E. T. O.

BOARD

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OPINIONS

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VOLS. 19-20

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

Judge Advocate General's Department

Holdings and Opinions

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Volume 19 B.R. (ETO)

including

CM ETO 8028 - CM ETO 8692

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CONTENTS OF VOLUME 19 B.R. (ETO)

ETO No.	CM No.	Accused	Date	Page
8519	295880	Briguglio	27 Jun 1945	285
8533	292948	Batiste	21 Jul 1945	291
8541	288268	Pace, Johnson, Karney	8 May 1945	299
8542	292898	Myles	20 Jul 1945	305
8555	297906	Kenney, Stavas	25 Jun 1945	311
8556	306388	Garrison	26 Jun 1945	319
8565	304037	Flanagan	2 May 1945	321
8581	304719	George	27 Jun 1945	323
8599	301908	Hart, Lemen, Raubolt, Cosgrove	5 May 1945	327
8610	293264	Blake	25 May 1945	345
8619		Lippie, Hinchey, Ramirez, Halis	4 Apr 1945	347
8630	297109	Williams	19 May 1945	349
8631	313370	Hamilton	26 Apr 1945	355
8632	287690	Golding	26 May 1945	361
8640	294682	Owsley	27 Apr 1945	365
8649	295014	Siglasky	14 Jul 1945	369
8689	291980	Wexler	20 Jul 1945	375
8690	296917	Barbin, Ponsiek	25 Apr 1945	379
8691	287819	Heard	24 Apr 1945	387
8692	306216	Martin	4 Jun 1945	395

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

BOARD OF REVIEW NO. 1

24 MAR 1945

CM ETO 8028

UNITED STATES	)	VI CORPS
	)	
v.	)	Trial by GCM, convened at APO 46, U. S. Army, 12,15 February 1945.
Private JOHN E. BURTIS (14046563), Troop A, 117th Cavalry Reconnaissance Squadron (Mechanized)	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York

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

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1. The record of trial in the case of the 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 John E. Burtis, Troop A, 117th Cavalry Reconnaissance Squadron (Mecz), did, at Veney, France, on or about 17 November, 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat duty against the enemy and did remain absent in desertion until he was apprehended at Paris, France, on or about 4 December, 1944.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification, except the words "was apprehended" substituting therefor the words "returned to military control", of the excepted words not guilty, of the substituted words guilty, and guilty of the Charge. Evidence was introduced of two previous convictions by summary court, one for the loss of military property in violation of the 94th Article of War and one for absence without leave for one day 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 the rest of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. The evidence for the prosecution showed that on 17 November 1944 accused was a member of the second platoon of Troop A, 117th Cavalry Reconnaissance Squadron (Mechanized). The squadron was on that date on outpost duty near Veney, France (R6,10). Accused was present at a briefing of the organization held on the morning of that day which was conducted by a platoon sergeant. The platoon was informed it was about to depart on a dismounted patrol to Neufmaisons to contact the enemy and to discover enemy strength and gun positions (R12). Such patrols normally came under artillery fire and direct fire from tanks (R14). As part of the briefing accused had received personal instructions as to his duties on this patrol (R7,10). Twenty minutes later when the troop had made ready to leave on the patrol, accused seized one of the "bantams" without permission and drove into a neighboring woods. He was pursued. The "bantam" was found in a ditch but accused had disappeared. All of the members of the patrol detachment except accused performed their mission. He had previously engaged in like patrols, and appeared to be more nervous than the other men (R7-9,11,12). These patrols had encountered enemy artillery fire and also small arms fire (R14).

Accused was not with the patrol during the performance of its mission and was not at the troop command post on its return (R13). In an interview with the investigating officer accused stated that he was taken into custody at Paris by the military police on 4 December 1944 althoughhe was not returned to his troop until 25 December (R15).

4. After his rights were explained, accused as a witness in his own behalf testified that he had