilty, and not guilty to Charge II but guilty of violation of the 96th Article of War. He was found guilty of both charges and their respective specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority, the Commanding General, VIII Fighter Command, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution, summarized in chronological sequence, is as follows:

(a) Specification 6, Charge I: About the middle of March 1944 accused was adjutant and unit censor of the 3rd Replacement and Training Squadron (R33). About that time or thereafter, Technical Sergeant Wilburn C. Farrell, a member of

the squadron, placed in the squadron mail box a letter containing a one-pound note and a ten-shilling note, addressed to First Lieutenant Cecil B. Durant, Headquarters Communications Zone, ETOUSA, APO 887, United States Army (R33-34,35; Pros.Ex.2). Farrell did not see the letter thereafter, nor was the letter or its contents received by Lieutenant Durant. Sometime after the middle of April Farrell asked accused if he remembered censoring the letter. Accused replied in the affirmative and stated that he placed the inclosed notes in another "letter", placed Farrell's return address on it and addressed it to Lieutenant Durant (R34-35). On 24 June accused voluntarily signed a sworn statement to the effect that during the latter part of March, while he was acting as unit censor of the squadron, the letter in question came into his hands for censorship; that he extracted one-pound, ten-shillings from it; that he thereafter burned the envelope and the letter; that, upon complaint by Farrell that the money had not reached the addressee, he told Farrell that he had reinclosed the letter, money and original envelope in a cover envelope bearing the same return address and address as the original envelope and that the cover envelope had been forwarded through normal postal channels; and that he did not know why he took the money or remember exactly what disposition was made thereof, except that he was certain it was converted to his own use (R40-41; Pros.Ex.2).

(b) Specifications 1-5, inclusive, Charge I: Accused became attached to Detachment "A", Headquarters and Headquarters Squadron, 85th Service Group, AAF Station F-369, as commanding officer on 15 May 1944 (R21). It was customary for enlisted men of the organization to have their English currency placed, in their presence, in a sealed envelope, bearing the man's name and the amount, which envelope was in turn put in a steel safe of the squadron in the orderly room for safekeeping (R21-22,26; Pros.Ex.1).

Prior to and about 1 June 1944 Staff Sergeant John E. Wolfe, acting first sergeant, received personal funds in the following amounts from the following enlisted members of the 85th Service Group and placed the money in envelopes in the squadron safe, as indicated above:

Master Sergeant William A. Hartman
(£50 less £10 withdrawn) - £40 (R8-9,27-23; Spec.1).

Sergeant Joseph M. Thomas - £10 (R10-11,23-24, 28-29;Spec.2)

Corporal Unez W. Cates (£38 less £8 withdrawn early in June)	- 30	(R12-14,24; Spec.3).
Private First Class Lloyd E.Strayer (Approximated)	- £10	(R16-18,25; Spec.4).
Private George H. Weeks	- £12	(R18-20,25; Spec.5).

In no case did any of these men give accused permission to borrow or extract money from his envelope and in each case the deposit was for the purpose of safekeeping only. When the owners asked for their money on various dates from 12-23 June, it was not available (except ten pounds in the case of Hartman (R23)) (supra). On or about 12 June some of the money turned over to Wolfe for safekeeping was still in a cigar box in the safe, but on or about 18 June none of it was there (R27). Although accused had no key to the safe, he made it a practice to borrow one from Wolfe or the personnel and payroll clerk in order to enter the safe (R26,28). Between 12 and 18 June he asked Wolfe for his safe key purportedly to check records, accused's personal "201" file and ammunition contained in the safe (R26-27).

On 23 June 1944 accused voluntarily signed a sworn statement to the effect that during the period 20 May - 15 June he took from the safe and envelopes in question the sums of money belonging to the enlisted men, as alleged respectively in Specifications 1-5, inclusive, Charge I (R36-39; Pros.Ex.1).

It was duly stipulated that the English pound is equivalent in value to $4.035 in United States currency (R42).

(c) Specification, Charge II: About 1 June Private First Class Gerlando Quaglia similarly deposited 25 pounds with Wolfe for safekeeping. On or about 4 June accused called up Quaglia, inquired if he might use Quaglia's money which was in the safe and stated that he would return it on the 15th (of June) (R26,30-31). Quaglia agreed on condition that accused return it on that date. Accused stated he would pay him on the 15th, but failed to do so. He requested accused to repay him the money, but he still failed to do so. Sometime during the week preceding the date of trial (which occurred 9 July 1944), Quaglia received 17 pounds ten shillings, leaving seven pounds ten shillings still owing (R32).

4. After having been advised as to his rights, accused elected to make the following unsworn statement through counsel:

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"The accused enlisted in the regular army on October 2, 1940. Recently he has lost money constantly at cards. He took the monies referred to in the specifications of the charges in order to continue to play and with the hope that his bad luck would change to good. Had the loss not been discovered when it was all of the monies would have been replaced. He could and would have replaced them by the end of June with his own pay check and with other monies that he had arranged to get for that purpose. The accused never intended to permanently deprive the owners of these monies from enjoyment of the monies, as is evidenced by the fact that on the 23rd of June he gave a list which he had in his possession of the men and monies involved to a Colonel Turkey. He has voluntarily already made substantial restitution. He has returned almost all of the money referred to in all of the specifications, having paid back some 93 pounds 10 shillings of the total of 133 pounds 10 shillings, leaving a balance of 40 pounds. This balance he intends to pay at the end of this month. He is married, has a son less than three years old, both wife and son dependent on the accused for support and mainly because of them the accused is hopeful that this court will permit him to resign his commission and re-enlist in the ranks" (R42-43).

The defense introduced no testimony (R43).

5. Larceny is defined as

"the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein.* * *. The taking must be from the actual or constructive possession of the owner" (MCM,1928, par.149g, p.171).

(a) The evidence with respect to Specification 6, Charge I, including his own confession, is clear that accused in March 1944, while acting as unit censor of his organization, removed English currency of the value alleged from a letter of an enlisted member thereof, as alleged, destroyed the letter and envelope by burning, converted the money to his own use and thereafter, upon inquiry by the sender, falsely stated to him that he had forwarded the letter and currency in a cover envelope bearing the same address and return address as the original. Such evidence supports and amplifies accused's plea of guilty of wrongfully taking and using without authority the money in question. It clearly warranted the court in inferring the existence of an intent permanently to deprive the owner of his property in the money and in finding him guilty of larceny thereof, as alleged (MCM, 1928, par.149g, pp.171-173; CM 115684 (1918), Dig.Op.JAG, 1912-1940, sec.451(38), p.324; Chanock v. United States, 267 Fed. 612, discussed in sub-paragraph (b) infra; Cf: CM 234468, Rhea, (1943), 20 B.R. 399, Bull. JAG, June 1943, Vol.II, No.6, sec.454(105), p.239).

(b) The evidence with respect to Specifications 1-5, inclusive, Charge I, establishes that enlisted members of accused's command left varying amounts of English currency belonging to them with the first sergeant upon the understanding that such money would be held in separate envelopes, so marked as to identify the owner of the contents of each, for safe-keeping in the squadron safe in the squadron orderly room. The evidence, including his own confession, is clear that accused at some time or times during June 1944, despite his obvious understanding of the situation and his knowledge that he had no permission to remove the money, nevertheless removed from the safe and from the envelopes the several sums turned over by the enlisted men involved.

In Chanock v. United States (CA of DC, 1920), 267 Fed. 612, a guest upon registering at a hotel gave defendant two envelopes, containing securities and money, to be placed in the hotel safe. During the following night defendant opened the safe, took the securities and all of the money but $10 from the envelopes and absconded. It was contended that although the indictment charged larceny, the proof established embezzlement. The court wrote, at page 613:

> "The securities and money were committed to the custody of defendant for a specific purpose, namely, to be placed in the safe for safe-keeping until called for by the owner. The power of

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> defendant over the property extended to placing it in the safe and returning it, when requested by the owner. In People v. Montarial, 120 Cal. 691,695, 53 Pac. 355, where one of two roommates intrusted the other with his money for safe-keeping, and the latter placed it in his trunk, subject to the former's call, the taking by the custodian was held to be larceny. * * *.
>
> The bare custody with which defendant was vested did not change the possession of the property. It constructively remained in the owners".

In the Chanock case the court also quoted with approval the following portion of the opinion in People v. Johnson, 91 Cal. 265, 27 Pac. 663:

> "Where the owner puts his property into the hands of another, to do some act in relation to it in his presence, he does not part with the possession of it, and the conversion of it animo furandi is larceny, and not embezzlement."

The following statement from Clark and Marshall on the Law of Crimes, 454, 455, was cited in the Chanock case:

> "There is a well-settled distinction in law between the possession of goods and the mere charge or custody, and this distinction plays an important part in the law of larceny. The owner of goods may deliver them to another in such a manner, or under such circumstances, as to give the other the bare custody, without changing the possession in the eye of the law. The possession in such a case remains constructively in the owner, and, if the person having the custody converts the goods to his own use with felonious intent, he takes them from the constructive possession of the owner, and commits a trespass and larceny;

and it can make no difference, in such a case, when the felonious intent was first formed."

It is clear under the foregoing authority that the enlisted men herein, in retaining full control of and power over the disposition of the money belonging to them, retained the constructive legal possession thereof. Bare custody for the specific, limited purpose of safe-keeping was relinquished to the first sergeant, who was in a position analogous to that of the defendant in the Chanock case, supra. Although accused, as commanding officer of the unit of which these enlisted men were members, presumably had general supervisory control over the safe and its contents, and had physical access to the safe for the purpose of removing and replacing certain articles and papers other than these envelopes, he had no right whatever to handle these envelopes or their contents in any capacity, except as might be specifically authorized by the owners of the contents thereof. He was thus even further removed from the bare custody of the envelopes and their contents than the defendant in the Chanock case and at most had mere physical access thereto. His removal of the money and conversion of it to his own purposes, without the consent of the owners under the circumstances here shown, (which taking, he admitted by his plea, was wrongful and without authority) warranted the court in inferring the existence of a specific intent on accused's part permanently to deprive the owners of their property in the money. His previous larcenous taking of Farrell's money (Specification 6, Charge I, sub-paragraph (a), supra) throws light upon the question of his specific intent at the time of these later takings. The court's determination against accused of the factual issue injected by his unsworn statement that he never entertained the requisite specific intent will thus not be disturbed by the Board of Review upon appellate review (CM ETO 2840, Benson). The Board of Review is of the opinion that the evidence supports the findings of guilty of Specifications 1,2,3,4 and 5, Charge I.

An intention to restore stolen property or money or even its actual restoration, is no defense to a charge of larceny (MCM, 1928, par.149g, p.171; Cf: CM ETO 1588, Moseff).

(c) With respect to the Specification, Charge II, the evidence, in support of accused's plea of guilty, (except the word "dishonorably"), shows that accused, having borrowed 25 pounds from Quaglia, as alleged, failed to repay any part of the same on the date promised, 15 June, and persisted in such failure thereafter, despite the borrower's request for repayment, until sometime during the week preceding the trial

(which occurred 9 July 1944) when he paid 17 pounds ten shillings. Seven pounds ten shillings remained unpaid at the time of trial. The court was warranted in regarding such failure and neglect on accused's part under the circumstances here disclosed as dishonorable. The violation of Article of War 95 was established (CM ETO 1803, Wright; CM ETO 2581, Rambo, and authorities therein cited).

6. The charge sheet shows that accused is 21 years 11 months of age and enlisted in the Regular Army 2 October 1940 at Harrisburg, Pennsylvania, to serve for three years, was discharged at Miami Beach, Florida, 4 August 1942, appointed second Lieutenant in Army of the United States and called to active duty 5 August 1942.

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

8. Dismissal is mandatory upon conviction of a violation of Article of War 95, and is authorized, with total forfeitures and confinement at hard labor upon conviction of a violation of Article of War 93. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir. 210, WD, 14 Sep. 1943, sec.VI, as amended).

B. Franklin Pike, Judge Advocate

Edward H. Stevens, Jr., Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

1st Ind.

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

1. In the case of Second Lieutenant ROBERT E. WITMER (O-562368), Headquarters and Headquarters Squadron, 85th Service Group, Air Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 3335. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3335).

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

(Sentence ordered executed. GCMO 68, ETO, 22 Sep 1944)

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

BOARD OF REVIEW NO. 1

CM ETO 3362

16 SEP 1944

U N I T E D S T A T E S	79TH INFANTRY DIVISION.
v.	Trial by GCM, convened at Carteret, Manche, France, 22 July 1944.
Private CLAUDE E. SHACKLEFORD (34306180), Company B, 304th Engineer Combat Battalion.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for six years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT and STEVENS, JUDGE ADVOCATES

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

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

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

Specification: In that Private Claude E. Shackleford, Company "B", 304th Engineer Combat Battalion, did at or near St Nicolas de Pierrepont, Manche, France, on or about 4 July 1944, willfully, feloniously, and unlawfully kill Aimable Laurent, by shooting him in the head with a gun.

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

Specification: (Nolle prosequi)

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 violation of Article of War 61 (The review of the Staff Judge Advocate discloses that the offense of which accused was convicted

was absence without leave for 40 days). He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for six years. The reviewing authority approved the sentence and ordered it executed, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas as the place of confinement, directed that pending the transfer of accused to the Disciplinary Barracks he be confined in the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The undisputed evidence was substantially as follows:

About 9 p.m. 4 July 1944 at St. Nicolas de Pierrepont, Department of Manche, France (R7-8,11) about eighteen French civilians, including men, women and children, had taken refuge in two barns (R7,11). About 9:20 p.m. (R8) an American soldier (accused) arrived, asked for a glass of cider and was given one. He then went to the place where the women and children were quartered (R11) and flashed his torch. He saw a young girl lying there, "got to lay down with her," and kissed her. A man took her by the arm "to get her away a little." Another American soldier arrived, saw what was happening and took accused away. The civilians returned to bed (R7). About 20 minutes later accused reappeared and flashed his torch about looking for the young girl. Everyone arose. The girl was hidden by the civilians and managed to slip outside. When accused failed to find the girl he began to grasp some of the women, pushed them with his rifle, and pulled one by the hair. A man tried to get accused away but the latter resisted (R7,11-12). Some of the civilians left the building but the deceased (Aimable Laurent) and two children remained inside. Accused was also outside at this time. "As he (accused) could not take any of the women with him" he fired a shot through the door of the building where some women and children were present. Thereupon deceased and some other civilians rushed forward, seized and held accused. Three American soldiers arrived and told the civilians to release him. Deceased then started to return to the building and accused shot him just as he was entering the doorway (R8-9, 11-13). The wife of deceased testified that after the three soldiers asked that accused be released

> "this wretched creature (accused) followed my husband with his eyes until he could give him a shot. Then he picked up a rifle which had fallen to the ground and followed my husband as it was my husband who rushed him in the first place. He screamed for hatred and fired point blank" (R8).

Another witness to the shooting testified

"As soon as he (accused) was free he got back a little and fired at Laurent (deceased) who had got near the door and then fell. When I saw the man fall we ran for shelter"(R 11).

Part of deceased's head was blown away and he died about a half-hour later (R8,11). Accused later fired two more shots (R9,13). He appeared normal and "was not tight or anything else" (R16).

One witness testified that it was not very dark at the time of the incident and that "You could see easily." He had no difficulty in seeing the face of accused whom he identified as the man who fired the shot (R11,16). Two other witnesses identified accused after he was asked by the prosecution to stand up (R14-15). Three witnesses testified that they saw an American soldier shoot deceased but they were unable to identify the assailant in court (R13-15).

4. No evidence was introduced by the defense and accused, upon being advised of his rights, elected to remain silent (R15-16).

5. "Manslaughter is defined to be the unlawful and felonious killing of another, without malice aforethought, either express or implied and is either voluntary or involuntary homicide, depending upon the fact whether there was an intention to kill or not (1 Wharton's Criminal Law, 12th Ed., sec. 422, pp. 637-640).

"Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought" (Ibid; sec 423, p. 640).

The record of trial is brief and the testimony of the witnesses concerning the incident was somewhat sketchy and confusing. However, it is clear that accused deliberately and coldbloodedly fired at deceased without any provocation whatsoever, and there is every indication that he intended to kill him. The only reason for the shooting was apparently the resentment of accused at being seized by deceased and others, after accused fired the first shot through the door. Deceased's wife testified that her husband was the first person who rushed at accused after the first shot. The only evidence concerning accused's sobriety was that he drank one glass of cider and that he was "not tight". The circumstances indicate that accused could properly have been charged with and found guilty of murder. The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty of voluntary manslaughter, which offense is included in murder (MCM, 1928, par 148a, p.162; CM 165268 (1925) Dig. Op. JAG 1912-1940, sec. 450(2), p.310).

6. Although it was clearly established by the evidence that accused was the soldier who killed deceased, the action of the prosecution in pointedly directing the attention of two witnesses to accused, by asking him to stand up, was improper and is a practice not to be condoned. However, such action did not violate the prohibition of the Fifth Amendment to the Federal Constitution against compelling one to give evidence against himself (CM ETO 1107, Shuttleworth and authorities cited therein).

7. The charge sheet shows that accused is 28 years nine months of age, and that he was inducted 6 June 1942 to serve for the duration of the war plus six months. He had no prior service.

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

9. The maximum punishment imposable for voluntary manslaughter is dishonorable discharge, total forfeitures and confinement at hard labor for ten years (MCM, 1928, par. 104c, p.99). Confinement of accused in a Federal Reformatory is authorized on conviction of the offense of voluntary manslaughter by Sec. 275, Federal Criminal Code, (18 USCA 454) and Cir. 229, WD, 8 June 1944, sec II, pars. 1a(1) and 3a. The designation of the Disciplinary Barracks, Fort Leavenworth, Kansas, is also authorized (AW 42).

B. Franklin Potter Judge Advocate

Edward H. Clegg Judge Advocate

Edward L. Stevens Jr. Judge Advocate

1st Ind. (253)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 SEP 1944 TO: Commanding General, 79th Infantry Division, APO 79, U.S. Army.

1. In the case of Private CLAUDE E. SHACKLEFORD (34306180), Company B, 304th Engineer Combat Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Attention is invited to the provisions of paragraph 90a, Manual for Courts-Martial, 1928, p.81 concerning the policy of the War Department respecting places of confinement of general prisoners. Confinement in a Federal reformatory is authorized on conviction of accused of the offense of voluntary manslaughter by section 275, Federal Criminal Code (18 USCA 454) and Cir. 229, WD, 8 June 1944, sec. II, pars. 1a(1) and 3a. The designation of a disciplinary barracks is also authorized (AW 42; par.2b, AR 600-395, 28 Mar 1944). Accused was convicted of an aggravated and particularly vicious felony and might well have been charged with and found guilty of murder. It is suggested that because of the seriousness of the crime committed a new action bearing the same date be substituted, wherein the Federal Reformatory, Chillicothe, Ohio, be designated as the place of confinement.

> "Any action taken may be recalled and modified before it has been published or the party to be affected has been duly notified of the same" (MCM, 1928, par.87b, p.78).

Such action should be forwarded to this office for attachment to the record of trial.

It is noted that in the present action the sentence is ordered executed. The proper form of action to be followed in the instant case is found in form No. 10, Appendix 10, Manual for Courts-Martial, 1928, p. 275.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3362. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3362).

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

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

BOARD OF REVIEW NO. 2

15 SEP 1944

CM ETO 3366

U N I T E D S T A T E S	V CORPS
v.	Trial by GCM, convened at Headquarters, V Corps, Rear Echelon Command Post, near Balleroy, Normandy, 5, 7, August 1944.
Private GEORGE W. KENNEDY (36389365), 3275th Quartermaster Service Company.	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93d Article of War.

Specification 1: In that Private GEORGE W. KENNEDY, 3275th Quartermaster Service Company, did, in the town of Balleroy, Department of Calvados, (Normandy) France, on or about 23 July 1944, with intent to do her bodily harm, commit an assault and battery upon Therese Levavasseur, by wilfully and feloniously striking her on the head with a dangerous weapon, to wit, a U. S. .45 Cal. automatic pistol.

Specification 2: In that * * * did, in the town of Balleroy, Department of Calvados, (Normandy) France, on or about 23 July 1944, with intent to do him bodily harm, commit an assault upon Private DAVID GRIFFITHS, 159th Battery, 97th AT Royal Artillery (British), by willfully and feloniously shooting at him, with a dangerous weapon, to wit, a U. S. .45 Cal. automatic pistol.

He pleaded not guilty and was found guilty of the Charge and specifications. Evidence was introduced of three previous convictions by summary court for absence without leave from post and duties on 1 February 1944, in violation of Article of War 61, for insubordinate language and refusal to obey an order on 5 March 1944, in violation of Article of War 65, and for absence without leave on 6 April 1944, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. It was established by the prosecution that on 23 July 1944, accused was a private, 3275th Quartermaster Service Company, stationed outside of Balleroy, Calvados, Normandy, France. On the evening of that day, and in that vicinity, accused was seen walking along the road by Corporal Joseph Luzny, Company A, 507th Military Police Battalion, who questioned him because he was "out of uniform". Accused at that time had in his bosom a pair of "GI" shoes, similar to Prosecution Exhibit A, and was carrying in his pocket a United States .45 caliber pistol. Later, Luzny heard a couple of shots fired. He went to the area of the shots and saw two British soldiers and a girl "Therese Levavasseur", who was on a stretcher, her head bandaged with "bloody rags" being attended by a civilian doctor. About that time he also saw accused for the second time in a jeep in the custody of "Lieutenant McDermott". This was about one hour and a half after Luzny had first seen accused. Accused "looked sober" to him (R6-9,11; Pros.Ex.A). In the meantime, accused had taken a pair of shoes similar to Prosecution Exhibit A to Therese Levavasseur, a girl who lived in Balleroy. He had promised them to her, she having seen him "many times before", having known him for three or four days. Accused told the girl he was "afraid of the MP's". He took her to a field. They spoke a few words by means of books. The conversation was of "no special meaning". Accused "wasn't drunk at all" and did not "ask anything at all". Prior to that time he had "seemed very correct", having come over to her house and given chocolate to the little children. They had been in the field about ten minutes when the girl tried on one of the shoes. While she was doing this, accused who was behind her hit her a number of times on the back of her head with a pistol which she had previously seen "sticking out of his pocket a little bit". She received five cuts or lacerations, "moderately severe", on her head. She screamed and two English soldiers arrived very quickly. There were some shots. After that she went to a military hospital where she was attended by "Captain Fraser" (R10-13,16,24; Pros.Exs. A,E).

Privates B. J. Owens and David Griffiths, 159th Battery, 97th "AT", Royal Artillery, a British Army unit, were going for a walk on the evening in question, near Balleroy. At about a quarter of seven, they heard a girl scream in a field "opposite". Owens ran into the field where he saw a "young lady walking away and a negro". The negro "took a shot at" him. Owens dived behind a hedge and fired one shot. The negro was "on his knees against the hedgeway". Owens did not fire any more shots but helped the girl out of the field. Griffiths had paid little attention to the screams at first, but "got to the gate" (of the field) just as his friend and the girl came out. He went into the field. Just before that a shot had been fired. He saw "a colored person kneeling down fifteen yards away". Griffiths "pulled a Browning pistol and shot, and he shot". This "person" fired six shots at Griffiths, and then pulled the magazine out of his pistol and dropped it on the ground. Griffiths "dashed towards him and he ran", jumping over the hedge. Later, Griffiths found the magazine which he identified and which was received in evidence (Pros.Ex.C). It was "sticky and wet - bloody" at the time. Neither Owens nor Griffiths were able to identify accused (R17-24).

Lieutenant Colonel Dewey B. Gill, Inspector General's Department, 5th Infantry Division, after advising accused of the substance of the complaint against him and after reading Article of War 24 to him, gave him "an opportunity to say what he wished about it". Accused told Colonel Gill, in substance, that he had arranged to give Therese Levavasseur a pair of shoes in exchange for a bottle of cognac; that he brought the shoes to her house and that it was her suggestion they go into the field; that after they reached the field, she was sitting there with the shoes on and refused to give him the bottle of cognac; that he insisted on having the cognac or the shoes "and some remark was made about the Boche"; and that "he got mad and struck her with his pistol butt". Accused also said that after that some bullets came past him from some British soldiers and "he fired a pistol at the British". Accused identified Prosecution Exhibit C for Colonel Gill as the clip in his pistol, and said that the pistol was a United States .45 caliber type (R13-16). On her cross-examination, Therese Levavasseur denied that she and accused had talked "about the merits of the American soldiers and the German soldiers" (R12).

4. The rights of accused as a witness were explained to him. He elected to remain silent and called no witnesses.

5. The allegations of the specifications constitute an assault with intent to do bodily harm with a dangerous weapon under Article of War 93 and were fully supported by the prosecution's evidence of which there was no contradiction. "Weapons * * * are dangerous when they are used in such a manner that they are likely to produce death or great bodily harm" (MCM, 1928, par.149m, p.180). Accused struck Therese Levavasseur a number of times on the head with the butt of a

United States .45 caliber automatic revolver, with sufficient force to cause moderately severe lacerations of the scalp. The specification which states the assault on the girl also alleges a battery. "A battery is an assault in which force is applied" (MCM, 1928, par.149 1, p.178), in which force has made contact. As seen, this allegation was proved. A pistol used as a billy or club is a dangerous weapon (Dig.Ops.JAG, 1912-1940, sec.451(11), p.313, CM 144295 (1921)). This act of accused was likely to produce death or great bodily harm. Accused also fired this pistol at Private David Griffiths, as alleged in Specification 2. Firing a pistol at another is also an act likely to produce death or great bodily harm and is a felony under Article of War 93, as charged (Dig.Ops.JAG, 1912-1940, sec.451(1), p.310, CM 122271 (1918)). It was not necessary to constitute the offense charged "that any battery ensues", that the intended victims be struck by the bullet (MCM, 1912, par.149m, p.180). The offenses covered by the two specifications involved specific intent, felonious intent, as alleged in such specifications. The intent alleged is properly inferable from the circumstances (Dig.Ops.JAG, 1912-1940, sec.451(10), p.313, CM 193085, 193449 (1930)). The acts were not provoked or legally excusable. True, Griffiths fired the first shot. But at that time accused was in the position of a fugitive from justice. He had committed a felony and had resisted arrest by Owens. He was armed with a revolver and was prepared to resist Griffiths by the use of further force. Under the circumstances, there was no legal provocation which justified his firing six shots at Griffiths. His intent was felonious (MCM, 1928, par.148a, p.164).

6. Accused is 23 years old. He was inducted at Chicago, Illinois, 13 January 1943, to serve for the duration plus six months. There was no prior service.

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

8. Confinement in a penitentiary is authorized for assault with intent to do bodily harm with a dangerous weapon (AW 42; sec.276, Federal Criminal Code (18 USC 455). As accused is under 31 years of age, and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, is proper (Cir.229, WD, 8 Jun 1944, sec.II, pars. 1a(1), 3a).

(On leave) Judge Advocate

John Wannuthel Judge Advocate

Benjamin R. Reeves Judge Advocate

1st Ind. (259)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 15 SEP 1944 TO: Commanding General, Headquarters V Corps, APO 305, U. S. Army.

1. In the case of Private GEORGE W. KENNEDY (36389365), 3275th Quartermaster Service Company, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3366. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3366).

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

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

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BOARD OF REVIEW NO. 2

14 SEP 1944

CM ETO 3374

UNITED STATES	HEADQUARTERS COMMUNICATIONS ZONE (formerly designated HEADQUARTERS SERVICES OF SUPPLY), EUROPEAN THEATER OF OPERATIONS.
v.	
Private CHARLEY BAILEY, Jr. (35646820), Headquarters Company, Headquarters Command.	Trial by GCM, convened at Cheltenham, Gloucestershire, England, 10 July 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Charley Bailey, Jr., Headquarters Company, Headquarters Command, ETOUSA, did, at Cheltenham, Gloucestershire, England, on or about 24 May 1944, feloniously take, steal and carry away 1 Blue Eversharp pen, value about $7.50; 1 gray Parker mechanical pencil, value about $5.00; 4 ten dollar notes United States currency, lawful money of the United States; 3 one dollar notes United States currency, lawful money of the United States and 1 one pound sterling, lawful money of the United Kingdom of the exchange value of about $4.03; all of the aggregate value of about $59.53, property of Technical Sergeant Sidney C. Atwood.

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Specification 2: In that * * * did, at Cheltenham, Gloucestershire, England, on or about 24 May 1944, feloniously take, steal and carry away 1 green Wearever pen, value about $1.25; 1 novelty mechanical pencil, value about $2.00; 3 ten dollar notes United States currency, lawful money of the United States; 4 five dollar notes United States currency, lawful money of the United States; all of the aggregate value of about $53.25, property of Private First Class Eugene O. Colliflower.

Specification 3: In that * * * did, at Cheltenham, Gloucestershire, England, on or about 24 May 1944, feloniously take, steal and carry away 1 Regent lighter, value about $5.00; 1 black striped Parker pen, value about $6.00; 1 Eversharp pen and pencil set, value about $12.75; 4 ten dollar notes, 1 five dollar note and 1 one dollar note United States currency, lawful money of the United States; 1 ten shilling English bank note, lawful money of the United Kingdom of the exchange value of about $2.00; all of the aggregate value of about $71.75, property of Staff Sergeant Kenneth P. Hinch.

Specification 4: (Finding of guilty disapproved).

Specification 5: (Finding of not guilty).

He pleaded not guilty, and was found guilty of Specifications 1, 2, 3, and 4 and of the Charge, and not guilty of Specification 5. Evidence was introduced of two previous convictions, one by special court-martial, for driving a motor vehicle of the United States in a reckless and dangerous manner, leaving assigned duty and remaining at a public house, refusing to obey order of and using threatening language to a non-commissioned officer; and one by summary court for wrongfully wearing the bar of a second lieutenant on his cap, both in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority disapproved the finding of guilty of Specification 4 of the Charge, approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution's evidence was substantially as follows:

Accused was a private, Headquarters Company, Camp "A", Cheltenham, England. On the morning of 25 May, the Provost Sergeant of Camp "A" was given a "written list of property stolen from the tent area

occupied by the 1194th Engineers". He notified the orderly room and the camp commander and at two o'clock (R6), in company with Second Lieutenant Braxton DuVall, Headquarters Company, Headquarters Command, Camp "A" (R8), visited accused's tent and searched him and his equipment and clothing. Accused's "stuff was on a truck ready to move out of camp" (R6), the Camp Commander of Camp "A" having notified him at seven o'clock on the evening of 24 May that he was to be transferred the morning of 25 May to duty with the forward echelon (R10). The provost sergeant identified a number of articles on a table in the court room as items "obtained" from a search of accused and accused's barracks bag. He testified that he also found on accused $212 in American money, 25 stamped air mail envelopes and four pounds ten shillings in English currency. The American money was in his shoes (R7). This property was listed and turned over by the provost sergeant to "Sgt. Hall" (R8) who retained them until he turned them over to the trial judge advocate at the trial (R9).

Technical Sergeant Sidney C. Atwood, Headquarters Company, 1194th Engineer Base Depot Group, testified that he arrived with his company at Camp "A" in the afternoon of 24 May, having arrived in this theater on 16 May 1944. The company was quartered in tents. The men had had insufficient time to get more than a very nominal amount of their American currency changed to British currency (R11). The morning of the 25th of May, Atwood found his wallet at the foot of his bed with all his money (four ten-dollar bills, three one-dollar bills, and one English pound) missing. On looking through his clothing he discovered that his Parker pencil and Eversharp pen, each with his name on them, were also missing. Atwood then identified his pencil and pen from among the items of property recovered from accused which were displayed on the table. He had not authorized anyone to take these articles from him (R12).

Private First Class Eugene O. Colliflower, 1194th Engineer Base Depot Group, testified that he also arrived in this theater on 15 May and at his present station at 7:30 p.m. 24 May, going to bed at 11:30 p.m. The next morning his pocketbook, left in his shirt pocket, was on the floor. His money, three ten-dollar bills and four five-dollar bills, together with his pen and pencil, the latter with the name "Neihaus, St. Louis" on it, were gone. He also identified his pen and pencil from among the articles on the table. He had not had an opportunity to change his money into English currency (R13-14).

Staff Sergeant Kenneth Hinch, 1194th Engineer Base Depot Group, testified that he also arrived in this theater on 15 May and at "this camp" on the afternoon of 24 May. During the night after he retired, his wallet was rifled, pen and pencil set, lighter and a Parker pen, together with four ten-dollar bills, one five-dollar bill, one one-dollar bill and one ten-shilling note, were taken. He had checked the items in his wallet before he retired. His Eversharp pen and pencil set had his initials on them. He identified them among the articles on the table. He had not authorized anyone to take them (R16-18). The items identified were valued by Captain Alvin D.

Schwartz, Finance Department, and Post Exchange Officer, Headquarters Command (R18-19).

4. Accused remained silent and no evidence for the defense was presented.

5. Larceny is the fraudulent taking and carrying away of a thing without claim of right, with the intention of converting it to a use other than that of the owner, without his consent (Wharton's Criminal Law, Vol.2, sec.1097, p.1405). Proof of larceny requires the taking and carrying away by accused of the property of another as alleged; that it was of some value and that they were taken with the intent to permanently deprive the owner thereof (MCM, 1928, par.149g, p.173).

The victims of the larcenies herein were members of a unit just arrived in this theater and in this camp. They had not had the opportunity to change their American money to English currency or, it was evident, to bank any of their money. Their effects were rifled during their first night in their new camp. Accused, stationed at the same camp, had beennotified by his commanding officer on the evening that the new arrivals reached camp, that he was one of a group scheduled to leave the next day. When accused was searched, his belongings had already been loaded on the truck for leaving. On his person and among his effects were found some of the articles taken from the complaining witnesses named in each of the first three specifications herein, in each instance of a value in excess of $50.00. Accused's possession of their recently stolen property, unexplained, is evidence of guilt (Underhill's Criminal Evidence, par.514,pp.1040-1042; 1 Wharton's Criminal Evidence, par.191, pp.198-200; CM 211769, Brown; Dig.Ops.JAG, 1912-1940, sec.451(37), p.323; CM ETO 885, Van Horn; CM ETO 1607, Nelson). Where several articles have been stolen and accused is found in possession of some of them after the theft, such fact tends to show he was guilty of stealing all of the missing articles (CM 157982, Acosta; CM 192031, Allen; CM ETO 952, Mosser). While the currency recovered could not be identified, possession of such a large sum of American currency in this theater, where it is not used, being also roughly the amount missing, found hidden in accused's shoes, coupled with his possession of other of the missing property and his expectation of a speedy get-away from the scene of the crime, all point convincingly to the guilt of accused of the larcenies as charged.

6. The charge sheet shows accused to be 21 years of age. He was inducted at Huntington, West Virginia, 6 January 1943, with no prior service.

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

8. Confinement in a penitentiary is authorized for the offense of larceny of more than $50 (AW 42; 18 USCA 466). As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, is proper (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1), 3a).

(On Leave) Judge Advocate

Judge Advocate

Judge Advocate

(266)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 SEP 1944 TO: Commanding General, Headquarters Communications Zone, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private CHARLEY BAILEY, Jr. (35646820), Headquarters Company, Headquarters Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3374. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3374).

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

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

BOARD OF REVIEW NO.1

CM ETO 3375

1 SEP 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated, SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private SAMUEL W. TARPLEY (33035692), Company D, 1323rd Engineer General Service Regiment.	Trial by GCM, convened at Tidworth, Wiltshire, England, 19 July 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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 Pvt Samuel W Tarpley, Company D, 1323rd Engineer General Service Regiment, did, at or near Dunley, Hants, England, on or about 17 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Winifred Joyce Morgan.

He pleaded not guilty and, three-fourths of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous

convictions was introduced. Three-fourths of the 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 the provisions of Article of War 50½.

3. The prosecution's evidence showed that accused, a colored soldier of Company D, 1323rd Engineer General Service Regiment, on the afternoon of 17 June 1944, was engaged in road testing a government vehicle (a jeep) (R26). About 4 p.m. while driving on a public thoroughfare, he saw Winifred and her sister, Mary, age nine years, who were proceeding on foot to visit their friend, Mrs. Elizabeth Willis at the Bungalow, Egbury Common, St. Marybourne, Hants (R9-10,13,18). He stopped and made inquiry as to the nearest town. Upon receiving an answer from Winifred he offered the children a ride, which was refused (R10,13). After speaking with accused, Winifred and Mary ran through adjoining fields. Accused pursued them in the vehicle (R10,13). The girls became frightened and entered a wooded area. Accused dismounted from the jeep and followed the girls into the woods (R10,13). He overtook Winifred, grasped her, dragged her to a "beech tree", and threw her to the ground (R10,13). He tore her knickers from her body (R13,14) and placed himself on top of her. Winifred screamed and pleaded to be released, but accused held her on the ground and threatened her, "If you scream I'll kill you" (R10,11,13,15). He arose, pulled the child to her feet, and holding her by the hand, led her to the jeep where he secured lubricating grease which he applied to his penis (R10,11,13,16, 17). He again threw Winifred to the ground, placed himself on top of her and secured sexual connection with her (R10,13, 14,17). Upon consummation of the act he placed the children in the jeep and drove them to Mrs. Willis' home where they left the vehicle (R11,13,18). Details of the crime will be included in the subsequent discussion of important legal issues which arise in the case.

The accused elected to remain silent and offered no evidence in defense (R28).

4. Certain questions pertaining to the competency of witnesses and admissibility of evidence will receive preliminary consideration:

(a) Elemental in the case is the question as to the competency as witnesses of Winifred, the victim, age 11 years,

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and her sister Mary, age 9 years. Their evidence is vital. Without Winifred's testimony the conviction of accused cannot be sustained. Mary's testimony possesses important corroborative value. Each child was sworn as a witness but prior to administering the oaths, each of them was subjected to a voir dire examination by the trial judge advocate to determine her competency. Each child stated she knew the meaning of the truth and that she knew when she took an oath she must tell the truth and cannot tell a lie. In response to the question, "How does God feel if you tell a lie?", Mary answered, "Upset" (R9). On Winifred's examination, she was asked, "Do you know how God will feel if you tell a lie? Will he be happy or will he be displeased?" She replied, "Displeased" (R12).

The Board of Review in CM ETO 2195, Shorter, and CM ETO 2759, L.C.Davis considered the question of the competency of immature witnesses and the proper procedure for determination of their legal qualifications to testify in military courts. Reference is made to said holdings for a detailed discussion of the problem. It is unnecessary to repeat the same. A discriminating consideration of the voir dire examinations and of the demeanor of each of the girls on the stand as revealed by the record of trial compels the conclusion that each of them possessed "a sufficient knowledge of the nature and consequences of an oath" (Wheeler v. United States, 159 U.S. 523,524,525; 40 L.Ed. 244,247) to qualify them as witnesses. Their subsequent testimony is intrinsic proof of their intelligence and understanding in spite of their youth. Their responses to questions pertaining to the sacredness of an oath are convincing that each of them entertained keen sense and reason of "the danger and impiety of falsehood" (Wheeler v. United States, supra). The Board of Review, without reservation, is of the opinion that the competency of each of the young girls as a witness was fully established.

(b) Mrs. Elizabeth Willis, as a prosecution's witness, was interrogated at length concerning Winifred's condition, and also as to statements made to her by Winifred upon arriving at Mrs. Willis' home. The following excerpts from the record of trial cogently present the legal questions involved:

DIRECT EXAMINATION

* * *

"Q. In what condition was Winifred Joyce Morgan?
A. In a filthy condition.
Q. Was she crying?
A. Yes.

* * *

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Q. What condition was she in both mentally and physically?
A. She was crying, screaming, said the young man said be quickly in the house, wanted to take her on farther, said to me she didn't want to go. I said 'No, you are not going.'
Q. Did you examine her?
A. I certainly did, sir.
Q. What did you see?
A. I saw her little knickers were torn from her, she had grass in her hair, her clothes--you quite understand, sir.
Q. Did you look at her private part?
A. Her private part was greased, black grease.
Q. Did you see anything else about her private parts?
A. She was rather inflamed.
Q. Where?
Defense: I object. She is not an expert.
Law Member: She can testify.
Q. Will you tell the court where she was inflamed?
A. Around her private parts, sir.
Q. Around the vagina, around her privates?
A. Yes, sir.
Q. You have testified that Winifred Joyce Morgan was in a very excited condition, is that correct?
A. Quite correct.
Q. Did she make any statements?
A. Yes.
Q. Did she make the statements of her own free will or did you use any force to get the statements from her?
A. She just came in and told me everything that happened.
Q. What did she tell you?
Defense: I object as to what she told her.
Law Member: As part of the res gestae I believe it is very permissible.
Q. How soon after she stepped out of the jeep did she tell you what happened?
A. Direct.
Q. What did she say?
A. She said she was coming along to me, for her father, Mr. Morgan, and my husband, Mr. Willis, they do business together; she was coming on to me. This young man was in a jeep and he

asked her if she would like to ride. She said no, my mother has warned me not to get in a soldier's car. She ran away, and this man in the jeep, he asked them to get in. They refused to get in. He ran after them, took them to the moors just around my bungalow. She told me everything that happened.

Q. Will you tell the court just what happened?

A. The little girl said to me the men had got some grease out of the jeep and put on his fingers and of course you quite understand what else happened. He tried to pierce but he didn't do it. He got the grease, put it on his fingers and on her, jumped on her, said 'This what I am doing to you is what your father done when he was getting you.' She spoke up and said 'No, my mother always told me she took me up from under the gooseberry tree.' He jumped a bit on top of her. She said 'He wetted all over me.' (R18-20).

* * *

CROSS-EXAMINATION

* * *

"Q. You testified that the little girl told you that a man, a colored lad, put some grease on her privates, tried to 'pierce.' You used the word 'pierce'?

A. I couldn't explain anything else, could I?

Q. He didn't do it?

A. Yes.

Q. Did the girl tell?

A. She told me he tried hard to venture into the girl's body.

Q. She said he didn't do it?

A. No, she didn't say anything like that.

Q. When you examined her, did you notice any grease on her knickers?

A. I swore her knickers were torn and I saw grease on her private. I saw her knickers were in a like predicament.

Q. Did you or did you not see grease on her knickers?

A. I didn't notice on her knickers but on her privates, but I noticed her knickers were torn.

Q. You said also that you examined her privates, found them inflamed. Did you also find them swollen?

A. She said it hurt her, she hurt." (R20-21).

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The circumstances under which the young victim made the foregoing statements to Mrs. Willis are reconstructed from the evidence thus:

A few minutes after five o'clock on the afternoon of 17 June 1944, Mrs. Willis was in her garden. Mr. Arthur E. Willis, her husband, was in the house. He saw a jeep pass the house containing two girls and a colored soldier (R18,25). They were screaming, but Mr. Willis upon hearing the voices believed at first they were singing and called his wife's attention to the episode. She then entered the house from the garden (R18,25). A few minutes later Winifred and Mary ran into the Willis' house. They were screaming and Winifred was crying (R18-20). The jeep had been driven about 75 yards past the house. Mrs. Willis went to the door and looked down the road (R25). She saw the colored man in the vehicle and beckoned him to come to her. He backed the jeep to a point opposite the house door where Mrs. Willis stood and stopped about ten feet from her (R18,20,25). She said to the colored man as he sat in the jeep, "Come here, I want you. * * * What are you doing to these two little girls?" (R18). The man by this time left the jeep and stood by it. Mrs. Willis exclaimed, "Will you come back here?". Accused entered the jeep and Mrs. Willis called, "I will report you". He drove away (R18). Mrs. Willis did not identify accused in court. She testified "I couldn't recognize him as good as my husband. My husband was in front of me. The little girls were screaming on my shoulder" (R20). It was at this point that Winifred related to Mrs. Willis the facts and circumstances of the assault upon her (R19).

The substance of Mrs. Willis' testimony specifically quoted above obviously falls into three categories: (1) the description of Winifred's physical and mental condition at the time the child appeared at the Willis home; (2) testimony of the fact that Winifred complained of violence visited upon her by her assailant; and (3) statements made by Winifred to Mrs. Willis, narrative in form, as to the details of the attack.

There can be no question as to the admissibility of the portions of Mrs. Willis' testimony which relate to the facts included in (1) and (2), supra.

> "In cases involving the offense of rape the weight of authority is that one to whom a complaint has been made may testify as to the making of the complaint by the prosecutrix, her physical condition and appearance, and the state of her clothing at that time" (CM ETO 709, Lakas).

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The foregoing principle is supported by CM ETO 611, Porter, CM ETO 2905, Chapman, CM ETO 3141, Whitfield.

The question as to the admissibility of evidence contained in the third category, however, requires a determination whether Winifred's statements to Mrs. Willis of the details of her rape and her assailant's statements and actions constituted a narrative of past transactions in which event they were inadmissible hearsay evidence (CM ETO 571, Leach; CM ETO 709, Lakas, supra), or whether they were declarations which were part of the res gestae and therefore admissible (CM ETO 3141, Whitfield, supra). The Board of Review in CM ETO 2195, Shorter, adopted the following statement of the "spontaneous exclamation exception to the hearsay rule" operative in trials for sexual offenses announced in Beausoliel v. United States (107 Fed. (2nd) 292,294,295):

> "Error is assigned, also to the admission of the testimony of the child's mother. She testified, in substance, that she was not present when her daughter arrived at the department store but that she met her a few minutes later; that after walking with her a short distance she noticed a peculiar expression on her face and that, upon questioning the child told her what had happened in the taxicab. Over objection of appellant, the court permitted the witness to testify to this conversation. Declarations, exclamations and remarks made by the victim of a crime after the time of its occurrence are sometimes admissible upon the theory that 'under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and preceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations

> of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy * * *.' What constitutes a spontaneous utterance such as will bring it within this exception to the hearsay rule must depend, necessarily, upon the facts peculiar to each case, and be determined by the exercise of sound judicial discretion, which should not be disturbed on appeal unless clearly erroneous. That the statements in the present case were made in response to inquiry is not decisive of the question of spontaneity, as appellant contends, although that fact is entitled to consideration. Likewise, while the time element is important, it is not in itself controlling. 'Indeed, as has been well asserted, no inflexible rule as to the length of interval between the act charged against the accused and the declaration of the complaining party, can be laid down as established.' It has been held, moreover, that where, as in the present case, the victim is of such an age as to render it improbable that her utterance was deliberate and its effect premeditated, the utterance need not be so nearly contemporaneous with the principal transaction 'as in the case of an older person, whose reflective powers are not presumed to be so easily affected or kept in abeyance.' The declarations of the child - a party to the actual occurrence - were made under such circumstances and so recently after the occurrence of the transaction as to preclude the idea of reflection or deliberation. Therefore, the ruling of the lower court was correct."

Winifred's recital to Mrs. Willis of the details of the bestial crime committed against her person was obviously "a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock" of her tragic and ghastly experience. She was in a distraught, hysterical condition and in tears. There is evidence that she was still suffering from fright:

"She was crying, screaming, /she/said the young man said be quickly in the house, wanted to take her on farther, /she/said to me she didn't want to go" (R19).

The inference is irrefragable that her narrative of events was either during the time the colored soldier was yet in front of the Willis' house in her presence or immediately upon his departure. Her utterances were spontaneous and were made when she was yet under the influence of the fear and pain engendered by the shocking treatment she had suffered. The Board of Review concludes that Mrs. Willis' testimony relating to Winifred's statements to her concerning the details of the rape and accused's actions and statements was properly admitted in evidence (CM ETO 2195, Shorter, supra; CM ETO 3141, Whitfield, supra).

(c) Mrs. Willis' testimony as to her conversation with Mr. Willis at the time the jeep containing Winifred and Mary passed the house (R18) and likewise Mr. Willis' statement to his wife, "Come here, something must have happened" (R25) were, of course, hearsay and inadmissible. However, the statements could not have injured accused as they pertained to collateral matters and were in fact immaterial to the issues of the case. Their admission was non-prejudicial error (AW 37; CM ETO 709, Lakas, supra).

5. Winifred was unable to identify her assailant (R16) but testified he was a colored man of tan shade and that four or five of his teeth were missing from his lower jaw (R17). Mary was unable to recognize anyone in the courtroom as Winifred's assailant (R12). She stated, however, that he was a colored American soldier (R10,11). Both of the children were positive in their statements that the colored man who assaulted Winifred in the woods under the "beech tree" was the same person who placed them in the jeep and drove them to the home of Mr. and Mrs. Willis. Their evidence in this respect is unimpeached and was not questioned during the trial (R10,13,14). Mrs. Willis testified that when she spoke to the colored man in front of the door of her house,

"My husband went ahead and took great notice of the young man, his description" (R18).

Mr. Willis, while on the stand, made a positive and unqualified identification of accused as the person who was in the jeep which brought the two girls to his home. His testimony on this issue remained unchallenged (R25). Mrs. Willis, on cross-examination, testified that while she saw the colored man at a distance

of about ten feet and she "couldn't recognize him as good as my husband" (R20).

Accused's commanding officer, First Lieutenant Paul J. Roche, testified that on Saturday afternoon, 17 June 1944, he had occasion to ascertain the whereabouts of accused. He was absent from the camp. Lieutenant Roche made inquiry at intervals of fifteen minutes until 4:12 p.m. He finally saw him at about 7 p.m. on said date (R26).

With this evidence before the court, it was its province and duty to evaluate it, judge of the credibility of the witnesses, and reach a determination whether accused was the man who committed this atrocious crime. The evidence identifying him as the culprit was substantial, and its reliability and trustworthiness are unimpeached. Under such circumstances, the finding of the court will be accepted as conclusive and final upon appellate review (CM ETO 492, Lewis; CM ETO 503, Richmond; CM ETO 531, McLurkin; CM ETO 559, Monsalve; CM ETO 1621, Leatherberry; CM ETO 2686, Brinson and Smith).

6. The Manual for Courts-Martial defines the elements of the crime of rape as follows:

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent.
> Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.
> The offense may be committed on a female of any age.
> Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.
> Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent" (MCM, 1928, par.148b,p.165).

The evidence is abundant and uncontradicted that accused in his attempt to secure intercourse with the eleven year old Winifred, committed a violent, bestial and abominable assault and battery upon her. The details of the attack are described by the victim and her nine year old sister in an artless and unsophisticated but nevertheless highly convincing manner. Accused encountered them on a public road and after an inquiry which was undoubtedly simulated pursued them into a wooded area. There he seized Winifred, the older, threw her to the ground, and tore her knickers from her body. The inference is indisputable that on his first attempt, he encountered difficulty in effecting entrance with his penis into the child's person. Retaining her in his hold, he applied lubricating grease to his penis and again pushed her to the ground and pursued his purpose. He accompanied his bestiality with threats to kill the child. There can be no doubt that he applied overpowering force; that he put the child in fear of her life and that she at all times resisted his actions to the limit of her ability. Her non-consent is beyond question. Upon this phase of the case the court's findings are supported by a wealth of substantial competent evidence and will be accepted on appellate review as conclusive (CM ETO 1402, Willison and cases therein cited; CM ETO 2472, Blevins; CM ETO 3141, Whitfield; CM ETO 1899, Hicks).

The difficult problem in the case is produced by the testimony of a witness for the prosecution, Dr. James Ewing of the Vinery, Whitchurch, Hants. He testified he was a medical practitioner with the following experience:

> "I have been three years practicing, with one year's hospital gynaecology-maternity experience, six years' surgical; taking it altogether, three years in general practice" (R21).

He examined Winifred on the evening of 17 June 1944, at about 10 p.m. (R22). His direct examination proceeded thus:

> "Q. Will you tell the court what the results of your examination were?
> A. I found on external examination several small pieces of grass in her hair. There were no external skin abrasions. Her clothing appeared to be torn; that was taken by the Detective Officer. On vaginal examination, external appearance

there was staining or small dark stains on both thighs, on the inner sides of the thighs near to the labia. There were no scratches, bruises or anything visible on both external labia, that is, the greater labia, nor again on either side. There was a small dark stain on internal examination. There were no signs of penetration. Vaginal examination was completely negligible.

Q. Doctor, you have stated that on both sides of the major labia there were small dark stains, is that correct?

A. Yes.

Q. Is it possible, in your opinion, as an expert medical witness, that a male organ, penis, may have entered the major labia?

A. Yes, it is possible." (R22)

Upon cross-examination, he stated that there was no evidence of any inflammation of the major labia (R22). In answer to the hypothetical question propounded by a member of the court:

"If there were inflammation of the vagina to an extent apparent to a layman at about 5:30, would the inflammation be noticeable at about 10:00 o'clock?"

he asserted that such inflammation would be noticeable (R22). He repeated this statement that he observed no inflammation (of the vagina) and his conclusion was that there was nothing abnormal about it (R22). Further questioned by the defense, he testified that the child's vagina and hymen were normal for her age and that as an expert it was his opinion it would not be possible to make a penetration and that there was no penetration (R23).

He further stated that "penetration", in British Medical School,

"means a penetration of the hymen. The penis must enter beyond the limitation of the hymen" (R23) (Underscoring supplied),

but that in the instant case it was possible that the penis might have got as far as the major labia (R23). He discovered dirt beyond the outer edge of the labia major - at least between one-half and three-quarters of an inch from the hymen. He further explained:

> "There are two lips, the major and the minor. On the inner side is the minor. * * * The vagina is supposed to begin beyond the major labia and the labia minor, that is on the inner side of the labia minor. The labia major and labia minor constitute what is known together as the vestibule" (R23).

The dirt stain beyond the outer edge of the major labia was between the size of an English sixpence and an English shilling - probably half an inch square (R23). His findings within the vestibule were consistent with penetration by the male organ or by a finger. The dirt was within the inward part of the vestibule toward the hymen (R24).

The foregoing testimony of Dr. Ewing must be considered in the light of indubitable testimony of Winifred, the victim of accused's attack. She testified that he unbuttoned his trousers and put grease "on top of his legs" (R14,16). He then "got on top" of her and "he put his private in mine". She knew he put his private in her private because she "felt it" (R14,17). She felt his finger in her body. She experienced pain but not a great deal (R17). The child's cross-examination concluded with the following colloquy:

> "Q. When you say 'private parts' do you mean your legs?
> A. Yes, sir.
> Q. Can you describe what you mean by your private parts? Are you able to describe it?
> A. No answer.
> Q. Would you stand up? Would you point to what you consider your private parts, where it starts and where it ends?
> A. No answer.
> Q. Where does your private part begin? Point it out with your finger.
> A. No answer.

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Law Member: Do you know the difference between a boy and a girl? Will you tell me? Has a boy got something a girl hasn't?
A. Yes, sir.
Q. Is that what you call the private parts?
A. Yes, sir." (R17)

Mrs. Willis made an examination of Winifred. Her testimony (R19,21) as to the little girl's condition and particularly with respect to her genital organs, has been hereinbefore set forth. She was direct and positive that externally the vagina was inflamed.

The issue thus presented is whether there is substantial evidence of penetration. The rule announced in the Manual for Courts-Martial, quoted above, that "any penetration, however slight, of a woman's genitals is sufficient carnal knowledge" is sustained by a preponderance of authorities.

> "Proof of penetration is necessary in order to establish the charge of the crime of rape; that is, the proof must show beyond a reasonable doubt that there was an actual entrance of the male organ within the labia of the pudendum of the female organ. * * * The better opinion, and the prevailing one, is that full penetration need not be shown, but that proof of any penetration, however slight, of the male organ into the female organ, is sufficient to warrant and sustain a conviction, nothing beyond the proof of mere res in re being required. * * * But while the slightest penetration is sufficient, there must be proof beyond reasonable doubt of some penetration, though the proof of this may be inferred from circumstances aside from the statement of the party injured. It must be shown * * * that the private parts of the male entered at least to some extent in those of the female. At one time it was even thought that

there must be proof that the hymen was ruptured, though this is no longer considered necessary. The law may now indeed be considered as settled that while the rupturing of the hymen is not indispensable to a conviction, there must be proof of some degree of entrance of the male organ 'within the labia of the pudendum;' and the practice seems to be, to judge from the cases just cited, not to permit a conviction in those cases in which it is alleged violence was done, without medical proof of the fact, whenever such proof is attainable" (1 Wharton's Criminal Law (12th Ed.), secs.697-698, pp.935-938).

"Carnal knowledge or sexual intercourse denotes penetration; an actual penetration of the male sexual organ into the body of the female. There can be no carnal knowledge without penetration. Sexual penetration of the female is a necessary element of the crime of rape, an actual penetration into the body of the female being essential. * * * Penetration means that the sexual organ of the male entered and penetrated the sexual organ of the female; mere actual contact of the sexual organs is not sufficient; * * * However, penetration to any particular extent is not required. * * * And, generally, it is not necessary that the penetration should be perfect, the slightest penetration of the body of the female by the sexual organ of the male being sufficient; nor need there be an entering of the vagina or rupturing of the hymen; the entering of the vulva or labia is sufficient. But some degree of entrance of the male organ within the labia pudendum is essential" (52 C.J. sec.24, pp.1014-1016).

With the above elucidation of the applicable rule of law, there is no difficulty in reconciling Dr. Ewing's testimony with that

of the victim, Winifred. The doctor's testimony must be read in the light of his understanding of the word "penetration". He defined it according to the British Medical School as

> "a penetration of the hymen. The penis must enter beyond the limitation of the hymen" (R23).

Therefore, when he declared there had been "no penetration", he meant that accused's penis had not entered beyond the hymeneal membrane. This definition, however, is not the legal definition as above shown. Entrance of the male organ within the labia pudendum is sufficient. There need be no entrance of the vagina or rupturing of the hymen.

Upon this premise Dr. Ewing's testimony corroborated Winifred's statement that "he put his private in mine"; it did not conflict with it. The doctor discovered dirt stains within the "vestibule" or behind the outer edge of both sides of the major labia. He expressed the opinion that it was possible that the placement of the stains could have been effected by the male organ. The court was at liberty to draw from this evidence the inference that accused accomplished a penetration of Winifred's person as that term is defined at law.

Dr. Ewing's testimony, as thus understood, Winifred's positive declaration that she felt accused's "private" in her body, and Mrs. Willis' statement that when she examined the child she found her genital organ inflamed, form a substantial body of evidence that will support the court's finding that a penetration of Winifred's person was accomplished by accused.

In the opinion of the Board of Review, accused's guilt of the charge of raping of Winifred Joyce Morgan at the time and place alleged was established beyond reasonable doubt.

7. The charge sheet shows that accused is 23 years of age and was inducted 3 April 1941 to serve for the duration of the war plus six months. He had no prior service.

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

9. Imprisonment for life is an alternative mandatory sentence for the crime of rape (AW 92). Confinement in a penitentiary is authorized for such crime by Article of War 42 and section 278, Federal Criminal Code (18 USCA 457). Inasmuch as the sentence included confinement at hard labor for more than ten years, i.e. life, confinement in the United States Penitentiary, Lewisburg, Pennsylvania, is authorized (Cir. 229, WD, 8 June 1944, sec.II, pars.1b(4) and 3b).

B. Franklin Ritter Judge Advocate

Edward V. Ingram Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 1 SEP 1944 TO: Commanding General, United Kingdom Base , Communications Zone, European Theater of Operations, APO 871, U. S. Army.

1. In the case of Private SAMUEL W. TARPLEY (33035692), Company D, 1323rd Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The publication of the general court-martial order and the order of execution of the sentence may be done by you as the successor in command to the Commanding General, Southern Base Section, Communications Zone, European Theater of Operations, and as the officer commanding for the time being as provided by Article of War 46. However, such action should not be taken until you are empowered by the President under Article of War 8 to appoint general courts-martial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3375. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3375).

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

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

BOARD OF REVIEW NO. 2

26 SEP 1944

CM ETO 3379

U N I T E D S T A T E S	THIRD ARMORED DIVISION.
v.	Trial by GCM, convened at APO 253, U. S. Army, 17 June 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 25 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private VICTOR J. GROSS (36233636), Company B, Maintenance Battalion.	

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

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

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

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

Specification 1: In that Pvt Victor J. Gross, Co.B, Maint Bn, 3rd Armd Div, did, at Woolstore Camp, Codford St Mary, Wiltshire, on or about, 18 April 1944, feloniously embezzle by fraudulently converting to his own use six (6) pounds, six (6) shillings, (equivalent to $25.00 U.S. Money), the property of Technician 5th Grade Carson W Barefoot, entrusted to him by the said Tec 5 Carson W. Barefoot.

Specification 2: In that Private Victor J. Gross, Company B, Maintenance Battalion, Third Armored Division, did, at Woolstore Camp, Codford St Mary, Wiltshire, on or about 7 May 1944 feloniously embezzle by fraudulently converting to his own use two

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(2) pounds (equivalent to $8.00 US money), the property of Tec 5 Sol Helfman, entrusted to him by the said Tec 5 Sol Helfman.

Specification 3: In that Private Victor J. Gross, Company B, Maintenance Battalion, did, at Bury Camp, Codford St Mary, Wiltshire, on or about, 15 May 1944, feloniously embezzle by fraudulently converting to his own use six (6) pounds, five (5) shilling, two pence (2) (equivalent to $25.00 United States money), the property of Private Roy E Burst, entrusted to him by the said Private Roy E. Burst.

Specification 4: In that * * * did, at Woolstore Camp, Codford St Mary, Wiltshire, on or about, 11 April, 1944, feloniously embezzle by fraudulently converting to his own use two shillings (2) six (6) pence (equivalent to $0.50 United States money), the property of Technician Third Grade Harry G. Nelson, entrusted to him by the said Technician Third Grade Harry G. Nelson.

Specification 5: In that * * * did, at Woolstore Camp, Codford St Mary, Wiltshire, on or about 1 May 1944, feloniously embezzle by fraudulently converting to his own use two (2) shillings, six (6) pence, (equivalent to $0.50 United States money), the property of Private First Class Gordon J. Banks, entrusted to him by the said Private First Class Gordon J. Banks.

Specification 6: In that * * * did, at Woolstore Camp, Codford St Mary, Wiltshire, on or about 6 May 1944, feloniously embezzle by fraudulently converting to his own use two (2) shillings, six (6) pence, (equivalent to $0.50 United States Money.), the property of Sergeant Fred F. Laurens, entrusted to him by the said Sergeant Fred F. Laurens.

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

Specification 1: In that * * * did, at Woolstore Camp, Codford St Mary, Wiltshire, on or about 1 April 1944, while serving in his capacity as Company Mail Orderly, Company B, Maintenance Battalion, unlawfully detain, secrete and fail to deliver a First Class letter postmarked March 21, 1944, Tompkinsville, Kentucky, addressed to Cpl Cephas L.

Page, Company B, Maintenance Battalion, from Lela Mae Page, Rte 3, Tompkinsville, Kentucky, which letter had been received by him, the said Private Victor J. Gross, through the United States Mail and entrusted to him for the purpose of delivering to the addressee thereof.

Specification 2: In that * * * did, at Woolstore Camp, Codford St Mary, Wiltshire, on or about Jan 15, 1944, while serving in his capacity as Company Mail Orderly, Company B, Maintenance Battalion, unlawfully detain, secrete and fail to deliver a First Class letter postmarked Jan 2, 1944, New Orleans, Louisiana, addressed to Private Paul O'Reilly, Company B, Maintenance Battalion, from 2002 Roberts St., New Orleans, Louisiana, which letter had been received by him, the said Private Victor J. Gross, through the United States Mail and entrusted to him for the purpose of delivering to the addressee thereof.

Specification 3: In that * * * did, at Woolstore Camp, Codford St Mary, Wiltshire, on or about 1 Jan 1944, while serving in this capacity as Company Mail Orderly, Company B, Maintenance Battalion, unlawfully detain, secrete and fail to deliver a First Class letter postmarked Dec 20, 1943, North Attleboro, Massachusetts, addressed to Private Ralph W. Cote, Company B, Maintenance Battalion, from Miss Phyllis Beaulieu, 72 Division St., North Attleboro, Massachusetts, which letter had been received by him, the said Private Victor J. Gross, through the United States Mail and entrusted to him for the purpose of delivering to the addressee thereof.

Specification 4: In that * * * did, at Woolstore Camp, Codford St Mary, Wiltshire, on or about December 25, 1943, while serving in his capacity as Company Mail Orderly, Company B, Maintenance Battalion, unlawfully detain, secrete and fail to deliver a First Class letter postmarked December 11, 1943, Mansfield, Ohio, addressed to Corporal Carl F. Fulton, Company B, Maintenance Battalion, from Josie Sherman, 118 Purdy Street, Mansfield, Ohio, which letter had been received by him, the said Private Victor J. Gross, through the

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United States Mail and entrusted to him for the purpose of delivering to the addressee thereof.

Specification 5: In that * * * did, at Woolstore Camp, Codford St Mary, Wiltshire, on or about 20 Jan 1944, while serving in his capacity as Company Mail Orderly, Company B, Maintenance Battalion, having received for the purpose of depositing in the United States Mail from Corporal Herman Nietner, Company B, Maintenance Battalion, a stamped letter addressed to Time, Incorporated, 330 East 22nd Street, Chicago, Illinois, did unlawfully detain, secrete and retain said letter and contents in his possession.

Specification 6: (Finding of Guilty disapproved by reviewing authority)

Specification 7: (Finding of Guilty disapproved by reviewing authority)

Specification 8: (Finding of Guilty disapproved by reviewing authority)

Accused pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 25 years. The reviewing authority disapproved the findings of guilty of Specifications 6, 7 and 8 of Charge II, approved the sentence, and designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement.

3. Evidence introduced by the prosecution showed that accused was a private in Company B, Maintenance Battalion, Third Armored Division, and that from August 1943 until about 23 May 1944 he was company mail orderly who was authorized to and did receive all mail, including insured and registered mail for the company (R7-9,12,13; Pros.Exs.B,C, D). All of the witnesses were members of accused's company. The prosecution called the enlisted men alleged, in Specifications 1, 2 and 3 of Charge I, to have entrusted accused with money and each testified that he gave to accused the money, in the amount and on the date, as alleged in the specification which related to the witness, except that Technician Fifth Grade Carson W. Barefoot was not asked and did not state the amount of money he entrusted to accused, nor the date. However, the time and the amount involved in this offense were adequately established by the fact that the wrongful act was committed while accused was company mail orderly, which period included the alleged date of this offense, and by the further fact that accused in a voluntary, signed confession himself fixed the amount of money entrusted to

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him by Barefoot as $25.00, the sum alleged in the Barefoot specification. These three enlisted men testified that they had given money, in the amount alleged in their respective specifications, to accused for the purpose of buying money orders for them, and that accused thereafter failed to buy the money orders or to account to them for their money (R12-18,39,40; Pros.Ex.P). The enlisted men mentioned in Specifications 4, 5 and 6 of Charge I testified that they each gave accused, on the dates, and as alleged in the specifications relating to their respective transactions with accused, the sum of two shillings and six pence in English currency, equivalent to $0.50 in United States money, for the purpose of sending for them "EFM" cablegrams. They testified that the cablegrams were not dispatched because some time later they were shown by Captain Roquemore the original messages they had filled out (R18-24; Pros.Exs.E,F,G,). Accused said in his confession:

> "The money I received for the Cablegrams, I took and spent. I did not destroy the Cablegrams because I hoped to get some money and send them at a later date" (R39,40; Pros.Ex.P).

While cleaning out the scout car on 12 June 1944, two bags of mail were found in it. Captain James O. Roquemore, commanding officer of accused's company, was notified and he searched accused's tent and found a duffel bag practically full of mail. On top were dirty clothes "and the rest of it was mail, both incoming and outgoing mail, including packages, telegrams, cable-grams and everything". More mail was found under his bedding roll and in his mattress cover. With the two full mail bags there were "over one thousand pieces of mail, both incoming and outgoing". Some of this mail was dated back to 3 December. The letters had not been opened (R9,10). The enlisted men alleged in Specifications 1, 2, 3 and 4 of Charge II to have been the addressees of the mail mentioned therein, each identified a letter addressed to him. Each testified that he had not received his letter until about 14 June, when delivery was made to three of the witnesses by the company commander and to the fourth by the new company mail clerk. The letters so addressed and delivered to these witnesses were sent through the United States mails as first class mail; they were sealed when delivered and on the envelopes were the postmarked dates and other writings, as alleged in the respective specifications (R24-31; Pros.Exs.H,I,J,K). With respect to Specification 5 of Charge II, Corporal Herman Nietner, of accused's company, testified that about 20 January 1944, he gave to accused a letter to be mailed. This letter was not mailed by accused. It was returned to the witness, unopened, the second week in June, by Captain Roquemore who, presumably, found that letter, together with the letters mentioned in Specifications 1, 2, 3 and 4 of Charge II and the "EFM" cablegrams mentioned in Specifications 4, 5 and 6 of Charge I, in the effects of accused (R9-11, 31-33; Pros.Exs.E,L).

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4. Defense counsel stated that the rights of accused as a witness had been explained to him and that he elected to remain silent. Accused did not testify nor was any evidence presented in his behalf.

5. It is unnecessary to recapitulate the evidence. Each material allegation of the specifications, in which the findings of guilty were approved by the reviewing authority, was proved by competent evidence. The six specifications of Charge I allege the giving to accused of six items of money to be used by him for a specific purpose for the benefit of the six soldiers who gave him the money. Accused appropriated the money to his own use and benefit. This was embezzlement in each instance in violation of Article of War 93, under which these specifications were laid (MCM, 1928, par.149h, p.173).

Accused was company mail orderly. In Specifications 1-4 of Charge II he was charged with unlawfully detaining, secreting and failing to deliver First Class letters which had come through the mails of the United States Post Office Department and were entrusted to him for the purpose of making delivery, and in Specification 5 of this Charge with having unlawfully detained, secreted and retained a stamped letter received by him for the purpose of depositing it in the United States mails (a deposit by accused of this letter in an army postal unit was undoubtedly contemplated, the variance between allegation and proof is immaterial, the implications being the same in either case). The conduct so alleged and proved was prejudicial to good order and military discipline, in violation of Article of War 96. In CM ETO 3507, Goldstein, a soldier assigned to duty in an army post office was charged with abstraction of United States mail from that army post office. The charge there was brought under Article of War 96, as here. The Board of Review held that the conduct so charged was a violation of Article of War 96. It was also held by the Board of Review in that case that accused was not punishable as for larceny, but as for an offense analogous to that of unlawful interference with the United States mail under either sections 317 or 318, Title 18, United States Code, the latter section applying specifically to Post Office Department employees. The theory on which that conclusion was predicated found easy acceptance, since accused then was an "inside" employee assigned to duty at the army post office where the mail was actually handled. His offense was with respect to mail under the control and authority of the United States Army Post Office. Accused in the present case did not work in the army post office. He was a member of another unit, for which unit he was mail orderly. However, his duties and responsibilities were fixed and established by the Army, which controls the operates the army post office. These duties are carefully and specifically set forth in section I, paragraphs 1, 2 and 3, of Technical Manual 12-275, 24 October 1942, entitled "Regimental and Unit Mail Clerks". Therein, the unit mail clerk is described as "postmaster" of his group; it is provided that only authorized mail clerks will be permitted to handle mail; and therein it is further

provided that he

> "receives incoming mail from the regimental post office and distributes it to members of his organization. He also collects outgoing mail which he delivers to the regimental post office after he has examined it and assured himself that it is properly prepared for mailing and is correctly and sufficiently addressed. He operates under the supervision of the postal officer of the regiment or similar organization."

In view of the foregoing, the same analogy found in CM ETO 3507, Goldstein, with respect to Goldstein's offense, is applicable to the offenses committed by this accused, as set forth in the specifications of Charge II. With respect to the letter given to accused to mail, as alleged in Specification 5 of Charge II, that letter was as surely under the control and authority of the United States Army Post Office as is a letter given to a United States Post Office letter carrier under the control and authority of the latter.

No penalty is fixed by the Table of Maximum Punishments (MCM, 1928, par.104c), for the offenses alleged in Charge II as a violation of Article of War 96, nor is there a closely related offense specified therein. The offense approaches and is closely related to the offense of stealing, secreting or embezzling mail matter described in section 317, title 18, United States Code (CM ETO 3507, Goldstein; Bull.JAG, Vol.III, No.7, Jul 1944, sec.454(105), p.291, SPJGJ CM 245166 (2 May 1944)).

The maximum period of confinement imposable for a violation of section 317, title 18, United States Code, is five years. Five similar offenses were laid and proved under Charge II, in violation of Article of War 96, and support the period of confinement for 25 years imposed in this case in a place other than a penitentiary (AW 42).

6. Accused is 25 years of age. He was inducted at Fort Sheridan, Illinois, 3 February 1942, to serve for the duration plus six months. There was no prior service.

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

8. Confinement for 25 years in a place other than a penitentiary, Federal reformatory or correctional institution is authorized (MCM, 1928, par.104c; AW 42; sec.317, title 18, USC).

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

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 26 SEP 1944 TO: Commanding General, Third Armored Division, APO 253, U. S. Army.

1. In the case of Private VICTOR J. GROSS (36233636), Company B, Maintenance 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 only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 25 years in a place other than a penitentiary, Federal reformatory or correctional institution, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. None of the offenses of which accused was convicted were offenses for which penitentiary confinement is authorized. Penitentiary confinement is therefore illegal (AW 42). The place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. Supplemental action in accordance with the foregoing holding should be forwarded to this office to be attached to the record of trial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3379. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3379).

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

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

BOARD OF REVIEW NO. 1

22 SEP 1944

CM ETO 3380

U N I T E D S T A T E S	90TH INFANTRY DIVISION
v.	Trial by GCM, convened in vicinity of Periers, France, 30 July 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class ROBERT R. SILBERSCHMIDT (36804771), Replacement Detachment, 90th Infantry Division	

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

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

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

CHARGE: Violation of the 58th Article of War.
Specification 1: In that Private First Class Robert R. Silberschmidt, 90th Infantry Division Replacement Detachment, did, at vicinity of Pretot, France, on or about 17 July 1944, desert the service of the United States, by absenting himself without proper leave from his place of duty with intent to avoid hazardous duty, to wit: engagement with the enemy, and did

remain absent in desertion until he surrendered himself at Chef du Pont, France, on or about 18 July 1944.

Specification 2: In that * * * did, at vicinity of Pretot, France, on or about 18 July 1944, desert the service of the United States by absenting himself without proper leave from his place of duty with intent to avoid hazardous duty, to wit: engagement with the enemy, and did remain absent in desertion until he returned to military control at Chef du Pont, France, on or about 20 July 1944.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and both specifications thereunder. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, 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 90th Division Replacement Detachment was on or about 17 July 1944 under orders which required it to replace combat casualties in the 359th Infantry (R7,12), which was engaged in combat with the enemy at the front (R10,14). Accused, as a member of said detachment, had been assigned and transferred as a combat replacement to said infantry regiment but on said date he was awaiting transportation to it (R6,7,12,14). He had undergone preparatory combat training (R10). He had notice of orders transferring him to front line combat duty and of its hazards (R8,11,12). In an emergency he was placed on a battlefield casualty policing detail. As a result of such experience he thereafter asserted he was a "conscientious objector" and claimed he was a neuropsychotic subject (R7,10,12,15,16,18; Pros.Ex.A). He twice absented himself with the specific intent to avoid the duty at the front lines (R9,19; Pros. Ex.A). On the stand as a witness in his own behalf he admitted both his absences and the intent which prompted same (R19). All the elements of the offenses charged were thus established (CM ETO 1400, Johnston; CM ETO 1405, Oliff; CM ETO 1406, Pettapiece;

CM ETO 1432, Good; CM ETO 1589, Heppding; CM ETO 1664, Wilson; CM ETO 1685, Dixon; CM ETO 2473, Cantwell).

4. The charge sheet shows that accused is 20 years 11 months of age and was inducted 11 February 1943, at Milwaukee, Wisconsin, to serve for the duration of the war plus six months. No prior service is shown.

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

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

_____ Judge Advocate

(Absent on leave) Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 22 SEP 1944 TO: Commanding General, 90th Infantry Division, APO 90, U. S. Army.

1. In the case of Private First Class ROBERT R. SILBERSCHMIDT (36804771), Replacement Detachment, 90th Infantry Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 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 3380. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3380).

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

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

BOARD OF REVIEW NO. 1

CM ETO 3416

16 SEP 1944

UNITED STATES	)	VII CORPS
	)	
v.	)	Trial by GCM, convened at Carentan, France, 26 July 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private JOSEPH CONYER, Jr. (38504751), 692nd Quartermaster Battalion (attached unassigned).	)	

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

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Joseph Conyer, Jr, 692nd Quartermaster Battalion, attached unassigned, did, without proper leave, absent himself from his bivouac area at Carquebut (33.8-92.4), France, from about 1300, 8 July 1944 to about 1730, 8 July 1944.

CHARGE II: Violation of the 93rd Article of War.
Specification: In that * * * did, at Carquebut (33.8-92.4), France on or about 8 July 1944, with intent to commit a felony, viz, rape, commit an assault upon Mme Gabrielle Couppey, by willfully and feloniously striking and seizing her, throwing her to the floor, tearing her clothes, and laying on top of her with his trousers unbuttoned and his penis exposed.

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CHARGE III: Violation of the 96th Article of War.
Specification 1: In that * * * having received a lawful order from Captain Jerry S Brown to keep out of all farmyards and residences of French civilians, the said officer being in the execution of his office, did, at Carquebut (33.8-92.4), France, on or about 8 July 1944, fail to obey the same.
Specification 2: (Finding of Not Guilty)

He pleaded not guilty, and was found not guilty of Specification 2, Charge III, guilty of Charges I, II and their respective specifications, and guilty of Charge III and Specification 1 thereof. Evidence was introduced of one previous conviction by summary court for absence without leave for one day in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The undisputed evidence was substantially as follows:

On 8 July 1944 accused's company was bivouacked in the vicinity of Carquebut, France. No one was authorized to leave the company area without the permission of a commissioned officer (R8,14). On 26 June (R8) accused's battalion commander, Lieutenant Colonel Donald K. Armstrong, issued a battalion order to the effect that all villages, farmyards and farmhouses were off limits to all battalion personnel except those on official business and directed that "every single man be acquainted with it" (R9,14). Accused's company commander, Captain Jerry S. Brown, 3279th Quartermaster Service Company, read the battalion order to the company at a company formation. Accused was present at the time. At 5:30 p.m. 8 July, a roll call was made and accused was absent. Captain Brown did not authorize him to be absent from the company area nor did he know of any other person who granted such authority (R9).

On 8 July accused appeared at the home of Madame Gabrielle Couppey in Carquebut and asked for a glass of cider. When she refused to give it to him he pushed her in the kitchen and locked the door. He was "a little tight". He put his rifle "at her throat" and when she called for help he put his hand on her mouth. Then, pointing his rifle at her, he closed the window and locked the front door. Madame Couppey again called for help and her daughter, who was present, ran out through the garden door to summon the aid of some soldiers. Accused at first "layed" Madame Couppey down on the floor of the kitchen and then dragged her into the "next room behind". She tried to defend

herself "but could not as he was much stronger than I". He lay on top of her with his trousers unbuttoned and his penis exposed, and tore her underclothing and apron. She testified that her arms, legs and hips were black and blue as a result of his treatment (R10-13).

About 5:45 p.m. the daughter arrived at the battalion command post and the battalion commander, Colonel Armstrong, accompanied by an officer, went to the house and found the front and rear doors locked. As Colonel Armstrong came round the house he heard a woman speaking in an agitated manner. He kicked in the rear door and upon entering saw Madame Couppey on her back. Her legs were spread apart and her knees were visible. Accused was on top of her, "between her knees and face down and back up." He rose when ordered to do so. Colonel Armstrong testified that he saw no evidence that accused had attempted to remove his clothing, but he did observe a wet spot on his trousers. The woman's jacket was torn. Spoons, cards and writing paper were on the floor (R14-15). The daughter testified that her mother's "drawers were all torn," and that "her apron was holding up her dress" (R13). The battalion surgeon "made a rather superficial examination" of Madame Couppey and found "evidence of physical exertion." Her right shoulder was injured and there was a bad bruise over one hip. He made no vaginal examination (R16).

4. With reference to Charge II and Specification (assault with intent to commit rape), competent and substantial evidence fairly tended to establish every element of the offense charged and clearly supported the findings of guilty (CM ETO 3255, Dove and cases cited therein). The evidence is also legally sufficient to support the findings of guilty of Charge I and its Specification (absence without leave for four and one-half hours).

With respect to Specification 1, Charge III (failing to obey the order of Captain Brown), although Captain Brown read the battalion order to the assembled company, it would have been preferable to have alleged the offense as a failure to obey a standing order rather than the failure to obey the direct order of Captain Brown. CM 122636 (1918) (Dig.Op.JAG, 1912-1940, sec.454(44), p.353). However, inasmuch as the order itself was read personally by Brown at the company formation and accused was present at the time, it cannot be said that he was misled in any way as to the gist of the offense alleged, and no such contention was made by the defense. Any error in framing the specification did not injuriously affect the substantial rights of accused. The evidence was legally sufficient to sustain the findings of guilty of Specification 1, Charge III.

5. The charge sheet shows that accused is 23 years three months of age, and was inducted at Little Rock, Arkansas, 29 March 1943 to serve for the duration of the war plus six months. He had no prior service.

6. The court was legally constituted and had jurisdiction of the person and offenses. 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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7. Confinement in a penitentiary is authorized on conviction of assault with intent to commit rape (AW 42; sec.276, Federal Criminal Code (18 USCA 455)). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B. Franklin Riter Judge Advocate

Edward N. Sargent Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 SEP 1944 TO: Commanding General, VII Corps, APO 307, U.S. Army.

1. In the case of Private JOSEPH CONYER, JR (38504751), 692nd Quartermaster Battalion (attached unassigned), 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 3416. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3416).

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

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

(305)

BOARD OF REVIEW NO. 2

CM ETO 3436

23 SEP 1944

U N I T E D S T A T E S	2d ARMORED DIVISION
v.	Trial by GCM, convened at Headquarters, 2d Armored Division, APO 252, 5 August 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private LAWRENCE L. PAQUETTE (31026400), Regimental Headquarters and Headquarters Company, 41st Armored Infantry Regiment.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Lawrence L. Paquette, Headquarters and Headquarters Company, Forty-First Armored Infantry Regiment, did, at or near Saon, Normandy, France, on or about 20 July 1944, wrongfully and unlawfully make indecent advances towards one Alphonse Boullot, a civilian youth of about the age of 12 years, by fondling the penis of the said Alphonse Boullot.

Specification 2: (Finding of not guilty)

Specification 3: In that * * * did, at or near Saon, Normandy, France, on or about 20 July 1944, wrongfully, and unlawfully, and within the immediate

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presence and view of one Alphonse Boullot, a civilian youth of about the age of 12 years, perform an act of gross indecency upon himself, to wit, masturbation.

He pleaded not guilty, and was found guilty of Specifications 1 and 3 and of the Charge and not guilty of Specification 2. Evidence was introduced of one previous conviction by summary court for carelessly discharging a firearm to the danger of friendly troops, in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The uncontradicted evidence, including accused's own testimony, shows that in response to accused's invitation, twelve-year old Alphonse Boullot sat beside accused in the cab of a truck for from ten to twenty minutes, at the place and on the date specified, and that no one else was in the truck during that period (R5,7,11). The lad testified, under oath, that accused tickled his (witness') penis "With his hands, with his fingers" and "kept asking me if something was coming * * *"; that accused then took out his own penis, put a white rubber "preservative" on it, said "that he was going to make the cream come out" and "made the cream come out" in the preservative (R7-8).

4. Accused testified that, while in the cab, he and the boy listened to the radio and talked about the war and that (accused) asked Alphonse where he could get some cognac or "calvados". He admitted grabbing Alphonse by the arm and neck, "just merely being friendly", but insisted that he did not touch the child otherwise and specifically denied "tickling" him (R11-12). Alphonse Boullot and accused were the only witnesses who testified as to the facts involved.

5. The boy's testimony, corroborated by accused's as to surrounding circumstances, constitutes evidence amply substantial to support the court's findings of guilty.

6. Specifications 1 and 3 allege, respectively, assault and battery and indecent exposure, in violation of Article of War 96. Each offense, however, as alleged and established in this particular case, presents the more serious aspect of clearly service discrediting conduct calculated to corrupt the morals and contribute to the delinquency of a child. The District of Columbia Code provides that any person committing such an of-

fense "shall be guilty of a misdemeanor and punished by a fine not exceeding $200 or imprisoned not exceeding 12 months, or by both fine and imprisonment" (D.C. Code, 1940 Edition, Title 11, Chapter 9, Sec. 11-919, p.298). While the court was authorized to impose punishment with reference to each offense in its most serious aspect, it was, of course, limited to the aggregate of the maximum authorized for each offense (MCM, 1928, par.80, p.67; Dig.Ops.JAG, 1912-1940, sec.402(2), p. 249). In this instance, the maximum, as fixed by the District of Columbia Code, is one year for each offense, authorizing an aggregate of two years confinement for the two offenses.

7. The charge sheet shows that accused is 25 years of age and that, with no prior service, he was inducted at Fort Devens, Massachusetts, 12 January 1942, to serve for the duration of the war plus six months.

8. The court was legally constituted and had jurisdiction of the person and offenses. Except for the excessive period of confinement at hard labor adjudged in the sentence, 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 so much of the sentence as adjudges dishonorable discharge, total forfeitures, and confinement at hard labor for two years, in a place other than a penitentiary.

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

Judge Advocate

(Sick in quarters) Judge Advocate

Judge Advocate

(308) 1st Ind.

War Department, Branch Office of The Judge Advocate General, with the European Theater of Operations. 23 SEP 1944 TO: Commanding General, 2d Armored Division, APO 252, U. S. Army.

1. In the case of Private LAWRENCE L. PAQUETTE (31026400), Regimental Headquarters and Headquarters Company, 41st Armored Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and so much of the sentence as adjudges dishonorable discharge, total forfeitures, and confinement at hard labor for two years, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence, modified as hereinafter set forth.

2. I particularly invite your attention to the fact that the period of confinement in the approved sentence is excessive. The maximum period of confinement authorized for each offense by the District of Columbia Code is 12 months (Title 11, Chapter 9, Sec.11-919, p.298, and Sec.11-906, p.295). Thus, the aggregate maximum period authorized for the two offenses is two years. Accordingly, by additional action, which should be forwarded to this office for attachment to the record, you should reduce the period of confinement to two years, which reduction will be recited in the general court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3436. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3436).

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

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

BOARD OF REVIEW NO. 2

CM ETO 3450

22 SEP 1944

U N I T E D S T A T E S	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE.
v.	
Private GENE C. WILLHIDE (19039142), 2002nd Ordnance Maintenance Company.	Trial by GCM, convened at AAF Station 586, on 25 July 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

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

Specification: In that Private Gene C. Willhide, 2002nd Ordnance Maint. Company, Air Force, AAF Station 582, APO 635, BADA, ASC, USSTAF, U. S. Army, did, without proper leave, absent himself from his command at AAF Station 582, APO 635, from about 0545 hours 8 May 1944 to about 1830 hours 8 May 1944.

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

Specification: In that * * * having been duly placed in arrest in quarters at Site #8, AAF Station 582, APO 635, on or about 8 May 1944, did, at AAF Station 582, APO 635, on or about 9 May 1944, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that * * * did, at AAF Station 582, APO 635, on or about 9 May 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Marchmont Street, London, England, W.C.1., on or about 13 June 1944.

He pleaded guilty to Charges I and II and their specifications and not guilty to Charge III and its Specification. Two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of all charges and specifications. No evidence of previous convictions was introduced. 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 20 years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, total forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Accused confirmed his pleas of guilty to Charges I and II and their specifications after the effect of such pleas had been explained to him by the court.

The undisputed evidence for the prosecution substantially shows: That accused was assigned to (R7) and entered the 2002nd Ordnance Maintenance Company on 7 May 1944. He was absent without leave from 0545 hours until approximately 1830 hours on 8 May 1944 (R5) and was placed in arrest in quarters by his company commander at that time, pending the preferring of charges against him (R8-9). He remained in arrest approximately four hours only (R8), and on 9 May 1944 was again missing (R6) without permission (R10). On 13 June 1944 accused, accompanied by a young lady, was stopped by two Metropolitan Police officers on Marchmont Street, London. He was dressed in civilian clothes and claimed to be an Englishman. They were asked for their identity cards but neither had one. The police accompanied them to their lodgings at 7 Handel Street to procure their cards and there found part of an American army uniform. They accused Willhide of being an absentee or deserter from the American army and accused stated that he had been absent for five weeks; that he was living with the lady who was with him as man and wife, and that he was a conscientious objector and didn't want to fight (R10-13, 14-17). He made a signed sworn statement (Pros.Ex.3) to the officer who investigated the charges against him, as follows:

"I Private Gene C. Willhide, 19039142, 2002nd Ordnance Company, being duly sworn and advised of the provisions contained in Article of War 24 do voluntarily make the following statement.
That on 8 May 1944 I absented myself from my organization from 0545 hours to 1830 hours and that at the time I absented myself I was under arrest in quarters and at this time I did not realize what I was doing due to the fact that at times I suffer periods of irresponsibility due to the past use marjuanna cigarettes over a period of about eight years. On the 9th of May when I left my quarters I went to Preston and then went to Liverpool and remained in Liverpool for about four days and nights. I went from Liverpool to Blackpool and while at Blackpool I changed into civilian clothes, about ten days after being absent, I changed into civilian clothes because I thought it would help keep me from being apprehended. I was in Blackpool about five days and from there I went to London and remained in London about three and one half weeks before I was arrested by civilian police. I was dressed in civilian clothes at the time I was arrested by the civilian police. I told the civilian police at the time of arrest that I was absent from my organization, and that I was a conscientious objector. I was later turned over to the Military Police.
I have been a conscientious objector for approximately two and one half years and base this objection on the Christian religion."

4. No evidence was introduced or testimony offered on behalf of accused and, on being advised by the court of his rights as a witness, he elected to remain silent (R21).

5. In addition to accused's pleas of guilty thereto, the allegations of Charges I and II and their specifications are conclusively proven.

The allegations of Charge III and its Specification are also proved beyond a reasonable doubt. "Desertion is absence without leave accompanied by the intention not to return * * *" (MCM, 1928, par.130a, p.142). Inference of intent not to return may be drawn from his wearing civilian clothes, claiming to be an Englishman, establishing himself in a flat with a young woman as his wife, together with his written admission that he changed to civilian clothes to avoid apprehension.

6. The charge sheet shows accused to be 24 years 11 months of age. He enlisted at March Field, California, 26 May 1941, to serve for three years. He had no prior service.

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

8. Confinement in a penitentiary is authorized for the offense of desertion in time of war (AW42). As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is proper (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1), 3a).

_____ Judge Advocate

(Sick in quarters) Judge Advocate

_____ Judge Advocate

1st Ind.

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 22 SEP 1944 TO: Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U. S. Army.

1. In the case of Private GENE C. WILLHIDE (19039142), 2002nd Ordnance Maintenance 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 approved, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3450. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3450).

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

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

BOARD OF REVIEW NO. 1

CM ETO 3453

18 SEP 1944

U N I T E D S T A T E S	)	82D AIRBORNE DIVISION
	)	
v.	)	Trial by GCM, convened at Division
	)	Headquarters, 82d Airborne Division,
Private A. L. KUYKENDOLL	)	APO 469, U. S. Army, 16 August 1944.
(34810395), Headquarters Com-	)	Sentence: Dishonorable discharge,
pany, 2nd Battalion, 507th	)	total forfeitures and confinement at
Parachute Infantry.	)	hard labor for ten years. United
	)	States Disciplinary Barracks,
	)	Greenhaven, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.
Specification: In that Private A. L. Kuykendoll, Headquarters Company, Second Battalion, 507th Parachute Infantry, did, at Le Flaux, Normandy, France, on or about 15 June 1944, run away from his company, which was then engaged with the enemy, and did not return thereto until 13 July 1944, after the engagement had been concluded.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for 11 and one-half hours, in violation of Article of War 61. 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

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the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, directed that pending accused's transfer to the designated place of confinement, he be confined in 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Competent, substantial evidence shows that at the time and place alleged, while accused and his company were engaged with the enemy, he absented himself from his company without permission, remained absent 28 days, and returned to the company while it was on the beach waiting to re-embark for England. The evidence supports the findings of guilty (CM ETO 1663, Ison, and cases cited therein; CM ETO 1685, Dixon; CM ETO 2582, Keyes).

4. The charge sheet shows that accused is 19 years three months of age, and that he was inducted 24 June 1943, at Fort McClellan, Alabama, to serve for the duration of the war plus six months. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

(ABSENT ON LEAVE) Judge Advocate

1st Ind. (317)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 20 SEP 1944 TO: Commanding General, 82d Airborne Division, APO 469, U. S. Army.

1. In the case of Private A. L. KUYKENDOLL (34810395), Headquarters, 2nd Battalion, 507th Parachute 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 3453. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3453).

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

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

BOARD OF REVIEW NO. 2

9 SEP 1944

CM ETO 3454

UNITED STATES)
)
v.)
)
First Lieutenant BERNARD P.)
THURBER, Jr. (O-573586),)
553rd Bombardment Squadron,)
386th Bombardment Group,)
Air Corps.)

IX BOMBER COMMAND.

Trial by GCM, convened at Air Force Station 164, 15 June 1944. Sentence: Dismissal and forfeiture of all pay and allowances due or to become due.

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

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

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

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

Specification: In that 1st Lt. Bernard P. Thurber Jr., 553rd Bombardment Squadron, 386th Bombardment Group, did, at AAF Station 164, on or about 27 April 1944, feloniously embezzle by fraudulently converting to his own use £10.11s, of a value of about $42.00, the property of Castle Cleaners, Hadleigh, Essex, England, and the Royal Laundry, Brentwood, Essex, England, entrusted to him for the said Castle Cleaners and the said Royal Laundry by commissioned officers of AAF Station 164, for payment of laundry and cleaning service.

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

Specification 1: In that * * * did, at AAF Station 164, on or about 1 April 1944, with intent to deceive Major W. L. Klum, AC, Assistant Ground Executive Officer, AAF Station 164, officially report to the said Major W. L. Klum that the Officers' Laundry Service, AAF Station 164, was indebted to the Royal Laundry, Brentwood, Essex, England, in the amount of £93, 17s, 7½d, of a value of about $376.00, which report was made by the said 1st Lt. Bernard P. Thurber Jr., as true when he did not know it to be true, in that the actual indebtedness of the Officers' Laundry Service to the Royal Laundry on 1 April 1944, was about £303, 14s, 7½d, of a value of about $1215.00.

Specification 2: In that * * * did, at AAF Station 164, on or about 27 April 1944, feloniously embezzle by fraudulently converting to his own use £10, 11s, of a value of about $42.00, the property of Castle Cleaners, Hadleigh, Essex, England, and the Royal Laundry, Brentwood, Essex, England, entrusted to him for the said Castle Cleaners and the said Royal Laundry by commissioned officers of AAF Station 164, for payment of laundry and cleaning service.

He pleaded not guilty to and was found guilty of the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, IX Bomber Command, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the findings of guilty of Specification 1 of Charge II, and of Charge II, as finds the accused guilty of the specification set forth, except the words "with intent to deceive", in violation of Article of War 96, confirmed the sentence, but, owing to special circumstances in the case, remitted that portion thereof adjudging confinement at hard labor for one year and withheld the order directing the execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows: That accused was on duty as (Assistant S-2 (R51)), Squadron Intelligence Officer. He was given the additional duty of officer in charge of the (officers') laundry and dry cleaning in September or October 1943 and, so that he

might give it all his time, was detailed for duty as officer in charge of officers' laundry by order dated 4 February 1944 (R10; Pros.Ex.1). It was a more or less unofficial duty (R12) for the service primarily of the group of officers. It had not been functioning satisfactorily while accused was away at school and it was closed until his return about 25 January 1944 (R13). The undertaking showed a deficit and it was then decided to leave accused in charge, giving it his full time, and a service charge was added with the object of reducing the deficit (R14). To keep them advised of his progress, accused was required to furnish Major W. L. Klum, Assistant Ground Executive Officer at accused's station, on the first and fifteenth of each month, a statement as to the laundry (shoe and dry cleaning) status, to include the outstanding obligations, cash on hand, and amount of laundry (shoe and dry cleaning) for which he had not collected (R10). Statements for 1 March (Pros.Ex.2; R11), 15 March (Pros.Ex.3), 1 April (Pros.Ex.4), and 15 April (Pros.Ex.5) (R12) were admitted in evidence. The production manager of the Royal Laundry testified that before he saw accused he had made an arrangement by 'phone "with a Major" and when accused came along,

> "we had a verbal agreement that the money would be paid, well, either weekly or monthly. I didn't set any definite time when it would be paid because there was no written agreement, and the laundry came in and it was usually paid from one week to the other".

Accused was to bring the laundry in to them. They checked it and he would collect it when it was ready. He got a bill with the names of the individuals.

> "It was agreed then when he collected the money from the individuals, he would give us the money. * * * we didn't say definitely whether it was to be paid weekly or monthly. I believe after a time it was paid monthly. Normally, with our arrangement, we hold someone responsible, and sometimes they have to wait when officers are gone." (R16).

Accused's duty under the arrangement was to bring the dirty laundry to the establishment, to collect the clean laundry, and to pay the laundry for the services rendered. Accused was not considered the laundry's agent (R17). "The charges were paid as the money was collected for the service" (R18).

Miss E. C. Cannell, cashier and chief clerk of the Royal Laundry, identified the officers' account, Station 164, which, she tes-

tified, showed the amount of £303-14s-4½d as owing on 31 March 1944 (R19,23). The moneys which the laundry received came from accused although the accounts were all listed separately to each man (R20). The records show no payments for the period from 23 April to 26 April 1944. The ledger sheet showing these figures was admitted in evidence as Prosecution Exhibit 6 (R21). Payments as received were credited as a lump sum and not to each individual officer and if the amount collected and paid the laundry was short, the laundry would not know which officer had not paid (R22). Accused was not considered the laundry's agent and the officers as a group would be considered responsible for the money. The first payments after 31 March for the week ending 8 April were £206-5s-6d (R23). There was a charge for work for the week ending 1 April of £24-7s-3d but no cash was paid in that week (R24).

Miss Helen Haden, manager of the Castle Cleaners in Chelmsford (R25), testified that she knew accused "more or less as an agent for my business". His duties were to bring cleaning in and to collect and pay her. He was to pay when he collected for one lot of work, for the previous lot, more or less a ten-day agreement. No payments were received from accused from 23rd to 27th April 1944 (R26). The account was charged to accused and he was held responsible (R27,36). According to her books £22-14s-11d were due and owing her by the "officers' set-up on this station" on 27 April 1944. It was paid on 6 May and covered charges for cleaning over a period of "possibly two months" (R36).

Private Raymond C. Bray, of Station 164, testified he worked under accused as a clerk at the officers dry cleaning (R27) from "around in December" (R29) continuously up to 27 April. He identified the daily record of cleaning picked up for the officers, "the cash record", kept under accused's direction (R27). The record shows the money received from officers from 23 April to the end of 26 April as:

23 April	£ 4-15s-7d
24 April	£11-19s-4d, laundry
	£ 1-11s-3d, dry cleaning
	£ 1- 4s-0d, shoe repair
25 April	No entry
26 April	£ 1- 4s-9d
	£ 3- 7s-10d

The book itself was then admitted in evidence as Prosecution Exhibit 7. The money received was kept in a cigar box and accused picked up the pound notes (R28,30,31) and put them in a separate compartment of his billfold as they had no safe (R29). Accused and Bray were the only persons having keys to the establishment and having access to the box and money. When Bray closed the shop he would hide the box (R30). No record was kept of the money accused took from the box and there was no way to balance the receipts against the cash on hand. There would be a bill on each officer's bundle of laundry but no record was kept of

individual payments or of who owed. If their laundry was in the shop they still owed for it. The ten per cent was added to the laundry, dry cleaning and shoes on each bill and was supposed "to make up a deficit for lost clothing and so on" (R31) but no record was kept of moneys paid for missing clothes (R34). The extra ten per cent when collected was shown in the cash book (R32). It was added to and collected on each bill but no separate record of it was kept (R34). Bray testified he believed some shoes were paid for out of the cash on hand in the box between 23 April and 27 April. Shoes would be taken to the shoe repairer with whom they had a contract and when they went after them cash was taken from the cash receipts box to pay for them. He did not know the amount and no record was kept of payments (R32). He denied that he kept any of the money or that he was paid anything additional for his services in the laundry and cleaning job. He turned over to Lieutenant Sessions £9-18s as the moneys on hand (R33) on 27 April (R34).

First Lieutenant John M. Sessions, an Intelligence Officer of accused's unit, while acting under orders to investigate the operation of the laundry and cleaning on the post, saw accused on 27 April, about five o'clock in the evening (R37), and asked if he had any funds that belonged to the "operation" and accused gave him three pounds which he had in his pocket, stating "'This is all the laundry funds I possess'". He went in the "establishment" and asked for all the cash on hand and received a cigar box containing £9-18s-6d which, with the three pounds received from accused, a total of £12-18s-6d, was all the money he received (R38). Sessions informed accused that there was a shortage and accused stated he had just returned from London where he had gone on business for the laundry establishment, that some of the money had been spent on the trip and "he didn't know where the rest of it was". Sessions checked with the shoe repair company who informed him that no funds had been received (R39) between 15 April and 27 April. The amount of the shortage was arrived at by ascertaining the last time any bills were paid to the various concerns with which the establishment did business and then totaling the cash received since that time against the cash on hand. The difference should represent the amount short. The three pounds received from accused was added to that found in the cigar box, which sum, subtracted from the total shown by the cash receipt book, gives the amount of the shortage (R40). He testified he totaled the receipts as shown by the cash book from 23 April to 26 April, amounting to £23-9s-6d, and from this was deducted the moneys received amounting to a total of £12-18s-6d, leaving a shortage of £10-11s. The cash book was not complete, whole days being missing, which Bray explained by saying that a "light" day would be run in with another day (R41). He had found that the last bills paid were on 21 or 22 April, so he took the period from 23 April to 27 April. Accused was visibly excited and alarmed, was red in the face, and trembling (R42) when called in and questioned. No part of this shortage has been paid (R43).

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4. The evidence for accused was substantially as follows:

First Lieutenant William P. Nash, Administrative Inspector of accused's unit, first investigated the officers' laundry and cleaning establishment 26 April (R45). It was not attached to or an activity of any military organization and its accounts received no outside supervision or audit. The cleaning and laundering of officers' clothing is an individual responsibility (R44). From his investigation a large shortage appeared and the subsequent action taken was recommended (R45). Major Klum, who had testified as a prosecution witness, testified as a defense witness that the statement given him by accused and dated 1 April was received by him "on or about the first" (R46) and it possibly was the third or fourth when it was given to him. Accused was relieved of the laundry activity about 27 April 1944.

Accused, after being informed of his rights, related the difficulties encountered in getting laundry and cleaning done (R52). He made an arrangement with the Royal Laundry but the Air Ministry would not allow them to make a contract for officers' laundry and a verbal agreement was finally made that accused would bring the laundry bundles down and take them back when clean, collect from the officers, and return with the money to the laundry.

> "They would enter the amount of a total bill. When I'd go down and pay, I usually paid the exact amount of a bill. Sometimes I did and sometimes I didn't".

A receipt was given for the "whole sum" paid.

> "Sometimes it happened that a fellow might be on a two-week pass or something like that and didn't pick his stuff up, and I felt obliged, because I told them I'd pay these people for the past week. If it wasn't too much, I would pay it out of my own pocket. Once in a while I got too much and I'd hold up for few days."

Accused did not consider himself the agent of any officer but sometimes he would know a certain officer's stuff had come back because he had seen it and then maybe a couple of days later it wouldn't be there and there would be no cash entry. In such case he felt there was nothing else he could do but pay for it (R53). The Castle Cleaners arrangement was similar. He felt the obligations to the Royal Laundry and Castle Cleaners were his and the money received from the officers for work done was also his for payment on their bills. He had difficulty getting help and they were not so competent (R54) and the money was not always kept separate. He was asked for a report on the first and

fifteenth of each month so that progress could be checked and the reports were so dated, but "I don't believe it ever happened I gave a report on the exact first and fifteenth, but they were all dated that day as an arbitrary figure". On 1 April he had well over £200 and was going to pay the laundry but did not recall whether he paid the laundry before he handed in the report. 1 April was on Saturday and the report might possibly have been handed in on the third or fourth. The amount of £93-17s-7½d, or balance owing the Royal Laundry on 1 April, was reached by subtracting the total cash on hand from the total of the bills owing (R55). The Air Ministry had ordered the Castle Cleaners to stop handling work brought by accused, and accused was away about 25 April trying to locate a new cleaning concern (R56). He spent a little over three pounds, expenses on the trip. He was ordered to make the ten per cent overcharge, at first to provide additional pay for his help (R57), but it was later decided to use it to make up the deficit (R61), and he decided to set up a very simple set of books. About that time, 1 April, he asked a sergeant, "an old Army man" and an "administrative inspector, or something like that" whose present whereabouts are unknown, about bookkeeping, who told him:

> "'First, before you go any further, I want to go off record. Officially I don't want to know about this place, but the less books you keep, the better off you are.'"

Accused decided not to keep any books and kept all receipts on his person. All the moneys, including the ten per cent overcharge, were kept together and expenses paid out of it.

> "I would give the fellow, whoever it was went around to pick the stuff up, money to eat on and pay his expenses off the station."

Bray never received any extra money (R65) and no receipts were taken or records kept. After 22 March a cash book was kept and when an officer made a payment, "supposedly" his name and amount paid were entered. He accounted for the deficit, in part, by a reported theft (R66) and by payment for lost stuff. No record of such payments was kept and the last such payment was in February. Such payments amounted to a total of approximately ten pounds. The cleaning and laundry bills would run about £200 per month and the ten per cent to about £20 per month, which was "just added into the sum total to keep the business solvent" (R67). There was a huge deficit. How it was created, he didn't know (R68). When asked where the money went which is the difference between £23-9s-6d, cash receipts and the money received by Lieutenant Sessions of £12,18s-6d, accused answered, "Right now, I don't know of its whereabouts, except what was brought out today" (R57). On the first day of his trip he took six or seven pounds out of the box to cover expenses.

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> "The pounds were coming in and I took them out of the box. I didn't use them that day, I just kept them. The next day I did eat, and I had a driver with me so he was fed. We ate at these restaurants and so forth. I don't recall just exactly how much we spent. The next day too I had a driver and we had two meals coming back. I don't recall the exact amount. I know I turned the remainder in to Lieutenant Sessions when I come back. * * * It was my money to pay bills I had incurred."

If he wanted to make a trip he paid the expenses out of the money he received (R58). He took money from the box and mingled it with his own.

> "It was all my money, more or less. * * * I was thinking it was all my money. In case anything happened, I would be stuck. But I did keep it separate from my money I had in my pocket. Say I might have five pounds in my billfold already. Then if I went down to the laundry and took twenty pounds out of the cigar box, I'd stick it back in the back of the wallet. I don't know why, more or less keeping myself on an allowance. I didn't want to spend more money than I had free there". (R59).

Exactly on 1 April he did not know what the indebtedness was but learned the balances shortly after when he went down and made the "big payment" (R60). Accused had been a master sergeant, and in civilian life had kept the payroll in a "NYA camp", but he was not a bookkeeper (R60-61).

5. Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come. The gist of the offense is a breach of the trust arising from some fiduciary relationship existing between the owner and the person converting the property and springing from an agreement, express or implied or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship (MCM, 1928, par.149h, pp.173-174).

The evidence is undisputed that in the operation of this laundry, cleaning and shoe repair service for the officers, the money to pay for such service was received, directly or indirectly, by accused for the purpose of paying the concerns doing the work; that such moneys, together with the added charge of ten per cent, also collected at the same time, was intermingled by accused with his own money and used and spent in the same way as his own. No records were kept by

accused of the moneys of others received and disbursed by him, except only a cash book in which all moneys received were "supposed" to be entered. The operation was conducted with very little if any overhead expense, in spite of which a "huge deficit", the joint obligation of all the officers, was created. The lack of records rendered an audit impossible but the shortage alleged in Charge I and its Specification was definite enough for the period it covered. Accused admitted the money was gone and baldly stated at the trial, "I don't know of its whereabouts, except what was brought out today". The inferences arising from facts disclosed by the evidence, as well as those facts themselves, undeniably point to the fraudulent appropriation of the missing moneys by accused. The money is described in the Specification of Charge I as "the property of Castle Cleaners * * * and the Royal Laundry * * * entrusted to him for * * * [them] by commissioned officers * * * for payment of laundry and cleaning service". Payment to accused was not payment of their bills for services. On his default the officers still owed for services performed. The money did not become the property of the cleaners and the laundry until paid by accused to them. However, the gist of embezzlement is the breach of trust, the Specification clearly states the transaction, and accused could not have been misled or his substantial rights injuriously affected by this allegation.

By excepting the words "with intent to deceive" in Specification 1, Charge II, the court absolves accused of all intent to deceive his superior officer in rendering an incorrect report of the business indebtedness, and finds him guilty only of making such report "as true when he did not know it to be true". Such finding at least convicts him of neglect in handling the money of his brother officers with apparent reckless disregard for their rights to an accounting from him of his use thereof. The specification remaining states an offense in violation of Article of War 96.

Specification 2, Charge II, is an identical restatement of the Specification of Charge I but charged as a violation of Article of War 95 instead of Article of War 93. Article of War 95 provides that any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

> "Where an officer has committed a specific military offence so dishonorable in its circumstances as also to constitute 'conduct unbecoming an officer and a gentleman', he is amenable to trial for the same act under two articles; but here again there is no difficulty, since the offence may be charged under both -- the specific article and the 61st" (now 95th).
> (Winthrop's Military Law and Precedents, 1920 Reprint, p.149).

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In finding accused guilty of this specification, the court has decided only that the evidence was sufficient to also show him guilty of the additional offense of "conduct unbecoming an officer and a gentleman" (CM 238970, Hendley).

6. The charge sheet shows accused to be 25 years of age. He enlisted 27 December 1939 in the regular army, to serve three years, and was commissioned second lieutenant on 20 January 1943.

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

8. Dismissal of an officer is authorized upon a conviction of a violation of Article of War 93 and is mandatory upon a conviction of a violation of Article of War 95.

Judge Advocate

Judge Advocate

Judge Advocate

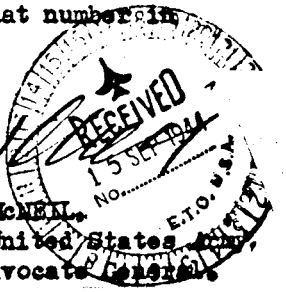
1st Ind. (329)

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

1. In the case of First Lieutenant BERNARD P. THURBER, Jr. (O-573586), 553rd Bombardment Squadron, 386th Bombardment Group, Air Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. It is noted that the forfeitures were not remitted.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3454. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3454).



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

(Sentence ordered executed. GCMO 78, ETO, 29 Sep 1944)

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

(331)

BOARD OF REVIEW NO. 2

CM ETO 3455

29 AUG 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE (formerly designated SOUTHERN BASE SECTION, SERVICES OF SUPPLY), EUROPEAN THEATER OF OPERATIONS.
v.	
Second Lieutenant THOMAS J. McMANAMON (O-1643865), 579th Signal Depot Company, Signal Corps.	Trial by GCM, convened at Wilton, Wiltshire, England, 16 June and 8 July 1944. Sentence: Dismissal.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Thomas J. McManamon, Detachment A, 579th Signal Depot Company, APO 403, U. S. Army, did, without proper leave, absent himself from his organization at Westbury, Wilts, England, from about 19 May 1944 to about 1 June 1944.

He pleaded not guilty to and was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, Southern Base

Section, Communications Zone, European Theater of Operations, approved only so much of the sentence as provides for the officer to be dismissed from the service and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as approved, "while deemed wholly inadequate", and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows, by duly authenticated extract copy of the morning report of accused's organization, that his status was changed 19 May 1944, from duty to absent without leave. The extract copy further indicates that the original report incorporating this entry was signed by the official custodian thereof "4 May 44" (Ex.1). Change of status from absent without leave to confinement on 1 June 1944 was similarly shown by entry dated 4 June 1944 upon report signed by the custodian on the last-mentioned date (Ex.2). Accused's sworn statement in writing, dated 6 June 1944, was also introduced by the prosecution (R6; Pros.Ex.3). It recites accused's election to make such statement after having his rights under Article of War 24 "read and explained to" him. It is, in substance, as follows:

On 18 May 1944, he was granted a 24-hour pass and went to London by train. That evening, attempting to reach Paddington Station, he got lost in the underground and, as a result, missed the train on which he had expected to return. He had three drinks of gin, became sick, and remained so, in a nervous and depressed condition, until 1 June 1944, when apprehended dining with a woman friend at a London Hotel. In the interim, he remained in London, despite repeated resolves and even transitory efforts to return, rendered abortive by his continuing illness, his nervousness, and his mental depression caused by recent tidings of a serious injury and impending brain operation upon his brother, also in the service, and by worry as to his ailing mother's reaction, should the operation prove unsuccessful (Ex.3).

4. The evidence for the defense shows that accused was working under trying conditions prior to his visit to London, with long hours and little or no relaxation, and that he was "pretty broken up" when he received news of his brother's serious condition (R6-7). Second Lieutenant Lyle J. Parker of accused's unit, having known him since 1942, both as an officer candidate and as an officer, testified that "his character has been excellent, and he has had no trouble whatsoever to my personal knowledge" (R6). It was stipulated that if Captain Daniel W. Hudgings, III, Commanding the 579th Signal Depot Company, were present in court, he would testify that the character of accused's prior

service was excellent and that, in his opinion, accused should not be separated from the service but reassigned where his undoubted ability could be put to some use; further that, in another organization, Captain Hudgings would be glad to have accused under his command (Def.Ex.1). It was also stipulated that 1st Lieutenant John L. Campbell, Commanding Detachment A, 579th Signal Depot Company, would testify that accused was a capable officer who could be relied on to carry out orders and instructions in a military manner; and that Lieutenant Campbell believed that prior to going on pass, accused "was worried about something which he did not disclose" (Def. Ex.1).

It was further stipulated that Miss Antonie Rohr and Mrs. Claire Walden, both residents of London, would testify, if present in court, that during his absence in London, accused seemed "terribly depressed about his brother, and that he would just sit with his head in his hands, talking of this", according to Miss Rohr; "looking off into space", according to Mrs. Walden, who noted also,

> "that he didn't seem to know where he was, but seemed to be in a daze. That he seemed terrified of the crowds and asked her to take him to the station so that he might return to his unit, but did not actually go with her" (Def. Ex.1; R7).

5. Accused was sworn and testified, in substance, as follows:

When he missed the train back to his station, he planned to return on another the following morning. He had difficulty finding a place to sleep, visited a bar where he made inquiries about lodgings, fell in with an officer's suggestion that they have a drink, and left, after two or three potations, in search of a cab. Outside, he was seized with an excruciating pain in his stomach, which continued upset for the entire period of his absence without leave. He was subject to diarrhea which failed to relieve his distress and occasional nausea. Whiskey afforded temporary relief of extremely brief duration. He drank whiskey from time to time but never became drunk. He was worried about being absent without leave, about his brother and his mother, was in constant pain, and the crowds in the station, on one occasion when he undertook to return, "got on my nerves so bad that I felt like screaming". Every day he attempted and wanted to come back but his physical condition and mental depression were such, and his imagination so affected, that "when train time came I knew it was physically impossible for me to ever reach Paddington Station". On cross-examination, he admitted that, during this entire period, he did not see a doctor,

explaining on redirect-examination, that he reasoned that consulting a physician would involve admitting the fact that he was absent without leave. He desired not to be apprehended but "to come back to my unit of my own accord and explain to the Detachment Commander just what had transpired" (R7-11).

6. After accused had testified, the defense requested that he be examined by a medical officer. The prosecution offered no objection and the court adjourned to meet at the call of the president (R11). The court reconvened 8 July 1944, whereupon the prosecution introduced the findings of "the Board of Officers which was convened under the provisions of Paragraph 35c, Manual for Courts-Martial, 1928, and AR 420-5, pursuant to the directions of this court", to the effect that accused was, when examined and on or about 19 May 1944, sane and responsible for his actions (R12). The full report of the Board shows that accused was admitted to the 36th Station Hospital (NP), 16 June 1944, and examined 26 June 1944 (Pros.Ex.4).

7. The extract copy of the morning report noting accused's initial change of status from duty to absent without leave by entry dated 19 May 1944, is shown to have been signed by the custodian 4 May 1944. However, accused's statement, introduced by the prosecution, and his testimony on the trial establish the date of the commencement of his unauthorized absence as 19 May. The evidence adduced by the defense, including accused's own testimony, was of a character to raise - not too sharply - some question as to the sanity of accused. This doubt was properly resolved by the evidence of the sanity board's proceedings and findings, which eliminates any possible question as to the legal sufficiency of the evidence as a whole to sustain the findings of guilty.

8. The charge sheet shows that accused is 35 years seven months of age; that he was inducted 24 January 1941, entered Officers Candidate School 19 November 1942, and appointed second lieutenant, Signal Corps, 27 March 1943.

9. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal is authorized upon conviction of an officer for a violation of Article of War 61.

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 AUG 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant THOMAS J. McMANAMON (O-1643865), 579th Signal Depot Company, Signal Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 3455. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3455).

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

(Sentence ordered executed. GCMO 77, ETO, 29 Sep 1944)

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

BOARD OF REVIEW NO.1

CM ETO 3456

7 SEP 1944

U N I T E D S T A T E S	1ST BOMBARDMENT DIVISION.
v.	
Second Lieutenant ROBERT M. NEFF (O-1575487), Quartermaster Corps, 1124th Quartermaster Company, Service Group, Aviation (RS).	Trial by GCM, convened at AAF Station 117, APO 557, U.S. Army, 18 July 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 96th Article of War.
Specification 1: In that Second Lieutenant Robert M. Neff, 1124th Quartermaster Company, Service Group, Aviation (RS), AAF Station 117, APO 557, then Second Lieutenant, 179th Quartermaster Company, did, at Fort Myers, Florida, on or about 13 September, 1942, willfully, unlawfully

and feloniously enter into a contract of marriage with Miss Mayme Irene Kyle, the said Lieutenant Neff being then and there lawfully married to a living wife, Wanda R. McCoy Neff.

Specification 2: In that Second Lieutenant Robert M. Neff, 1124th Quartermaster Company, Service Group Aviation (RS), AAF Station 117, APO 557, did, at Kettering, Northamptonshire, England, on or about 11 December 1943, willfully, unlawfully and feloniously enter into a contract of marriage with Miss Jacqueline Marie Ainger, the said Lieutenant Neff being then and there lawfully married to a living wife, Wanda R. McCoy Neff.

Specification 3: In that * * * did, at Kettering, Northamptonshire, England, on or about 11 December 1943, willfully and wrongfully and in violation of Circular Number 88, Headquarters, ETOUSA, 3 November 1943, marry Miss Jacqueline Marie Ainger without the approval of the officer authorized to approve such marriage under said circular.

Specification 4: In that * * * did, at Kettering, Northamptonshire, England, on or about 2 December 1943, with intent to deceive the Superintendent Registrar, Kettering Register Office, Kettering, Northamptonshire, England, and to obtain a license for marriage to Miss Jacqueline Marie Ainger, willfully, wrongfully, unlawfully, falsely and fraudulently make and write a certain paper in the following words to wit:

"HEADQUARTERS
AAF STATION 117
APO 634

3rd October, 1943

TO WHOM IT MAY CONCERN:

This is to certify that the case of Robert M. Neff-A.S.N. 0-1575487-2nd. Lt. QMC. has been investigated.

The above named officer is hereby granted permission to marry, one, Jacquline M. Ainger, of 94 Wood St. Kettering, on or after December 1st. 1943.

/s/ Harley L. Anderson
HARLEY L. ANDERSON
1st.Lt.QMC.
COMMANDING.

APPROVED

/s/ M. A. Preston
M. A. PRESTON
COLONEL. AC.
COMMANDING."

Specification 5: In that * * * did, at Kettering, Northamptonshire, England, on or about 2 December 1943, with intent to deceive the Superintendent Registrar, Kettering Register Office, Kettering Northamptonshire, England, and to obtain a license for marriage to Miss Jacqueline Marie Ainger, willfully, wrongfully, unlawfully, falsely and fraudulently make and write a certain paper in the following words to wit:

"AAF STATION 117 :
APO 634 : 4th. December, 1943

C E R T I F I C A T E

1. ROBERT M. NEFF, 0-1575487, 2nd. Lt. QMC. devoriced from, one, GERALDINE KNIGHT NEFF, 14th. April, 1941; Courts of Domestic Relations, Columbus, Ohio; U.S.A.

I certify that the above statement is true and correct. (Taken from U.S. Army records)

/s/ David L. Myer
DAVID L. MYER
CAPTAIN, AC.
PERSONNEL OFFICER

OFFICIAL:

/s/ Russell W. Barthell
RUSSELL W. BARTHELL
CAPTAIN, AC.
ADJUTANT."

Specification 6: In that * * * did, at Kettering, Northamptonshire, England, on or about 2 December 1943, with intent to deceive the Superintendent Registrar, Kettering Register Office, Kettering, Northamptonshire, England, and to obtain a license for marriage to Miss Jacqueline Marie Ainger, willfully, unlawfully, wrongfully and fraudulently offer and deliver to the said Superintendent Registrar as true and genuine a certain paper in words as follows:

"HEADQUARTERS
AAF STATION 117
APO 634

3rd. October, 1943

TO WHOM IT MAY CONCERN:

This is to certify that the case of Robert M. Neff-A.S.N. 0-1575487-2nd. Lt. QMC. has been investigated.

The above named officer is hereby granted permission to marry, one, Jacquline M. Ainger, of 94 Wood St. Kettering, on or after December 1st. 1943.

/s/ Harley L. Anderson
HARLEY L. ANDERSON
1st Lt. QMC
COMMANDING.

APPROVED.

/s/ M. A. Preston
M. A. PRESTON
COLONEL. AC.
COMMANDING."

Which paper, he the said, Lieutenant Neff well knew had not been written or signed by First Lieutenant Harley L. Anderson or by Colonel M. A. Preston.

Specification 7: In that * * * did, at Kettering, Northamptonshire, England, on or about 2 December 1943, with intent to deceive the Superintendent Registrar, Kettering Register Office, Kettering, Northamptonshire, England, and to obtain a license for marriage to Miss Jacqueline Marie Ainger, willfully, unlawfully, wrongfully and fraudulently offer and deliver to the said Superintendent Registrar as true and genuine a certain paper in words as follows:

"AAF STATION 117: 4th. December, 1943
APO 634 :

C E R T I F I C A T E

1. ROBERT M. NEFF, O-1575487, 2nd. Lt. QMC, devoriced from, one, GERALDINE KNIGHT NEFF, 14th. April, 1941; Courts of Domestic Relations, Columbus, Ohio; U.S.A.

I certify that the above statement is true and correct. (Taken from U. S. Army records).

/s/ David L. Myer
DAVID L. MYER
CAPTAIN, AC.
PERSONNEL OFFICER

OFFICIAL:

/s/ Russell W. Barthell
RUSSELL W. BARTHELL
CAPTAIN AC.
ADJUTANT."

Which paper, he the said, Lieutenant Neff well knew had not been written or signed by Captain David S. Meyer or by Captain Russell W. Barthell.

Specification 8: In that * * * did, at AAF Station 117, on or about 10 March 1944, in an affidavit make under oath, a statement in substance as follows:

"I have not married any English women since returning from the United States, nor have I ever been married to an English woman,"

which statement he did not then believe to be true.

He pleaded guilty to and was found guilty of the Charge and of all specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority, the Commanding General, 1st Bombardment Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50½.

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

On 7 April 1941 one Geraldine G. Neff obtained a divorce from accused at the Court of Common Pleas, Franklin County, Ohio, and was awarded custody of their minor child (R8; Pros.Ex.1). On 2 August 1941 at Napoleon, Henry County, Ohio, accused married Mrs. Wanda M. Windon, who was a divorced woman at the time of their marriage (R8;Pros.Exs.2,4). Mrs. Wanda M. Windon Neff was the same person as Wanda R. McCoy Neff (R9). Wanda deposed on 9 June 1944 that she and accused lived together during the period 3-21 August 1941, and for several periods of a few days each during July and August 1943. She received an allotment from him of $60 per month from about June 1943 "to present date," had never instituted divorce proceedings against him, nor had she ever been served with legal process or received any notice relative to divorce proceedings instituted against her by accused (Pros.Ex.4).

On 13 September 1942 at Fort Myers, Florida, accused married Mayme Irene Kyle (R10;Pros.Exs.5,6). She deposed on 9 June 1944 that she lived with him at Fort Myers, Florida, 13-18 September 1942 and that she received six allotments of $100 each during February-July 1943. She was not receiving an allotment at the time of her deposition and had never instituted divorce proceedings against accused. During the summer of 1943 he told her he intended to institute divorce proceedings but she was never served with legal process, nor did she receive any further information whether such proceedings were actually instituted (Pros.Ex.6) (Specification 1).

On 11 December 1943 accused married Jacqueline Marie Ainger at Kettering, Northamptonshire, England. She was 18

years of age at the time, and was not aware of his former marriages. She testified that she believed he was still in love with her, that she loved him and desired to continue living with him. She was pregnant and accused was the father of the child which she expected would be born about 21 October 1944 (R16,18-20;Pros.Exs.9,10) (Specification 2).

With reference to Specifications 3,4,5,6 and 7 inclusive, both the prosecution and defense asked the court to take judicial notice of paragraph 3, Circular No.88, Headquarters, European Theater of Operations, 3 November 1943 (R17-18). Paragraphs 2a and 3 of this circular provide as follows:

> "2. War Department Prohibition of Marriage Without Approval.
> a. Sec.II, WD Cir 305, 1942, provides that: 'No military personnel on duty * * * in any foreign country or possession may marry without the approval of the commanding officer of the United States army forces stationed * * * in such foreign country or possession'
> 3. Delegation of Authority Within ETOUSA.
> a. General officers are authorized to approve or disapprove applications for permission to marry by commissioned, warrant, and flight officers under their command.
> b. Regimental and corresponding commanders are authorized to approve or disapprove applications for permission to marry by enlisted personnel under their command.
> c. The authority delegated in a and b above will not be sub-delegated; however, communications relating to its exercise may be signed or transmitted by the commanders concerned either personally or as provided for official communications in general."

On 2 December 1943 accused signed a "notice of marriage by licence" (to Jacqueline) before Sidney H. Gillard, Superintendent Registrar, Kettering Register Office, England (R13-14;Pros.Ex.7). It was stated therein that accused was divorced. The register office in such cases usually required that a copy of the actual divorce decree be submitted (R15). Either on 2 December or between 2-11 December accused submitted

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two papers to Gillard: a document dated 3 October 1943 granting accused permission to marry Jacqueline, purportedly signed by Harley L. Anderson "1st Lt. QMC. COMMANDING" and allegedly approved by M.A.Preston, "COLONEL AC. COMMANDING" (Pros.Ex.3); and a certificate dated 4 December 1943 in which it was stated that according to "U.S. Army records" accused was divorced from Geraldine Knight Neff, 14 April 1941, at the Court of Domestic Relations, Columbus, Ohio. The certificate was purportedly signed by Captain David L. Myer, Air Corps, Personnel Officer, and under the word "OFFICIAL" was the purported signature of Russell W. Barthell, Captain, Air Corps, Adjutant (Pros.Ex.8). Both documents supposedly emanated from "AAF STATION 117, APO 634" (R14-15). Colonel M. A. Preston, commanding officer of AAF Station 117 (R9), Captain Harley L. Anderson, commanding officer of accused's company (R22), Captain David S. Meyer, personnel officer of AAF Station 117 on 4 December 1943 (R21-22), and Captain Russell W. Barthell, adjutant of AAF Station 117 (R23-24) each testified that the signature of his name on the document concerned was not his and that he did not know who affixed his name to the paper.

With reference to Specification 8, on 10 March 1944 Captain Barthell interviewed accused as the result of a "letter" received from the Eighth Air Force wherein it was requested that accused be asked whether he desired to make a statement concerning his marital status and allotments. An indorsement thereon from the 1st Bombardment Division "asked if Lieutenant Neff was married to an English woman." Barthell read the 24th Article of War to accused who gave an oral statement. The statement was then typed, and after reading the same accused signed the statement under oath (R24-25). After referring to his marriages and allotments to Wanda and Mayme, he stated therein as follows:

> "I have not married any English women since returning from the United States, nor have I ever been married to an English woman" (Pros.Ex.12).

4. For the defense, Captain Louis M. Foltz, Chief of the neuro-psychiatric section, 49th Station Hospital, testified that he examined accused 26 May 1944 and that in witness' opinion he showed no evidence of psychosis. His attitude and past life "showed a psychopathic personality" found in about 30-40 percent of the people, which group does not "seem to be happy or to shoulder responsibility very well" (R10-11). Witness believed punishment would be detrimental and that "good guidance is more important". Accused could

determine right from wrong but would be more easily influenced not to adhere to the right by an "emotional drive" (R12).

Accused, after being warned of his rights, testified that he typed Pros.Exs.3 and 8 (permission by his commanding officer to marry Jacqueline, and certificate by personnel officer that army records showed he was divorced from Geraldine). He affixed the false signatures thereto and gave the documents to Gillard when he applied for a license to marry Jacqueline (R26,31). He also executed under oath Pros.Ex.12 (statement that he had never been married to an English woman). This statement was erroneous in that he married Mayme 13 September 1942, not 1943, and the allotments to Mayme were made from September 1942, not 1943, to 22 April 1943 (R31). He was in love with Jacqueline and was the father of her expected child. He intended to make a home for her some day, to live with her and to "raise our child as it should be raised" (R26-27). When they were married he did not tell her of his marriages to Wanda and Mayme (R31).

Although it is somewhat difficult to gather from accused's evidence the time elements involved during his military service the following appears to be correct: he became an enlisted man 2 January 1941 (R32), married Wanda 2 August 1941 (R30), lived with her between 2-19 August 1941, and returned to see her during the last of that month when he was about to go overseas (R28,33). He went to Puerto Rico about 1 September 1941 and did not see Wanda while he was stationed there. He returned to the United States about 26 March 1942 and attended an officer candidate school at Camp Lee, Virginia(R33) where he received in April a letter from Wanda in which it was indicated that she was pregnant by another man (R27-30,33; Def. Ex.A). He was commissioned 3 July 1942 (R32), saw Wanda on 14 July 42 (R30), and judged by her appearance that she had been pregnant about seven months, which would place the time of conception about December 1941 when he was in Puerto Rico. When he saw that she was pregnant he decided to have nothing more to do with her but did not institute divorce proceedings because he had just received his commission and went to Florida where he thought he "could file charges". However, he left Florida during the third week in September (R33). He had no feeling for Wanda whatsoever (R27) and did not know whether her child was ever born (R30).

He knew Mayme Kyle about two weeks before he married her (in Florida, 13 September 1942) and lived with her from 13-18 September 1942 (R29). He was then still married to Wanda (R30). He intended to dissolve both marriages and to

live a happy life with Jacqueline (R29). During the third week of September 1942 he left Florida for England, returned to the United States where he arrived about 15 July 1943, remained until the latter part of September and again arrived in England 9 October (R30,32-33). He did not see Mayme when he returned this time to the United States (R30) and when he spoke to her by long distance telephone relative to divorce proceedings, she said that she "would see about getting a lawyer"(R29). He made no inquiries concerning Wanda (R31). He did not live with Wanda after August 1941 (R28) and the statement contained in her deposition that he lived with her for several days during July and August 1943 was incorrect because during this time he was stationed at Westover Field, Massachusetts, then at a camp near Boston, and then in the District of Columbia, Colorado and Arizona (R28-30). He made no attempt to straighten out his affairs when he was in the United States on this occasion because he was stationed at about six different bases and "didn't get a chance before I was assigned and shipped out again" (R32).

5. The pleas of guilty of all specifications and of the charge are fully supported by the evidence, including accused's own testimony.

(a) With reference to his marriages to Mayme and Jacqueline (Specifications 1 and 2):

> "Bigamy is willfully and knowingly contracting a second marriage when the contracting party knows that the first marriage is still subsisting" (10 CJS, sec.I (1), p.359).

The crime of bigamy is recognized as an offense under both Articles of War 95 and 96 (CM ETO 1729, Reynolds and authorities cited therein). Essential elements of the offense are:

(1) A valid marriage entered into by accused prior to and undissolved at the time of the second marriage.

(2) Survival of the first spouse to the knowledge of accused.

(3) His subsequent marriage to a different spouse.

The marriages to Wanda, Mayme and Jacqueline were clearly established by the evidence. Neither Wanda nor accused had instituted divorce proceedings and they were in a married status when he later married Mayme and Jacqueline.

It was evident that Wanda was living on the dates of the two subsequent marriages and that accused was then aware of this fact. Her deposition was dated 9 June 1944 and accused admitted sending her an allotment of $60 per month since 22 April 1943. Wanda deposed that she received this allotment from about June 1943 to the date of her deposition. The questions whether Wanda was living on the dates of the subsequent marriages and of accused's knowledge of this fact, were not raised by the defense. The findings of guilty of Specifications 1 and 2 were fully supported by the evidence (CM ETO 1729, Reynolds).

(b) With reference to Specification 3 (marriage to Jacqueline without the approval of a general officer required by Circular No.88, Headquarters, European Theater of Operations 3 November 1943), the court was authorized to take judicial notice of the circular and the Board of Review may likewise take judicial notice of the same upon appellate review. Accused was also charged with notice of this directive (CM ETO 2788, Coats and Garcia and authorities cited therein). His marriage to Jacqueline without obtaining the required approval constituted an offense in violation of Article of War 96 (CM ETO 567, Radloff).

(c) The findings of guilty of Specifications 4 and 5 (false and fraudulent execution with intent to deceive of military permission to marry and of military certificate concerning his divorce) and Specifications 6 and 7 (offering and delivering these two documents as true and genuine with intent to deceive), are supported by competent substantial evidence. Accused freely admitted that he falsely executed both documents (Pros.Exs.3 and 8) in their entirety and that he submitted them to the registrar, Gillard, when he applied for the license to marry Jacqueline. Such conduct is obviously of such a nature as to bring discredit on the military service in violation of Article of War 96 (CM ETO 1092, Sussex-Loasby).

(d) The findings of guilty of Specification 8 (making a false statement under oath) was fully supported by the evidence. The Specification set forth the time and place where the statement was made, the contents of the statement itself, and the fact that it was made under oath. It did not, however, contain an allegation that the false statement was given during the course of an official investigation or inquiry, nor did it set forth the name and capacity of the officer before whom it was made.

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> "No finding * * * need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appeared from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby"(MCM, 1928, par.87b, p.74) (Underscoring supplied).

Accused not only pleaded guilty to Specification 8, but freely admitted in his testimony that he made under oath the statement alleged. The statement was made to Captain Russell W. Barthell, Station Adjutant. No contention was made by the defense that he was in any way misled or his substantial rights otherwise injuriously affected by the failure fully to allege the circumstances surrounding the making of the statement. The Board of Review is of the opinion that the facts alleged in the Specification "and reasonably implied therefrom" constituted an offense. The making by an officer of a false statement under oath is certainly a disorder to the prejudice of good order and military discipline in violation of Article of War 96 (Cf:CM ETO 1447, Scholbe).

6. The charge sheet shows that accused is 25 years 11 months of age. He enlisted 8 January 1941 at Fort Hayes, Columbus, Ohio, entered the Quartermaster Officer Candidate School, Camp Lee, Virginia, 4 April 1942, where he was comissioned a second lieutenant 3 July 1942, to serve for the duration of the war plus six months.

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

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

B. Frank Reter, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

1st Ind.

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

1. In the case of Second Lieutenant ROBERT M. NEFF (O-1575487), Quartermaster Corps, 1124th Quartermaster Company, Service Group, Aviation (RS), attention is invited to the foregoing holding of the Board of Review that the record 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 3456. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3456).

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

(Sentence ordered executed. GCMO 72, ETO, 23 Sep 1944)

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

BOARD OF REVIEW NO. 2

CM ETO 3468

30 NOV 1944

U N I T E D S T A T E S	FIRST UNITED STATES ARMY
v.	Trial by GCM, convened at First United States Army Stockade, near Formigny, France, 20 July 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Privates ALTON BONTON (38384354), ROBERT H. JAY (36796053), GEORGE C. RUSSELL (32972005), and HAROLD WRIGHT (13111201), all of 3192nd Quartermaster Service Company.	

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

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

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

BONTON

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Alton Bonton, 3192nd Quartermaster Service Company, having received a lawful command from Captain Frederick C. Malkus, Jr., his superior officer, to work in some unfinished graves, did at Cemetery No. 3, LaCambe, France, on or about 6 July 1944, willfully disobey the same.

JAY

CHARGE: Violation of the 64th Article of War.

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Specification: In that Private Robert H. Jay, 3192nd

Quartermaster Service Company, having received a lawful command from Captain Frederick C. Malkus, Jr., his superior officer, to work in some unfinished graves, did at Cemetery No. 3, LaCambe, France, on or about 6 July 1944 willfully disobey the same.

RUSSELL

CHARGE: Violation of the 64th Article of War.

Specification: In that Private George C. Russell, 3192nd Quartermaster Service Company, having received a lawful command from Captain Frederick C. Malkus, Jr., his superior officer, to work in some unfinished graves, did at Cemetery No. 3, LaCambe, France, on or about 6 July 1944 willfully disobey the same.

WRIGHT

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Harold (NMI) Wright, 3192nd Quartermaster Service Company, having received a lawful command from Captain Frederick C. Malkus, Jr., his superior officer, to work in some unfinished graves, did at Cemetery No. 3, LaCambe, France, on or about 6 July 1944, willfully disobey the same.

There was a common trial of the four accused, to which each consented in open court. Each accused pleaded not guilty and each, on separate vote, two-thirds of the members of the court present when the votes were taken concurring, was found guilty of the Charge and Specification against him, respectively. Evidence was introduced of one previous conviction against two of accused, Russell and Wright, by special court-martial for absence without leave, in violation of Article of War 61, from 25 December 1943 to 8 February 1944, in the case of Russell, and from 10 January 1944, to 8 February 1944, in the case of Wright. No evidence of previous convictions was introduced against accused Benton or Jay. Three-fourths of the members of the court present when the votes were taken concurring, each was sentenced, by separate vote, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority, in each case, approved the sentence but reduced the period of confinement to 10 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

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3. The prosecution's evidence showed that on 6 July 1944 and for the preceding three weeks the 3192nd Quartermaster Service Company was stationed at United States Cemetery No. 3, near LaCambe, France (R7-8). The duties of the organization, during that period, were described by Captain Frederick C. Malkus, Jr., commanding, as being

> "To furnish all laborers or any laborers that the graves registration company might give us or request of us".

As to the type of work his company was engaged in, he testified that

> "some men were digging graves, some men were transporting the dead, others were covering up the graves, some of them were helping beautify the area, some of them were driving stakes, and any incidental jobs that might have to be done around there" (R8).

Between 6:30 and a quarter of seven on the evening of 6 July 1944, Captain Malkus ordered the four accused and two other members of his company collectively

> "to go ahead and clean out some graves" (R8-9).

The order was given in the cemetery and the graves referred to

> "were graves that had been cleaned out there once, and German dead had been buried there and the German dead had been removed, I think the day before; lime had been thrown in the holes and the dirt that had to be cleaned out was the dirt that had been used to cover over German bodies, and, in some cases, where the holes were not dug deeply enough, they had to be dug just a bit deeper".

Captain Malkus explained to the group that he

> "had gone to the Graves' Registration Officer and this was the work that the entire company would do the following day".

When Captain Malkus gave his order collectively, none of the group moved. Then he gave the order directly to each and every man, ordering each accused individually

> "To go over there and start working and cleaning out those graves".

Only one member of the group - and he was not one of the accused - obeyed the order thus directed to him individually by his commanding officer. Captain Malkus then took the remaining five to the company area. There

> "they sat down in the meadow or field there where they'd probably bivouac that night, and then I gave them another opportunity and I told them and asked them to go back, and gave each one the command directly to go back to the graveyard and start cleaning out those graves. At that time Private Richardson /not one of the accused/ decided he was going back; he went back and went to work. And I called on Private Wright to go back, and he never even got up off of the ground; he just rolled over and refused. Private Jay did likewise, not getting up off the ground at all and refused and continued laying on the ground. And Private Russell did get up, but definitely refused to go over there and work in the graves. Private Bonton also got up, complained that something hurt him and that he didn't think he should go over there at that time; he was on a duty status; I asked him to go over and dig and told him to go over and dig and he refused" (R9).

The original group included the only six members of accused's company who were ordered to work in the cemetery that night. The reason the captain proposed to work this particular group after supper was, he explained, because

> "I had been having trouble with them running off during the day going to movies, sleeping, and I have to get the work done some kind of way, so I decided to have them make it up after chow at night".

He was "more interested in getting their work done" than in ordering them to work in the cemetery at night as a form of punishment (R10). It was "make-up work" which he was requiring of them, all except Wright, upon whom he had imposed disciplinary punishment under Article of War 104, having formally designated "Extra fatigue July 5 to July 11, 1944" as Wright's punishment. In serving it, Wright was doing extra duty or hard labor after regular working periods (R10,13). The others were not under punishment.

> "They were just out there to make up work that the rest of the boys were doing during the day while they were sleeping or away from the area" (R10).

Several days before, Captain Malkus testified: 3468

"Jay had been caught sleeping during the day, and I brought him before me and I started to punish him under the 104th Article of War and I told him to go to work; he didn't want that; he wanted to be court-martialed; well, I looked up the maximum punishment under court-martial and I couldn't give him anything but a fine for three days * * * so I decided then to forget the whole thing and let him make up his work".

He had done two nights work. But "I did not punish him under the 104th Article of War". When asked if he knew if Jay knew whether he was being punished under Article of War 104, Captain Malkus answered:

"I told him that I wasn't going to court-martial him, and since he had elected court-martial rather than punishment under the 104th Article of War, I presumed he thought he was going and I was just sending him over there to work".

"I started to punish him. 'No', he said; he would rather take a court-martial than work two days. He wanted to be court-martialed. Both he and Wright wanted to be court-martialed, and I checked up on the manual and all I could find for him sleeping during the day was two days' fine; I believe that would be correct; I decided to forget about that and have him make up his work".

There was no discussion with Russell or Bonton about punishment under the 104th Article of War (R11). Bonton had been absent during the regular working period of the 6th July, the others on 4 July (R12). All of them, Captain Malkus reiterated, were making up time lost from regular working periods except Wright, who was doing extra duty or hard labor under the 104th Article of War (R13).

First Lieutenant Albert F. Arnold, of accuseds' organization, testified that he was present when the order was given to accused and they each refused to obey (R15-16).

Staff Sergeant Charles A. Corley, of accused' unit, testified that he also was present when the order was given accused and they refused to work. He thought the work constituted company punishment because Captain Malkus had set up the punishment that all men who were not on the job during the hours of work, were to go back after supper and make up the time, except in case of sickness (R17-18).

4. For the defense, First Sergeant Alvin A. Emanuel, of accuseds' unit, testified that he was present and heard the order given to accused to work "after night in the cemetery" because they had not worked when they should. He did not know what was their status or whether or not it was a punishment under the 104th Article of War.

Corporal Robert Simmons, company clerk of accuseds' unit, was also present when accused were ordered to go to work after supper on the 6th (R20) and they refused. He kept the records of punishment imposed under the 104th Article of War and remembered the record covering Wright as being punishment under the 104th Article of War, but knew nothing about the others. When asked if the company commander explained to these men whether this was punishment under the 104th Article of War or just make-up for lost time, he answered, "104th Article of War". He "supposed" it was explained to them but

> "don't know the complete set-up of the case, only from what instructions he gave me in order to make up a charge sheet for Private Wright. Private Wright asked for a court-martial, which in the next day or two he changed, and he stated that the men would have to work under the 104th Article of War, and if they wished to have the charge sheets taken out they could have it done so".

Defense counsel announced that "disobedience of an illegal order is no offense, and that is the defense which these men are presenting to the court" (R12).

No evidence was introduced in behalf of the accused and each of them, on being informed in open court of his rights as a witness, expressed his desire to remain silent.

5. Whether Captain Malkus or any of the accused regarded the work in question as company punishment is immaterial. Its performance was the principal military duty of accuseds' organization. Malkus, as commanding officer, was vested with authority to order any member to perform such duty at any time, as unhampered by considerations of maximum hours as of minimum wages. A quartermaster service company is a military organization. In this instance, although the performance of its prime function required the labor of its members, the purpose involved constituted their labor in this regard military service of the highest type. The commanding officer was no more circumscribed in ordering any man or men of his organization, whenever he saw fit, to dig graves deemed essential for the burial of the dead, than the commanding officer of a combat unit is circumscribed in ordering any man or men of his organization to dig trenches deemed essential for his unit's protection. It is of course recognized that military duties will not be degraded by imposing them as punishments and that, in Wright's

case, Captain Malkus' obvious misconception of the prime military function of his service organization as "extra fatigue" as well, rendered invalid his imposition of the performance of this function as company punishment. But he was still Wright's commanding officer, with full authority to order Wright or any other member of his organization, whenever he deemed it necessary, to perform the labor in question as a military duty; and the proof clearly shows that such labor was a military duty for all of the accused at the time the order to perform it was given.

The fact that, in Wright's case, the duty assigned was regarded by Captain Malkus as company punishment did not render his order to Wright to perform it illegal, since the rule against assigning military duty as company punishment is not for the benefit of soldiers receiving company punishment, but for those performing military duties, to preserve from degradation their performance of their essential functions. Wright was, therefore, in no position to invoke the rule (CM 118674 (1918); Dig. Ops. JAG 1912-1940, sec.422(6), p.286). As to the others, there is substantial evidence that the work was not regarded or intended as company punishment. The evidence, therefore, in the case of each accused, sustains the findings of guilty.

6. The charge sheets show: Accused Bonton is 26 years and seven months of age. He was inducted at Shreveport, Louisiana, 8 December 1942.

Accused Jay is 19 years, eight months of age. He was inducted at Chicago, Illinois, 19 February 1943.

Accused Russell is 19 years, three months of age. He was inducted at New York County, New York, 19 June 1943.

Accused Wright is 24 years, three months of age. He was inducted at Pittsburg, Pennsylvania, 22 September 1942. Each to serve for the duration plus six months. None of accused had any prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of 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 the offense of willfully disobeying any lawful command of a superior officer is death or such other punishment as a court-martial may direct (AW 64). The designation of the Eastern Branch,

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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

(DISSENT) _____ Judge Advocate

_____ Judge Advocate

1st Ind. (359)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 30 NOV 1944 TO: Commanding General, First United States Army, APO 230, U. S. Army.

1. In the case of Privates ALTON BONTON (38384354); ROBERT H. JAY (36796053); GEORGE C. RUSSELL (32972005); and HAROLD WRIGHT (13111201), all of 3192nd Quartermaster Service Company, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences, in which holding I concur. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. In this case, the company commander ordered the four accused to work after supper digging graves. It was necessary work and had to be completed promptly. The organization was a Quartermaster Service Company and their normal work was of this nature. There are no minimum hours in war time, for service units any more than for combat units on the front line. Commanding officers are provided to command their units and see that the job is done. A company commander has the power and it is his duty to work all of his unit over time, or any part of it, when necessary to complete his mission. Extra work beyond normal hours should be apportioned fairly. Deficiencies in command are often responsible for rebellious conduct and refusals to obey.

In this case, three of the accused had been absent from work during the day and the company commander ordered them to work after supper to make up lost time. He could have tried them by court-martial or punished them under Article of War 104 for their offenses; he just as surely had the power to order them to work after hours to make up the lost time. The fourth accused, Wright, was serving a week's extra duty legally imposed under Article of War 104 for a similar absence. As to him also, the order was legal. The principle that military duty, such as drill and guard duty, should not be imposed as punishment, is founded on the idea of preserving the dignity of such military duties. It has no application here. This is war time. Decisions with respect to legal sufficiency must be based on reason, designed to support military authority when it is not exercised in an arbitrary, capricious, unfair manner resulting in injustice to the soldier. So regarded this conviction is legally sufficient.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this in-

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dorsement. The file number of the record in this office is CM ETO 3468. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3468).

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

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

BOARD OF REVIEW NO. 1

- 9 SEP 1944

CM ETO 3469

U N I T E D S T A T E S)	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	
Private First Class CONWAY GREEN (38227964), Company A, 354th Engineer General Service Regiment.)	Trial by GCM, convened at Tidworth, Wiltshire, England, 27 June 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private First Class Conway (NMI) Green, Company "A" 354th Engineer General Service Regiment, did, without proper leave, absent himself from his Company at Whitchurch, Hants, England, from about 0800 hours 15 May 1944, to about 2215 hours 15 May 1944.

CHARGE II: Violation of the 92nd Article of War.
Specification: In that * * *, did, near Faulkner's Farm, Saint Marybourne, Hants, England, on or about 14 May 1944, forcibly, and feloniously, against her will, have carnal knowledge of Sylvia Joan Nokes.

CHARGE III: Violation of the 93rd Article of War.
Specification: In that * * *, did, at Upton, Hants, England, on or about 15 May 1944, with intent to commit a felony, viz, rape, commit an assault upon Mary Hutchings by willfully and feloniously

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shooting her in the leg with a dangerous weapon, to wit, a Humane Killer, by striking the said Mary Hutchings upon the head with a Humane Killer, forcing her to the ground and attempting to have sexual intercourse with her.

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 all charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court 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. Charge I and Specification - Absence without leave. Accused's absence without leave from his company and station from 0800 hours to 2200 hours 15 May 1944 was fully proved and the evidence is uncontradicted (Pros. Ex.1; R9,10). Accused admitted his absence from camp without authority (Pros.Ex.14; R47). He was apprehended and taken into custody by the civil police at about 10:15 p.m. on said date (R34) and was delivered into the custody of his company commander shortly thereafter (R10,34,41). The record is legally sufficient to sustain the finding of guilty of Charge I and its Specification.

4. Charge II and Specification - Rape of Sylvia Joan Nokes.

(a) Prosecution's evidence summarizes as follows:

Ada Painter, a farm worker of 20 Picket Piece, Andover, testified that in company with her brother and his friend, between 3:45 and 4:15 p.m. on 14 May 1944 she walked down Faulkner's Road near Andover. She was acquainted with Sylvia Joan Nokes, and saw her riding a bicycle on the road. She approached the witness (R10-11). Soon thereafter Miss Painter saw a colored American soldier standing on the side of the road near a gap in the hedge. Miss Nokes rode past the soldier and then passed Miss Painter (R12). The witness was unable to identify the soldier, except that he wore one stripe on his sleeve (R11,12).

Sylvia Joan Nokes, a housemaid of Middle Wyke, St.Marybourne, Hampshire, on the afternoon of 14 May was engaged in delivering to the home of Bertram John Green, Faulkner's Down, Hampshire, England, a pail of milk which she had obtained from a farmer named Crane. She rode a bicycle and proceeded down Faulkner's Lane. A colored soldier greeted her, "Good-afternoon" and she made similar response. He said, "Just a minute", but Miss Nokes answered, "I am sorry" and did not stop. He followed her, took

hold of the bicycle, halted the girl and then grabbed her arm. He pulled her from the bicycle (R12-13,15). The man said "Come back here". She protested, "I am sorry". The soldier produced a knife and pressed it to her throat. She screamed and he "pressed harder". Her assailant compelled her to drop the bicycle and place the pail of milk on the ground and forced her to accompany him behind a straw rick. She went with him because she was afraid of the knife. She screamed again and said, "No". He replied "Either come or I will kill you" (R13,15). He then produced a gun and threatened "If you make another sound you know what you will get. I will unscrew the end and knock it" (R13). He then pushed her on the ground (R16) and exclaimed "Don't you make a sound or you know what you will get" (R13). He then pulled up the girl's dress, cut the elastic of her knickers, tore them from her body and said, "Promise you won't tell" (R13,16,17). She replied "Yes only to get away from him" but engaged in a struggle to prevent removal of the knickers (R13,16). He then exposed his privates and had sexual intercourse with the girl (R13). The act occurred close to the road. No one passed. Immediately after the commission of the rape Miss Nokes mounted her bicycle, picked up the pail of milk and rode to the Green home where she reported the incident to her friend Elfrida (R17,18). She cried as she went down the road and when she spoke with Elfrida (R18). She identified a knife and a gun presented to her in court, as being similar to the knife and gun he displayed to her (R13,14). She also identified a garment as the knickers she wore at the time of the assault and same was admitted in evidence without objection (Pros.Ex.2;R14). She made a positive identification in court of accused as her assailant and stated she had identified him at an identification parade held on 20 May at the camp (R14,16,18). Accused "wore" a moustache at the time of the assault (R16), but at the identification parade on 20 May he was without it (R18).

Bertram John Green, mentioned above, saw Sylvia Joan Nokes on the afternoon of 14 May at his home immediately after she delivered a pail of milk (R19), "just before" 5:00 p.m. (R20). "She was crying with her hands on her breast, sobbing very much". He inquired as to the cause of her tears. She hesitated, could not speak and appeared about to collapse (R19, 21). Finally she said, "a black man". Green asked, "Whatever is the matter? What did he do?" She replied, "attacked me". Green queried, "Are you sure?" Miss Nokes replied, "Yes, he's done me, he's done me" (R21).

Cecil Frederick Cope, a medical practitioner residing in Andover, examined Sylvia Joan Nokes on 14 May. He could find no injuries except two minute scratches on the front of her neck (R31-32). She was not virgo intacta. There was no evidence that she had been raped "at that particular time", but it was possible that a penetration had occurred at the time concerning which he had been informed (R33).

Richard Henry Bradshaw Whitehead, Detective Sergeant, Andover Civilian Police, was present at an identification parade held at Hurstbourne Priors on 20 May when Sylvia Joan Nokes was directed to identify her assailant (R49). Although accused had removed his moustache, Miss Nokes pointed to accused and said, "This is the man, but he has no stripes on his arms

now" (R50). Accused had a moustache and wore stripes on his arms on 15 May (R50).

Technician Fourth Grade William J. Thyer, 17th Military Police, Criminal Investigation Section, identified Miss Nokes' knickers (Pros.Ex.2) and stated he delivered them to the Metropolitan Police Laboratory for examination (R42). He further testified that on 20 May he interviewed accused, who voluntarily signed a written statement which had been prepared by the witness after interrogating him. The statement (Pros.Ex.14) was admitted in evidence over objection by defense (R47). The following is the material part thereof:

> "I wish to say that I came into Andover, Hants, on official pass 14 May 1944. I got on the train at Hurstbourne Prior Station and arrived in Andover about 1200 hrs. 14 May 1944. Sometime during the afternoon I borrowed a bicycle from Howard Wallace (spelling not sure) and he told me to take it back to camp. When I was near St. Marys, Bourne I met a girl on a bicycle. I spoke to her. I said "Howdy" or "Hello" I don't know which. She said she was in a hurry and went by me up the hill. Very shortly she came back. and I saw her near the place where I saw first time. I didn't speak to her the second time. She went on and shortly she came back and I was in about the same place that I was when I saw her the first two times. She stopped on her own accord. I walked over & went to talking to her. She said she had to go soon after she stopped. I told her to wait awhile. I told her I wanted her to do me a favor. I held the handle bar of the bicycle to keep her from moving. I told her 'Let's get off the road. After we got off the road I told her to lay the wheel up against the bank. During all of the time I had my knife in my hand but I never did put it on her. I at one time laid my hand on her shoulder in which was my knife but I never did put it to her throat. We then walked down the side of the fence. I had my arm on her shoulder. We stopped near a haystack. I told her to lay down. She did. She asked me if I was going to hurt her & I said 'no' When she was down on the ground I pulled out the gun that I had recovered near my camp which I had hidden near a log. I got the gun on my way from Andover the afternoon 14 May 1944 when I was on the bicycle. I showed her the gun after I pulled it out of

my belt. She asked me what it was and I told her it was a gun. I unscrewed the top off the gun and showed it to her exposing the undischarged cartridge. I screwed the top then back on and laid it over beside me near the haystack. She asked me again if there was anything going to happen to her and I said 'no'. She pulled her pants down and I got on top of her. I had a complete intercourse with her. I wiped myself off and she got up and I brushed off her clothes. I asked he whether she was going to tell anyone what happened and she said 'no'. She went immediately and got her bicycle and went up the road."

It was stipulated between prosecution, defense counsel and accused that James Davidson, Director, The Metropolitan Police Laboratory, Hendon, The Hyde, London, would testify that he had received and made examination of

"One pair of knickers labelled as belonging to SYLVIA NOKES" (R48)

and that the examination yielded the following results:

"Seminal staining is present in the region of the fork" (R49).

(b) Accused elected to appear as a witness in his own behalf and with respect to the charge of rape of Miss Nokes he denied he had ever seen her prior to her appearance in court (R54). At the identification parade on 20 May he "saw a girl, but I didn't know her name". He had never seen that girl before. "She looked down the line. * * * She said she was not sure but thought I was the one". Another woman at the same parade pointed to a boy next to witness (R55). On 14 May he was in Andover about noon time and was not near St. Marybourne. He was a private first class but did not wear stripes on that date (R60-61).

(c) The defense objected to the admission in evidence of the statement (Pros.Ex.14), signed by accused after it had been prepared by Thyer, who testified that prior to making the statement accused was warned as to his rights; that the statement was voluntarily given; that no promises were made accused; that force was not used, and that he informed accused that it is always better to tell the truth (R46,47). Assuming that the s tatement was a confession, there is no evidence that it was given under circumstances which would deny its admissibility. The court's determination will not be disturbed upon appellate review in view of the substantial affirmative evidence of its voluntary nature (CM ETO 559, Monsalve; CM ETO 1606, Sayre; CM ETO 2007, W. Harris). The fact that the statement was reduced to writing by one other than accused does not militate against its admissibility (CM ETO 438, H. Smith; CM ETO 2007, W. Harris).

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(d) The identity of accused as Miss Nokes' assailant was established by the victim's positive identification of him in court and evidence of her prior identification of him at the identification parade. Accused's statement (Pros.Ex.14) admitted the act of intercourse with Miss Nokes at the time and place alleged. There was substantial evidence to support the court's finding that accused was the colored American soldier who committed the acts of violence upon Miss Nokes and its findings are binding on the Board of Review (CM ETO 3375, Tarpley and authorities therein cited).

(e) The evidence is clear and conclusive that accused by physical violence and threats of death overpowered Miss Nokes and against her resistance and protests and without her consent secured sexual intercourse with her. Penetration was not only proved by the prosecution but admitted by accused. "I had a complete intercourse with her" (Pros.Ex.14). All of the elements of the crime were proved by substantial competent evidence and the findings of the court are conclusive on the Board of Review. The record is legally sufficient to support the findings of accused's guilt of Charge II and its Specification (CM ETO 1402, Willison and cases therein cited; CM ETO 1899, Hicks; CM ETO 2472, Blevins; CM ETO 3141, Whitfield; CM ETO 3375, Tarpley).

5. Charge III and Specification - Assault with intent to commit rape on Mary Hutchings.

(a) Prosecution's evidence summarizes as follows:

Captain Bruce R. Merrill, commanding officer of Company A, 354th Engineer General Service Regiment, identified the copy of the morning report of the company (Pros.Ex.1) which showed accused's absence without leave from his company from 0800 hours 15 May 1944 to arrest at 2200 hours of said date (See par.3 hereof). At 2200 hours accused was brought to camp by a Constable from Hurstbourne Tarrant (R10).

Mrs. Vera Mills, a housewife, of Rowebank, Vernham Dean, had known Mary Hutchings from childhood. At 4:45 p.m. on 15 May 1944, Mrs. Mills rode her bicycle in the direction of Vernham Dean. As she turned Enbarn Corner in Upton (in Hampshire) she saw Mary Hutchings ahead of her also riding on a bicycle (R22). She saw Miss Hutchings' back as both women rode in the same direction (R24). Miss Hutchings was followed by a colored American soldier who was clad in green fatigue clothes and wore a round starched hat. He raised his arm and fired a shot (R22-23). He had an object in his hand (R23). Miss Hutchings fell from her bicycle and he ran to her and hit her on the head as she lay on the ground (R22). Mrs. Mills turned back to a nearby house for aid. When she returned with assistance Miss Hutchings was not to be seen (R23).

Mary Hutchings, a school-girl, whose address was The Forge, Vernham Dean, Hampshire, England, on 15 May at about 5:00 p.m. was bicycling on a public road near said village. At a point about 500 yards from the village a colored man appeared from the road side hedge and stopped her.

He inquired the way to St. Marybourne and she gave him directions. After they conversed for 15 or 20 minutes, she mounted her bicycle to proceed on her journey (R24,28). He then placed his hand on her neck and said, "No, go up this way". The girl replied, "Someone is waiting for me just around the corner". He answered, "It doesn't matter, you go up this way". She struggled and freed herself from his grasp. The man stood in front of her (R24). She turned her bicycle in the opposite direction toward Fernham, mounted and peddled away. When about five or six yards distant she heard a shot and felt some object hit her in the leg. She fell from the bicycle (R24,26). As she lay on the ground the man came up to her and hit her in the back of the head with the bore of a gun (R24,26,27) and then lifted and carried out to a point behind hay ricks in the adjoining field. He then returned and took observation on the road. The girl attempted to leave. The man called, "I will shoot you again". Under this threat she waited. The man returned, placed her on his shoulder and carried her further into the field (R24). He took a knife from his pocket and exclaimed, "I killed another man". Asked by the young woman what he intended to do with the knife, he answered, "Cut the bullet out of your leg". She replied, "I shall go to the hospital to have that out". His response was, "You won't live to go to the hospital" (R24). Blood was pouring from the leg wound and she asked for something to tie the wound. The man gave her his handkerchief (R25). He repeated that he had killed another man and when asked by the girl "What good he would get out of it shooting" her, he replied, "I have tried to talk to a lot of English girls. None of them would have anything to do with me" (R25). He directed her, "Come on up farther" but she refused. Again he said, "Come on up farther". Again she refused, saying, "I shall not go any farther". He ordered, "Lay down then". Upon her refusal he pushed her to the ground. He then got on top of her and pulled down her knickers but did not take them off (R24, 25,28,29). While he was on top of her she felt his penis (R25). The man then picked her up a third time and was about to carry her farther afield when she saw her father and brother approaching. She said, "There are some men coming." He then placed her on the ground and ran into the hedge calling, "If any one catches me you tell them I was drunk" (R24,28). However, he did not appear to be under the influence of liquor (R28).

Miss Hutchings, in the court room, identified accused as the colored American soldier who shot her (R29). She also identified a handkerchief similar to the one used to bind her leg wound (R25). Admitted in evidence upon her identification were the "Greener Humane Killer" with which she was shot (R26; Pros.Ex.3) and her knickers (R26; Pros.Ex.4).

Donald Roland Hutchings of The Forge, Vernham Dean, testified that he was a brother of Mary Hutchings who was also known as Lorna (R29-30); that about 5:15 p.m. on 15 May, while riding his bicycle down a lane his sister came out of the hedge saying, "Don't go up there, the nigger might shoot you" (R30). His father was present and told him to bring the automobile. By the time he brought the car, an ambulance arrived. His sister was placed in it and he accompanied her to the hospital (R30). Blood was flowing from her leg (R31).

Cecil Frederick Cope, a medical practitioner, attended Miss Hutchings at the hospital on 15 May. Upon examination he found a lacerated wound at the back of her skull about one and one-half inches long and a bullet wound in her left leg below the knee cap. He removed a bullet from the front of the knee (R31-32). The bullet was admitted in evidence (R32; Pros.Ex.5).

Alexander Lingley James Brodie, Police Constable of Hurstbourne Tarrant, near Andover, at about 10:15 p.m. on 15 May encountered accused on the Andover-Newbury road endeavoring to obtain transportation on passing vehicles. He had stains on his clothing similar to blood stains. Not being satisfied with accused's explanation of his presence on the road, Brodie took him into custody and escorted him to the police cottage. Later in the evening accused was interviewed by English police and Technician Fourth Grade William H. Thyer of the American Army. Upon being questioned, accused asserted that the stains on his clothing were "dried gasoline" (R34). Brodie identified the "Humane Killer" (Pros.Ex.3) and stated that as a result of information received by him he found the instrument in his front garden. He also found in the garden a handkerchief in which were tied eleven bullets. Upon positive identification by Brodie the handkerchief and bullets were admitted in evidence (R35; Pros.Ex.6). While Miss Hutchings was in the ambulance Brodie removed from her leg a handkerchief which he identified. It was admitted in evidence (R36; Pros.Ex.7).

John Ernest Payne, 9 Egbury Road, St. Marybourne, identified Pros. Ex.3 as a humane cattle killer, made by Greener, Birmingham (R36). He described the manner of using same and testified that if dropped on the ground when the safety catch was "off" it would discharge. Otherwise it was discharged by hitting it with a half-pound mallet (R37). It could also be fired by tapping it with a rock (R38). It discharged a 3.10 calibre bullet (R37).

Captain Bruce R. Merrill, recalled as a witness, identified a knife taken from accused's person on the night of 15 May as an Army Engineers' issue knife (R38). Also he identified trousers, underwear and jacket as being similar to those removed from accused that evening (R39). He verified the accuracy of an excerpt from accused's service record which showed that accused's blood type was "A" (R40).

Technician Fourth Grade William H. Thyer, was a member of a searching party on the night of 15 May having for its purpose the discovery of the colored man who had shot a girl (R41). At the civilian police station he met a colored soldier whom he identified as accused whose clothes were stained with what witness believed was blood. Accused asserted the stains were from ethyl gasoline. Thyer escorted him to Captain Merrill, commanding officer of Company A, 354th Engineer General Service Regiment, where his clothes were taken from him. His trousers (Pros.Ex.9), underwear (Pros.Ex. 10), field jacket (Pros.Ex.11) and hat (Pros.Ex.12) were admitted in evidence upon Thyer's identification (R41-43). Thyer delivered these articles to Metropolitan Police Laboratory in London (R41), together with Miss Hutchings'

knickers (Pros.Ex.4; R42). He also delivered to the Police Laboratory the bullet removed from Miss Hutchings' leg by Dr. Cope (Pros.Ex.5) and received by him from Sergeant Whitehead of the British Police (R43).

On 16 May Thyer interviewed accused and secured from him a written statement: Neither force nor persuasion was used to obtain the statement. Thyer wrote the statement after interrogating accused. He was warned of his rights and was informed that it would be better if he told the truth (R44). The statement (Pros.Ex.13) was admitted in evidence. The pertinent part thereof is as follows:

> "I left my camp about 0800 hrs. 15 May 1944 without a pass. I left my camp on a work truck which was driven by Walter B. Adams of my Company. After the truck got to the place where the men detailed on it were to work I got off. This truck stopped near Hurstborne Prior and in this vicinity I got on to another truck of the 415 D.T.Eng. Co. I went to Newbury with them. When I got off the first truck I recovered a bottle of whiskey (about a quart) which I had hidden the evening of 14 May 1944. I started drinking it from the time I got it. I stayed in the truck until it left Newbury. I stayed with the truck until about 1600 hrs. 15 May 1944. By this time I was feeling pretty drunk and I found myself not close to a town. I didn't know exactly where I was. Along this road a girl on a bicycle passed me and as she did I inquired of her where I was at. She turned the bicycle around and came back and talked to me. We talked for awhile and she asked what I had in my hand and I told her it was a gun. She started to leave ahead of me on her bicycle and when she had gotten about 40-50 feet away from me the gun I was holding accidently went off. This gun that I had used when it accidently went off was found by myself near a haystack near St. Marysborne. I got the gun at the same spot as where I picked up the bottle of whiskey morning of 15 May 1944, after I had seen that I had shot her I went up to her right away. I took her bicycle and laid it on the side of the road. I didn't know at present exactly where she was shot at so I carried her off the road and seeing her leg was bleeding I tied my handkerchief around her leg. We talked for awhile and I asked her what she

was going to tell her folks about getting shot. She said she didn't know. I said I was about drunk when she asked me why I shot her. While she was laying there I kissed her once. I don't remember if I caressed her any more than kissing her. I was getting sleepy and felt like laying over and going to sleep. She said that she was hurt and had to go. I picked her up and put her on my shoulder. She looked up an saw a person and when she did this she told me to let her down and run. I never did see this person. I ran over into the wood and fell down and I went to sleep about 30 yards off of the road. Finally I woke up and started walking. I walked through the fields until I hit a main road where I was picked up by a British Civilian Policeman. Agent Thyer took me back to my Company Commander and I was turned over to him. I also told agent Thyer where I had placed the gun that was used when the girl was shot and agent Thyer has this weapon and cartridges in his possession. The clothes that I wore when the girl shot are also in agent Thyer's possession. These are 1 pair G I Shoes, 1 fatigue trousers. 1 fatigue jacket, 1 fatigue hat, 1 wool vest, 1 wool drawers 1 pair of socks and 1 field jacket."

Under stipulation of prosecution, defense counsel and accused it was agreed that James Davidson, Director of the Metropolitan Police Laboratory at Hendon, The Hyde, London would testify if he were in court he had examined accused's trousers (Pros.Ex.9), under-pants (Pros.Ex.10) and field jacket (Pros.Ex.11); Miss Hutchings' knickers (Pros.Ex.4), sample of her blood and a bullet extracted from her left leg (Pros.Ex.5), and that as a result of said examination he found:

Blood of Mary Hutchings: Belongs to Group AB.
Knickers of Mary Hutchings: Seminal staining at fork. Blood staining on one leg.
Bullet: Shows markings similar to test bullets fired from "humane killer".
Field Jacket: Blood belonging to Group AB on left front, left sleeve, right arm and right shoulder.
Fatigue trousers: Blood staining belonging Group AB on both legs. Seminal staining on inner surface of right fly. "There is staining on the outer surface of the right side of the fly opening, and this staining is similar to s tains on the outer surface of the knickers labelled as be-

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longing to MARY HUTCHINGS, being apparently vaginal in origin."

Underpants: Blood staining on inner and outer surfaces of right side of fly opening (R48,49).

Richard Henry Bradshaw Whitehead, Detective Sergeant of the Hampshire Joint Police Force, saw accused at the police cottage of Constable Brodie at 11:00 p.m. on 15 May. Accused was dressed in fatigues. When asked how he accounted for stains on his clothing he said, "I got it this morning. It is ethyl petrol" (R49,50). Whitehead identified the "humane killer" (Pros.Ex.3) and stated he was present when Brodie found it in the hedgerow of the cottage (R50).

(b) Accused, as a witness in his own behalf with respect to Charge III and Specification, testified that on the afternoon of 15 May he met Miss Hutchings on her bicycle and inquired as to the destination of the road he was on. At that time he had the "humane killer". On receiving her reply she rode her bicycle in one direction and he turned to walk in the opposite direction (R55). He accidentally struck his leg with the "killer" and it discharged and shot her in the leg (R56,58). The bullet also struck his left thumb. He carried her off the road and tied his handkerchief around her leg (R56,59). Then he attempted to take her home. He carried her on his shoulder and his clothes became blood stained. She saw someone and asked to be released (R56). Accused put her on the ground and then he ran away and went into the woods and fell asleep (R60). He had been drinking whiskey from a bottle he had hidden in the nearby haystack the previous day (R59) and was "feeling pretty good" (R60). He denied he struck the girl on the head or attempted to remove her knickers (R56). He stated he found the gun ("humane killer") in a haystack near St.Marybourne (R59). There were petrol s tains on his jacket and blood stains on his trousers (R62). He could not explain why he informed Constable Brodie that the blood stains were petrol stains (R62).

(c) On rebuttal Mrs. Vera Mills testified that she saw a colored American soldier shoot Miss Hutchings. He ran behind her and a shot rang out. When she fell from her bicycle he continued to run towards her. When he reached her he raised his hand and "bashed her on the head" (R63).

(d) Notwithstanding defense counsel's objection to the admission in evidence of accused's statement to Thyer (Pros.Ex.13) accused as his own witness testified that Thyer informed him that he did not have to say say anything unless he desired.

> "He told me I could say something if I wanted to or could keep silent. * * * He told me if I knew anything about it, it would be best for me to tell it than to wait until they found it out" (R46).

The court's finding that it was a voluntary statement was fully justified (See authorities cited in par.4(c), supra).

(e) No question arises as to the identity of accused as Miss Hutchings' assailant, as he admitted his participation in the attack upon the young woman. The only issue presented is whether there is evidence of a substantial nature that he entertained the specific intent to rape Miss Hutchings when he pushed her to the ground after he carried her for the second time. The facts that he then placed himself on top of her and tried to remove her knickers; that she felt his penis at that time; that seminal stains were found on her knickers and that staining, probably of a vaginal nature, was discovered on the right side of the fly opening of his trousers similar to that discovered on the girl's knickers, form a substantial body of evidence to sustain the finding that accused assaulted Miss Hutchings with intent to rape her (CM ETO 3309, Tapp and authorities therein cited).

6. The charge sheet shows that accused is 24 years old. He was inducted on 8 October 1942 to serve for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of 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. Imprisonment for life is an alternative mandatory sentence for the crime of rape (AW 92). Confinement in a penitentiary is authorized for the crime of rape by AW 42 and sec.278 Federal Criminal Code (18 USCA 457), and for assault with intent to commit rape by AW 42 and sec.276 Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement is authorized (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4) and 3b).

B. Franklin Pitts Judge Advocate

Edward H. Tripp Judge Advocate

Edward L. Stevens Jr. Judge Advocate

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1st Ind. (373)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. - 9 SEP 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 871, U.S. Army.

1. In the case of Private First Class CONWAY GREEN (38227964), Company A, 354th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the 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 3469. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3469).

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

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

BOARD OF REVIEW NO. 2

CM ETO 3470

25 SEP 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS, redesignated SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Technician Fifth Grade GEORGE R. HARRIS (33643966), 4008th Quartermaster Truck Company (TC).	Trial by GCM, convened at Plymouth, Devonshire, England, 17 July 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Technician fifth Grade George R. Harris, 4008th Quartermaster Truck Company (TC), did, at Tavistock, Devon, England, on or about 8 June, 1944, forcibly and feloniously, against her will, have carnal knowledge of Beryl Jean Adams.

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

Specification: In that Technician Fifth Grade George R. Harris, 4008th Quartermaster Truck Company (TC), did, at Tavistock, Devon, England, on or about 8 June 1944, willfully, unlawfully and feloniously have carnal knowledge of Beryl Jean Adams, a female under the age of sixteen (16) years.

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He pleaded not guilty to and, all members of the court present when the vote was taken concurring, he was found guilty of both charges and specifications. No evidence of previous convictions was introduced. All 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 confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The testimony for the prosecution shows: That Beryl Jean Adams, 13 years old (R12), living with her mother at Sportsman's, Tavistock, Devonshire, England, was walking home from school at half-past four on 8 June 1944. Coming up the hill she saw an army lorry. A small boy, David, got out and the lorry came on and stopped by Beryl (R9). The driver told her to get in but she replied that she preferred to walk. He then forced her to get in the truck (R10-11) and drove on a short distance and turned around. She asked to be let out and when he refused, she jumped out of the moving truck and ran, but he caught her and forced her on to the ground despite her attempts to get up. He then "took up my clothes and threw my knickers across the field * * * undid his own clothes and * * * layed along me". He got inside of her and stayed that way four or five minutes. She told him it hurt her and he said if she "yelled, he would kill" her. She tried to get up but he held her down. He hit her on the face and said, "don't shout". She didn't cry, she was too afraid (R10). She knew no colored boys and never invited any of them to her home (R11). She positively identified accused as the man in the truck of whom she had been talking. While they were driving down the road he asked, and she told him, her name and that she was 13 years old. Her mother testified that Beryl was born 20 February 1931 (R12). The commanding officer of accused's company identified accused as being in the military service of the United States Army and stated his character was "very good" (R13).

4. Accused was the only witness for the defense. He testified substantially to the same circumstances as did Beryl except that he stated she did not object to what was done. "She never said yes and she never said no". He described the act of intercourse (R14) and admitted she was going to shout when he had her on the ground and wanted to have intercourse with her. He told her not to shout. He denied asking her her name or age and his story, in part, was confused and conflicting (R14-18).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent. Carnal knowledge with her consent of a female under the age of consent, may be an offense under Article of War 96 (MCM, 1928, par.148b, p.165). It has been held to be such an offense by this Board of Review (CM ETO 3044, Mullaney; CM ETO 2620, Tolbert & Jackson).

The evidence is undisputed that intercourse occurred. The only dispute is whether the act occurred by force and without the consent of the girl. The credibility of the witnesses and the resolving of the facts are questions for the sole determination of the court (CM ETO 1899, Hicks) and unless palpably in error, its determination will not be disturbed by the Board on appellate review (CM ETO 1953, Lewis). There is substantial evidence in the record of trial to support the court's findings of guilty.

He was found guilty of both rape and carnal knowledge of a minor, arising from a single act but was in no way prejudiced thereby as the sentence imposed was mandatory for the offense of rape alone.

6. The charge sheet shows accused to be 21 years and two months of age. He was inducted 19 July 1943 to serve in the army for the duration of the war plus six months, with no prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

3470

(378)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 SEP 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 871, U. S. Army.

1. In the case of Technician Fifth Grade GEORGE R. HARRIS (33643966), 4008th Quartermaster Truck Company (TC), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

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

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3470. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3470).

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

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

BOARD OF REVIEW NO. 1

22 SEP 1944

CM ETO 3473

U N I T E D S T A T E S)	82D AIRBORNE DIVISION.
)	
v.)	Trial by GCM, convened at Division Headquarters, 82d Airborne Division, APO 469, U.S. Army, 16 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private PETER C. AYLLON (32621611), Company "A", 507th Parachute Infantry.)	

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

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Peter C. Ayllon, Company "A", 507th Parachute Infantry, did, at Flaux, Normandy, France, on or about 10 June 1944, desert the service of the United States by absenting himself without proper leave from his organization and place of duty with intent to avoid hazardous duty, to-wit: rejoining his company after having returned from a patrol, his company then being engaged with the enemy, and did remain absent in desertion until he surrendered himself at the beach near Saint Marie Du Mont, Normandy, France, on 12 July 1944, where his organization had withdrawn from combat and had assembled for return from Normandy, France, to England.

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 summary court for absence without leave for two days, and one by special court-martial for absence without leave for four days, both in violation of Article of War 61. 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 ten years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, directed that pending accused's transfer to the designated place of confinement he be confined in 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The undisputed evidence showed that on or about 10 June 1944 and for several days thereafter, accused's company was engaged in actual combat with the enemy in the vicinity of Flaux, Normandy, France (R7-9,17). Accused arrived in Normandy with a seaborne detachment, the members of which were to join their units after unloading the boats (R7,9). Seaborne members of accused's company were expected to report to the company about 10 June (R10-11). On 8 June accused was one of a group of 20 men who were members of his regiment, and who were led by a Sergeant Garrison from "the beach" to the vicinity of Flaux. They reached an area occupied by the 325th Glider Infantry and on 9 June a battle developed. After the battle was over accused accompanied Garrison and an officer on a patrol which escorted 15 men "to the 507th". When they returned to the area Garrison ordered accused to deliver a prisoner to a regimental headquarters about 300 yards away. When this mission was completed Garrison ordered accused on 9 June to report to his company which was about a half mile away, and told him that his battalion was "up ahead on the hill and off to the right of the road" (R13-16). About 10 June Sergeant Wesley A. Jorgensen, communications sergeant of accused's company, saw accused with the rest of the seaborne troops crossing a field. Jorgensen told accused to join his company "right over there about a 100 yards", and pointed out the location of the organization. Jorgensen testified "We were the only unit there." Accused replied "O.K." (R17-18). Although the other seaborne members of accused's company joined the organization (R10,12-13,18), accused failed to do so. He did not join the company until he surrendered on 13 July when it was on the beach at St. Marie Du Mont, France, ready to embark for England. He was not authorized to be absent during the interval and was "carried" as missing in action (R10-12, 18-19).

4. No evidence was introduced by the defense and, after his rights were explained to him, accused elected to remain silent (R19-20).

5. The findings of guilty of the offense alleged were fully supported by competent, substantial evidence (CM ETO 3380, Silberschmidt and cases cited therein.

6. The charge sheet shows that accused is 22 years of age and was inducted 7 November 1942, at the United States Army Induction Station, New York. His period of service is governed by the Service Extension Act of 1941. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and 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 committed in time of war is death or such other punishment as the court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir. 210, WD, 14 Sep 1943, sec.VI, as amended).

B. Franklin Riter Judge Advocate

(ABSENT ON LEAVE) Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 22 SEP 1944 TO: Commanding General, 82d Airborne Division, APO 469, U.S. Army.

1. In the case of Private PETER C. AYLLON (32621611), Company "A", 507th Parachute 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 3473. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3473).

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

3473

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

BOARD OF REVIEW NO.1

CM ETO 3475

29 SEP 1944

U N I T E D S T A T E S	8TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 8, Vicinity of Betton, France, 12, 14 August 1944.
Private EARL J. BLACKWELL (14018476), Private First Class JOSEPH WARD (14004769), and Private JOE P. HUSKEY (7009842), all of Company G, 13th Infantry.	Sentence: Each accused, dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Disciplinary Barracks, Eastern District, Greenhaven, New York.

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

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

2. Accused were charged separately and tried upon the following identical Charge and specifications:

CHARGE: Violation of the 93rd Article of War.
Specification 1: In that /Private Earl J. Blackwell/, /Private First Class Joseph NMI Ward/, /Private Joe P. Huskey/, Company G, Thirteenth Infantry, did, at or near Chartres-de-Bretagne, France, on or about 9 August 1944, with intent to do him bodily harm, commit an assault upon Jean Armand, at the Cafe Chartie-de-Bretagne, I.E.V., Chartres-de-Bretagne, France, by shooting at him with a dangerous weapon, to wit: a U. S. Army 30 Cal. M-1 Rifle.

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Specification 2: In that * * * did, at or near Chartres-de-Bretagne, France, on or about 9 August 1944, with intent to do him bodily harm, commit an assault upon Lacien Renouard, at the Cafe of Henri Renouard, Chartres-de-Bretagne, France, by shooting at him with a dangerous weapon to wit: a U. S. Army 30 Cal. M-1 Rifle.

Specification 3: In that * * * did, at or near Chartres-de-Bretagne, France, on or about 9 August 1944, willfully, maliciously, unlawfully and feloniously burn or aid and abet the burning of the dwelling house and cafe Henri Renouard, Chartres-de-Bretagne, France.

By direction of the appointing authority, and without objection by any of accused, all accused were tried together. Each pleaded not guilty to and was found guilty of the Charge and specifications preferred against him. No evidence was introduced of previous convictions of accused Blackwell or of accused Ward. Evidence was introduced of two previous convictions of accused Huskey: one by special court-martial for failing to obey a standing order and being drunk in uniform in a public place, and one by summary court for breaking restriction by leaving company area, both in violation of Article of War 96. 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 20 years. The reviewing authority, as to each accused, approved the sentence, designated the United States Disciplinary Barracks, Eastern District, Greenhaven, New York as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Certain procedural matters deserve preliminary attention:

(a) In his reference of the case of each accused for trial, the appointing authority directed "Common Trial of accused, together with" the other two accused. At no point during the trial was objection made by or on behalf of any of accused to trial with either of the other two. Accused were charged with simultaneously and severally committing offenses of the same character at the same times and places, provable by the same witnesses. Under the circumstances, their trial together was proper (CM 195294 (1931), Dig.Op.JAG 1912-1940, sec. 395(33), p.223; CM ETO 3147, Gayles et al, and authorities

therein cited).

(b) Because of "military necessity" the trial commenced on 12 August 1944, the date on which the charges were served on accused. The defense expressly stated that it had no objection to this procedure, and there is no indication in the record of trial that any of accused's substantial rights were prejudiced within the contemplation of Article of War 37.

(c) Specification 3 of the Charge against each accused alleges that at a named time and place he did "willfully, maliciously, unlawfully and feloniously burn or aid and abet the burning of" a certain dwelling house and cafe.

> "One specification should not allege more than one offense either conjunctively or in the alternative" (MCM, 1928, par.29d, p.19).

Technically, the allegation constitutes alternative pleading, but under Article of War 37, the error in pleading, if it be one, is immaterial unless it has injuriously affected the substantial rights of accused. It should be noted that the distinctions between principals, aiders and abettors have been abolished by Fed statute (Federal Criminal Code, sec.332, 18 USCA 550; CM ETO 1453, Fowler, pp.11-12). Consequently, assuming that the alleged burning constituted the offense of arson, as will be discussed hereinafter, aiding and abetting such burning would not constitute an additional offense, but rather an alternative description or evidentiary elaboration of the manner of commission of the same offense, namely, arson, and the prohibition would be inapplicable. In Greenberg v. United States (1924) 297 Fed. 45, the Circuit Court of Appeals for the 8th Circuit, following the general rule, held that under the above cited statute, an accessory either at or before the fact, might, at the pleader's option, also be charged directly with the commission of the crime, and such an indictment would be supported by evidence that the defendant aided and abetted its commission (Cf: CM ETO 1453, Fowler, supra; CM ETO 3740, Sanders et al). It is even clearer that accused could not be misled by the instant pleading. It was held in CM NATO 218 (1943) (Bull. JAG, Jan 1944, Vol.III, No.1, sec. 450, p.11).that a specification charging that accused killed the victim "by suffocating her with his hands or by other means forcefully employed" fully apprised accused of a definite charge, upon allegations which could not be considered uncertain, misleading or in any manner prejudicial to his rights. It was

stated that although alternative pleading is improper it may be free from fatal consequences if the alternatives do not constitute separate and distinct offenses, are not inconsistent, and do not render the charge uncertain. The instant pleading falls within the principle of the foregoing decisions and, in the opinion of the Board of Review, no prejudice to accuseds' substantial rights resulted from the alternative allegation.

(d) At the opening of the trial the prosecution inquired whether accused had "been advised of their right to challenge," to which each accused replied in the affirmative (R3). There is no indication in the record of the adequacy of the advice given each accused in this respect, and the prosecution failed to make any further statement concerning the same. Accused were not asked if any of them objected to any member of the court. This irregularity, however, is not fatal. In the absence of evidence in the record that any of accused was denied any of his rights and privileges, it will be presumed that defense counsel made proper explanation thereof to accused and that the usual and ordinary procedure of the court was followed (CM ETO 1786, Hambright, p.9 and authorities there cited).

(e) The record states that the court reconvened on 14 August 1944,"all the personnel of the court, prosecution, and defense, who were present at the close of the previous session in this case being present except" /one member of the court/(R40). No mention is made of the presence of any of accused. There is no statement in the record either that accused were not present during the proceedings or that they entered the court room at any point therein. Their presence, on the other hand, is affirmatively indicated at that portion of the record where their personal data were read (R48-50). Under the circumstances it may properly be assumed that each accused was present throughout the proceedings of 14 August (CM ETO 2473, Cantwell and authorities there cited).

4. (a) Specification 1: Uncontradicted evidence shows that at about 11 p.m. on the date and at the place alleged the three accused demanded liquor from Jean Armand at his cafe after it was closed (R10,14), that Huskey, when all accused were outside the building, fired shots into Armand's room, "tried to kill" him with his rifle and threatened to shoot him if he did not give him a bottle of liquor (R10-12,15; Pros.Ex. 2). They were given one or two drinks and left (R10,13,15). All three accused had rifles (R17,18).

(b) Specification 2: The three accused proceeded about midnight to the cafe of Henri Renouard, where they again demanded liquor (R18-19,26,31) and were served drinks by the proprietor's son, Lacien (R19). Ward threatened to decapitate the boy if he would not "give him a woman" and Blackwell took the boy's little sister in his arms (R20,24). The sister left the scene, Ward pulled the bolt of his rifle, placed Lacien in front of the barrel and "tried to kill" him, whereupon Renouard disarmed Ward before he could fire the rifle (R21,25,28). When accused "were about to leave", Ward pointed his rifle at the boy (R24,25), and subsequently shots were fired at "neighbors" and others, one of which came within four and one-half yards of the boy (R23,33,39).

(c) Specification 3: After Ward was disarmed, the three accused "went upstairs" in Renouard's house (R27;Pros. Ex.3). The cafe and dwelling house, in which lived Renouard, his wife, son and daughter and two "neighbors", Gaston Barreau and his brother-in-law Coussaint Langlement, were connected and in the same building (R23,28,30,34). The sleeping quarters were adjacent to the cafe section (R29). Lacien ascended to the second-story attic of the building (R21,22,28) and the remainder of his family went outside the building (R22,27). From the attic Barreau and Langlement saw an American soldier start a fire in the room which they occupied. With a "lighter" he ignited some laundry on the window sill and a table cloth near the window (R31,32,36-38). One or more other persons, speaking "American", were present in the room at this time (R32, 35,38). Lacien testified that the soldiers "were in the room and they broke everything" (R24), and that he was then on the roof of the building, saw flames by the window, suspended himself and dropped to the ground. There were no soldiers other than the three accused in the area after 11.30 p.m. and there was no one else in the vicinity at the time they arrived at the Renouard cafe (R22,24). The fire completely destroyed the building, but the walls did not collapse (R23,28).

5. After their rights were explained to them, each accused elected to remain silent, and no evidence was introduced for the defense (R47).

6. (a) Competent substantial evidence supports the findings of guilty as to each accused of assaults with intent to do bodily harm, at the time and places alleged, upon Jean Armand and Lacien Renouard with a rifle (Specifications 1 and 2) (CM ETO 2899, Reeves and authorities there cited; CM ETO 3255, Dove).

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(b) The specifications, which charge assaults upon the victims with intent to do bodily harm by shooting with a rifle, are sustained not only by proof of actual shooting at them but also by proof of threats to shoot them with a rifle (CM ETO 764, Copeland and Ruggles). As stated in that opinion,

> "the essence of the offenses alleged is that each accused, with intent to do bodily harm assaulted /the victim/ with a dangerous weapon, namely a * * *. The words 'by threatening him' /substituted by the court for the words 'by striking him in the stomach' in the specifications/ are merely descriptive of the manner in which the alleged assault was committed and are surplusage in character."

(c) The evidence, viewed as a whole, shows that the three accused were engaged in a wrongful joint venture, bent upon obtaining liquor and women by the use of such means, criminal or otherwise, as might appear to them necessary or desirable. Consequently, under well established principles, it was not necessary to prove that each accused physically committed the assaults charged, as all were engaged in the wrongful activity. Each was responsible not only for his own illegal acts but also for all illegal acts committed by either of the two other accused in pursuance of the common purpose of forcing the victims to accommodate them (CM ETO 2297, Johnson and Loper; CM ETO 3499, Bender et al). The evidence, moreover, supports the conclusion that such accused as did not actually commit the assaults aided and abetted the actual assailants in their commission thereof (CM ETO 1453, Fowler, pp.11-13, Vol.III, No.7, July 1944, sec.450, pp.284-285, and authorities there cited; CM ETO 3740, Sanders et al, supra).

7. (a) Specification 3, as to each accused, alleges that he did "willfully, maliciously, unlawfully and feloniously burn or aid and abet the burning of the dwelling house and cafe of Henri Renouard", in violation of the 93rd Article of War. The language follows that set forth in Form 90 of the Manual for Courts-Martial (App.4, Forms for Specifications, A.W.93, Arson, p.249).

Common law arson under Article of War 93, to be distinguished from statutory arson under Article of War 96 (secs.285,286,Federal Criminal Code, 18 USCA 464, 465; MCM, 1928, par.152c, p.191), is thus defined:

"the willful and malicious burning of the dwelling house or outhouse of another. (Clark). The offense is against the habitation of another rather than against his property. The term 'dwelling house' includes outbuildings that form part of the cluster of buildings used as a residence. A shop or store is not the subject of arson unless occupied as a dwelling. It is not arson to burn a house that has never been occupied or which has been permanently abandoned; but it is arson if the occupant is merely temporarily absent. * * *.

To constitute a burning some part, however small, of the house must be actually consumed or disintegrated by the heat, but a mere scorching is not a burning.

PROOF.- (a) That the accused burned a certain dwelling house of another, as alleged; and (b) facts and circumstances indicating that the act was willful and malicious" (MCM, 1928, par.149c, pp.167-168).

The Specification alleges the essential elements of the offense of common law arson against each accused (Ibid; 2 Wharton's Criminal Law, sections 1072-1075, pp.1363-1368).

(b) The burning must be malicious, that is, there must be an intent to burn the dwelling house or outhouse (2 Wharton's Criminal Law, sec.1059, p.1346-1348), and, as in other cases, the intent may be inferred from the surrounding facts, such as the conditions of the act, threats or quarrels, or other criminal activity (Ibid., sec.1061, pp.1349-1350). Circumstantial evidence of the criminal design will sustain a conviction (Ibid., sec.1064, pp.1352-1353). A person who commits arson as to one thing is generally guilty of arson as to every other thing which takes fire and burns as the natural and probable consequence of his wrongful act (6 C.J.S., Arson, sec.3(a), p.721). It is well

settled at common law that a building, to constitute a dwelling house, need not be used exclusively for that purpose. If one part is used as a habitation, it gives the character of a dwelling house to the entire building, if there is an internal communication between the two (United States v. Cardish, DCED, Wis.1906, 145 Fed. 242, 247).

Application of the foregoing principles leaves no doubt that each accused was properly convicted of arson in violation of the 93rd Article of War. Uncontradicted evidence shows that at the time and place alleged accused, all of whom had been involved in assaults upon Armand and threats upon Lacien Renouard's life if Lacien did not obtain a female companion for one of them, and at least two of whom had been thwarted in their desire to obtain such companions, "went upstairs" in Renouard's house to the room occupied by two lodgers, and that one of accused atarted a fire which spread and completely destroyed Renouard's building, including the cafe and dwelling rooms, which were internally connected. There is clear evidence in the violent conduct of accused of malice, and testimony of eye witnesses indicates malice and willfulness on their part. The questions of the existence of these elements and of the effect thereon of intoxication of accused, were issues of fact for the court, whose determination against accused in its findings of guilty will not be disturbed upon appellate review as it was fully supported by evidence of a competent and substantial nature(CM ETO 2007, Harris, Jr.; CM ETO 3180, Porter).

(c) The principles of responsibility of participants in a wrongful joint venture apply as fully with respect to the arson here alleged as to the assaults alleged in Specifications 1 and 2 (par.6(c), supra, and authorities cited therein). Moreover the law of aiders and abettors applies to the crime of arson the same as to other crimes (2 Wharton's Criminal Law, sec.1054, p.1343).

In the opinion of the Board of Review, the findings of guilty, as to each accused, of Specification 3 were fully warranted by the evidence, and the defense motion for findings of not guilty as to each accused was properly denied (R40,41) (MCM, 1928, par.71d, p.56; and see discussion in paragraph 3(c),supra).

8. The charge sheets show that accused Blackwell is 24 years four months of age and enlisted at Fort Bragg, North Carolina, 8 October 1940, that accused Ward is 25 years ten months of age and enlisted at Fort Screven, Georgia, 17 July 1940, and that accused Huskey is 22 years seven months of age and enlisted at Fort Bragg, North Carolina, 7 February 1940. Each enlistment was for a period of three years, which was extended by the Service Extension Act of 1941. None of accused had any prior service.

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

10. The maximum punishment for arson in violation of Article of War 93 is dishonorable discharge, total forfeitures and confinement at hard labor for 20 years (MCM, 1928, par.104c, p.99). The maximum period of confinement upon conviction for assault with intent to do bodily harm with a dangerous weapon is five years for each offense (Ibid.).

11. The designation of a United States Disciplinary Barracks as the place of confinement is authorized (AW 42), but the designation of the United States Disciplinary Barracks, Eastern District should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir. 210, WD, 14 Sep 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

(392)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 SEP 1944 TO: Commanding General, 8th Infantry Division, APO 8, U.S. Army.

1. In the case of Private EARL J. BLACKWELL (14018476), Private First Class JOSEPH WARD (14004769) and Private JOE P. HUSKEY (7009842), all of Company G, 13th Infantry, attention is invited to the foregoing holding that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Particular attention is invited to the failure of the trial judge advocate specifically to advise each accused of his rights to challenge members of the court or to make clear that each was satisfied with the membership thereof. Although such failure was not fatal, as indicated in the foregoing holding, it was an irregularity which should be avoided. Particularly is this true where several accused are tried together but not jointly, in which case each has a right to one peremptory challenge and should be so advised (Military Justice Circular #5, Branch Office of The Judge Advocate General with the European Theater of Operations, 4 October 1943, par.13).

3. When copies of the published orders are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3475. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3475).

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

3475

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

BOARD OF REVIEW NO. 2

3 OCT 1944

CM ETO 3478

U N I T E D S T A T E S	WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Privates ROCCO MARCHEGIANO (31301298), Company "A", and JOSEPH M. MURPHY (32829371), Company "C", both of 348th Engineer Combat Battalion.	Trial by GCM, convened at Newport, Monmouthshire, South Wales, 17 July 1944. Sentence: As to accused Marchegiano: Dishonorable discharge, total forfeitures, and confinement at hard labor for seven years. As to accused Murphy: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Rocco Marchegiano, Company A, 348th Engineer Combat Battalion and Private Joseph M. Murphy, Company C, 348th Engineer Combat Battalion, acting jointly and in pursuance of a common intent, did, at Filton, Somerset, England, on or about 15 June 1944, by force and violence and by putting him in fear feloniously take, steal and carry away from the person of Frederick J. Neath, one wallet of a value of about four dollars ($4.00) and British National Savings Stamps value of about two pounds fifteen shillings (£2:15:0d.) lawful money of the United Kingdom of the exchange value of about twelve dollars ten cents ($12.10) the property of Frederick J. Neath.

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Specification 2: In that Private Rocco Marchegiano, Company A, 348th Engineer Combat Battalion and Private Joseph M. Murphy, Company C, 348th Engineer Combat Battalion, acting jointly and in pursuance of a common intent, did, at Filton, Somerset, England, on or about 15 June 1944, by force and violence and by putting him in fear feloniously take, steal and carry away from the person of Eric F. Ashford, one wallet of a value of about eight dollars ($8.00) one Parker Fountain pen of a value of about ten dollars ($10.00), British National Savings Certificates of a value of about twenty-two pounds ten shillings (£22:10:0d) lawful money of the United Kingdom of the exchange value of about one hundred and thirty-six dollars ($136.00) and three pounds seven shillings (£3:7:0d) lawful money of the United Kingdom of the exchange value of about thirteen dollars and fifty cents, ($13.50) property of Eric F. Ashford.

Each pleaded not guilty to the Charge and its specifications. Marchegiano was found not guilty of Specification 1 and guilty of Specification 2 and the Charge. Murphy was found guilty of the Charge and both specifications. No evidence of prior convictions was introduced as to Marchegiano. Evidence was introduced of one prior conviction by special court of Murphy, of absence without leave for five and one-half hours, and being drunk and disorderly in camp, in violation of Articles of War 61 and 96. 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, Marchegiano for seven years and Murphy for ten years. The reviewing authority, as to Marchegiano, approved only so much of the findings of guilty of Specification 2 of the Charge as involves a finding that Marchegiano and Murphy acting jointly and in pursuance of a common intent, did, at the time and place and in the manner alleged, steal and carry away from the person of Eric F. Ashford, one wallet of some value, one Parker fountain pen of some value, British National Savings Certificates of a value of some 22 pounds ten shillings, lawful money of the United Kingdom of the exchange value of about $136.00, and three pounds seven shillings, lawful money of the United Kingdom of the exchange value of about $13.50, property of Eric F. Ashford, and approved the sentence; as to Murphy, he approved only so much of the findings of Specification 1 of the Charge as involves a finding that Murphy did, at the time and place and in the manner alleged, steal and carry away from the person of Frederick J. Neath, one wallet of some value and British National Savings Stamps value of about two pounds 15 shillings, lawful money of the United Kingdom of the exchange value of about $12.10, property of Frederick J. Neath; only so much of Specification 2 of the Charge as involves a finding that Marchegiano and Murphy, acting

jointly and in pursuance of a common intent, did, at the time and place and in the manner alleged, steal and carry away from the person of Eric F. Ashford, one wallet of some value, one Parker fountain pen of some value, British National Savings Certificates of a value of about 22 pounds ten shillings, lawful money of the United Kingdom of the exchange value of about $136.00, and three pounds seven shillings, lawful money of the United Kingdom, of the exchange value of about $13.50, property of Eric F. Ashford, approved the sentence; designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement of each accused and forwarded the record of trial for action pursuant to Article of War 50½.

3. The testimony for the prosecution shows that Frederick John Neath, General Secretary of the Bristol Airplane Company, and Eric Frank Ashford, Welfare Officer and sports secretary of the same company, lived together at the company Sports Pavilion in the city of Bristol (R8,14). Neath identified both accused and testified that on the evening of 15 June 1944 at the Anchor Hotel, he saw one of the accused, Murphy, whom he had previously met at a dance. He was introduced by Murphy to Marchegiano. Murphy informed Neath that he was "fed up" as he "had not sent his wife any money and he was expecting to go overseas", and that his friend was endeavoring to sell a coat for him. Feeling sorry for Murphy he invited him to his room for a drink and both accused got in Neath's car and went to his room and were given drinks. Murphy again said he was worrying about his wife and asked if Neath could help him. Neath told him he couldn't help him with any money just then but would try to help him if Murphy would go with him to the Bristol Social Service the following night. They sat talking for some time when Murphy went to the bathroom. As it was getting late, Neath followed him and drew the blackout curtains. As Neath turned to leave, Murphy again asked him for a loan and when Neath replied that he couldn't and wouldn't lend him any money, Murphy said, "Well if you want to have a bit of fun whats it worth to you?" Neath answered that he didn't want anything of that sort but would be pleased if he could help Murphy, an Allied soldier, then remembered he had a ten-shilling note in his wallet and gave it to Murphy. They returned to the room and talked for a while and finally Neath suggested that as they had a long ways to go it was time for them to leave. Murphy replied, "Oh, we aren't going now, we'll have some more music". A little later Murphy suddenly pushed Neath over a settee and said "What sort of a dive is this", and was told he was brought there for a drink. Ashford left the room to get his brief case and Neath followed. When he returned Marchegiano had put on his coat to go and Murphy was at the wireless set. Neath put his hand on Murphy's shoulder, told him not to worry as he would soon be back with his wife, and turned to walk across the room when, without warning, Murphy punched him in the face, knock-

ing him down, and then hit him again four or five times very hard in the face. Neath "screamed for help because he was helpless" and Murphy said if he didn't shut up he would make him do so, pulled Neath's coat open and took his wallet from his inside breast pocket. Murphy went outside and with difficulty Neath got to the door and met Marchegiano and Ashford returning and Neath informed them Murphy had hit him (R9-10). Neath went to the bathroom to bathe his face and was followed by Marchegiano who said Murphy had had too much to drink and offered to try and get the wallet back. Ashford went downstairs accompanied by both accused. Neath identified a pocketbook shown to him (Pros.Ex.1) and stated there was no money in it but it contained nearly three pounds value of savings stamps, an identity card, driving license, wireless license and some photographs. Neath suffered a black eye, a cut on the nose, a black bruise in his ear and for a week afterwards had a very black bruise on his neck. Accused left just before midnight. Neath remembered meeting, at a dance on 12 June to which he had brought about 100 girls from "our works", a Sergeant Jerome Denberg but did not recall a Private Benjamin or James Quinn or a John Gilmore. He had been general secretary of the Bristol Airplane Company for 21 years (R10-14).

Ashford identified the two accused as the men in "U. S. uniform" whom Neath brought to their flat about a quarter past ten on the evening of 15 June. One was called "Rocky", the other's name he did not know. He sat down and took part in the general conversation for a while and then prepared to retire. He went downstairs to get his brief case and when he returned found "Rocky" standing in the flat door and was told by him that he better not go any farther than the door. As he stood there Neath came out with the other accused behind him. Neath was bleeding and had a bad eye. They all accompanied Ashford downstairs saying their coats and hats were in Neath's car. Ashford was getting their things out of the car and Marchegiano was apologizing for Murphy when suddenly Ashford was hit, he thought by Murphy. Accused had a few words together and then turned and struck Ashford three or four times, he believed by both of them, in the face and he fell to the ground. One of accused, "Rocky", held him while the other went through his pockets (R15-16). They took his wallet which was in his inside coat breast pocket and contained "two pounds ten" in notes, his identity card, working pass, driving license and military registration card, and which he identified as Prosecution's Exhibit 3, and his fountain pen (Pros.Ex. 2). There were also about 25 pounds worth of savings certificates. All of these items were identified by witness as still contained in the pocketbook. He suffered a black eye and damage to his dental plate. At a later date Ashford saw accused ("Rocky") at the army camp at Tortworth, about fifteen miles away, and was shown where he had thrown the wallet (Pros. Ex.3) in a hedge. It still contained the money. Ashford had been employed by the Bristol Airplane Company for six years (R17-20).

Police Inspector William Hart of the Gloucestershire Constabulary, testified that he received a complaint from Neath about midnight of 15 June 1944 and visited his premises. He saw Neath with a badly discolored left eye, nose and mouth bleeding and Ashford also had a badly discolored left eye. He later interviewed both accused, telling them he was investigating the alleged robbery of Neath and Ashford. Murphy stated they had been in camp all evening playing cards and that he could bring witnesses to prove it. Marchegiano said, "We know nothing about it". Under the bed in Murphy's tent, he found the fountain pen belonging to Ashford (Pros.Ex.2) and in a roll of turf beside the tent, he found Neath's wallet and contents (R21). When Murphy was shown the wallet and told where it was found he gave witness a statement (Pros.Ex.4), reading as follows:

"I left camp about 7:30 p.m. Thursday night, the 15th of June 1944, and went to Filton and went to the Anchor pub to have a few beers with my friend Rocky (Marchegiano). As we were talking at the bar a man walked over and said hello, do you remember me and I said yes I do, your Mr. Neath whom I met at my company dance. So I introduced him to my friend and he said have a beer on me and we agreed. Then he said would you like to go to my place and have a few drinks. We said we would, so we left the place at 10 p.m. and went down to his place.

"We went upstairs and he poured both of us a drink and turned on the radio and he came over to my chair and started getting pretty friendly. He asked me if I was short of money so I said I was a little low because it was the middle of the month, so he pulled out a 10 shilling note and handed it to me and as he did he squeezed my fly and I said to him don't get the wrong idea of me, I'm not that kind, so he said to me I'm only doing this cause I like you, so I said OK.

"So he poured another drink and left the room and he was back in a few minutes with a friend of his and he sat down and had a few drinks and we started talking about the war. Then my friend Rocky left the room to go the bathroom and as he did the other fellow (Mr. Ashford) followed him and then Mr. Neath came over and started to open my fly and I hauled off and hit him and when he fell back on the couch he told me not to get excited, so I said I told you not to fool around and as I went to leave I noticed on the table was

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his wallet so I picked the wallet up to make sure I would get his identification so I could turn him in as a queer. As I went down to the street I seen my friend hit the other fellow so I told him to get his identification card so he did and we both left and went up to the main road and got a lift back to camp.

"I make this statement voluntarily, and before making it I was told by Captain E. J. Hangerud that I had the right to remain silent, that I did not have to say anything, and that if I did say something my statements could be used against me".

Later, when given the same information, Marchegiano also voluntarily gave a signed statement (Pros.Ex.5), which reads as follows:

"Murphy and I went to Filton, England, Thursday night, the 15th of June 1944. We went to a pub and had two beers apiece and then we went to the south pub, the Anchor, and had about two drinks more. And this chap here, Mr. Neath, was talking to my friend Murphy and so Murphy introduced him to me and Mr. Neath bought us a drink. About this time the pub was closing so he asked us to have a few drinks so he took us to his club and up to his room and gave us two or three drinks there. Seemed to be a very nice fellow. I had seen him at a company dance but was not introduced to him. In his room he acted funny but then he left the room to get Mr. Ashford. When Mr. Ashford came in things quieted down for a while. We had another drink, the four of us, and I got up to go to the lavatory and Eric Ashford, I noticed came behind me, when we were in the latrine together he grabbed my penis and acted very strange. I pushed him away and went into the other room and noticed Mr. Neath doing likewise only a little more immoral. I told Murphy it was time we left which I noticed he was already doing. I turned around and left the exact way I was let in thinking Murphy was right behind me. While I was getting my things out of Mr. Neath's car a pair of arms grabbed me and pulled me out of the car. I turned around and there Ashford told me to forget all about it. I pushed him out of the way and still tried to get my clothing which was still in the automobile. He kept bothering me and this time I struck him. By this

time Murphy came down and told me to get his I. D. card. I searched for it and took his wallet. We left in a hurry for we were out without a pass. We left thru the woods and picked up a short ride with a British soldier.

"I make this statement voluntarily, and before making it I was told by Captain E. J. Hangerud that I had the right to remain silent, that I did not have to say anything, and that if I did say something my statements could be used against me".

Both of the statements were read to the court. Inspector Hart obtained some clothes from the car and returned them "to the unit". He stated that he had known both Neath and Ashford for several years and that their reputation in the community was "most exemplary" and "beyond reproach" (R22-23).

A stipulation was agreed upon in open court between the prosecution and accused and their counsel that if Captain Erling J. Hangerud, the investigating officer, were available and present, he would testify that both accused, after being warned of their rights, made voluntary written signed statements before him; and that if Private Charles Benjamin, Acting Sergeant Jerome A. Denberg, Private James W. Quinn and Private John J. Gilmore were available as witnesses, they would testify as shown by their written statements (R8).

4. The last above statement was admitted in evidence as Defense Exhibit "A" (R24). It reads as follows:

"I, Private Charles Benjamin testify that Mr. Neath at our Company dance on 12 June 1944 held at Bristol, England, did, on several occasions make improper advances towards me against my wishes causing embarrassment to me in front of my friends; and I can prove my statement."

"I, Acting Sergeant Jerome A. Denberg, hereby testify that Mr. Neath whom I have known for the past five weeks, has on many occasions at the Bristol Social Center, Bristol, England, acted somewhat queer, and has made remarks becoming that of a homosexual. He has felt my leg, and hugged me on various occasions and I honestly believe that had I not left him or distracted him he would have gone further, and participated in actions unbecoming a normal man."

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"I, the undersigned do swear that on meeting and talking to Mr. Neath at a party given by my company in Bristol, England, on 12 June 1944, he did make improper advances towards me that proved to me that he was queer. He insisted on putting his hand on my privates and if I would let him I believe that he would have gone to extremes in committing an unnatural act".
(Statement of Private James W. Quinn, 31286484, Company A, 348th Engineer Combat Battalion.)

"I, Private John J. Gilmore testify Mr. Neath at the Bristol Social Center at our company dance on 12 June 1944, made approaches and actually did touch my penis. I pushed him away and if I didn't he would of done things that only a man who I think is queer would do".

Accused Murphy having first had his rights as a witness explained to him by the court, elected to be sworn as a witness and testified that the statement he signed before Captain Hangerud was substantially the way things happened. That Neath's action in first turning on the radio, giving them a drink and then dancing around the room was what caused him to think Neath was not normal. Neath was acting funny, he put his hand on Murphy's leg and then later tried to open his (Murphy's) pants and "that's the time I hauled off and hit him". He testified he took the wallet for the identification card to turn him in next day and then the reason he didn't was because he would be incriminating himself as he was out without a pass. He was "going to turn the wallet over" that afternoon. The only reason he did it was "that he is a queer". He stated he was six feet tall and weighed 185 pounds, while Neath was about five feet nine inches tall and would weigh 140 pounds. The first time he "pushed" Neath his wallet was in his pocket but Neath later put it on the table and Murphy saw and picked it up. When he went downstairs he saw Ashford on the ground and he yelled to Marchegiano to get his wallet, which he did. He denied going through Ashford's pockets and thought the fountain pen was one Marchegiano had dropped. He didn't report the matter to the British police that night as "it was pretty late and I wanted to get back to camp". His unit was alerted and passes were not obtainable. He denied hiding the wallet but thought under the bed was the best place to put it. He didn't report his possession of the wallet to anyone nor the fountain pen which he intended to return to the civilian authorities the "next day" (R25-29).

After like preliminaries, accused Marchegiano also testified that his statement given Captain Hangerud is substantially correct, that

he took Ashford's wallet for identification and took Inspector Hart to get it. He didn't have the wallet when he got back and he remembered that it was a wet night and in "going over the fence I slipped and went over the bushes". As that was his only fall he thought there is where he "must have dropped it". He stated Ashford "started to get fresh with me again" and "I struck him just once and he was unconscious, I guess. He didn't move and when Murphy told me to take his identification card I took it as I went through his pockets". This happened when they started to leave the place and Ashford went to get his (Marchegiano's) helmet liner and overcoat out of Neath's car and put his hand on Marchegiano's leg and said he liked him. He admitted going through Ashford's pockets but denied taking "the shillings out of his pocket". He knew his company was restricted to camp and he wanted to get back in time for bed check so did not attempt to get in touch with the police that night. He denied knowledge of the wallet when asked about it by the Inspector as "all the officers were around and I knew I was out without a pass and I was just scared to say it in front of the officers". He accompanied Inspector Hart to the place where the wallet was found as described by the Inspector. He insisted that he struck Ashford only once and then because he was angry, and that he was "five foot ten and a half" in height and weighed 190 pounds and that Ashford was much smaller (R30-33).

5. Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation (MCM, 1928, par.149f, p.170). The evidence of the prosecution conclusively established all the elements of the offenses, as to accused Marchegiano of Specification 2 only and the Charge, and as to accused Murphy of both specifications, and the Charge. The stories of accused substantially corroborate that of the two victims as to the facts involved but they deny the intent to steal, claiming they took the wallets for identification purposes in making complaint to the local police of alleged immoral advances made tothem by each of their hosts for the evening. Their claim appears neither reasonable nor consistent. Accused knew the names of each of their victims, their place of employment and residence. Their identity cards were not necessary in making such complaint to the police nor could any such reason justify assault or robbery. In addition each accused at first denied being absent from their camp on the night in question, nor did they make any report to the civilian police. The evidence in support of the findings of the court is substantial and convincing (CM ETO 78, Watts; CM ETO 3628, Mason).

6. The charge sheet shows that accused Marchegiano is 20 years and ten months of age and was inducted into the Army of the United States 4 March 1943, at Boston, Massachusetts; that accused Murphy is 21 years and 11 months of age and was inducted into the Army of the United States 10 March 1943 at New York, New York. Neither accused had any prior service.

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

8. Confinement in a penitentiary is authorized for the crime of robbery by Article of War 42 and section 284, Federal Criminal Code (18 USCA 463). As accused are each under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1), 3a).

Richard Bernstein Judge Advocate

Wm Hammond Judge Advocate

(Absent on Leave) Judge Advocate

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1st Ind. (403)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 3 OCT 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 871, U. S. Army.

1. In the case of Privates ROCCO MARCHEGIANO (31301298), Company "A", and JOSEPH M. MURPHY (32829371), Company "C", both of 348th Engineer Combat Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

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

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3478. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3478).

B. Franklin Riter

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

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BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL.
JAGC, EXEC. ON 26 FEB 1952

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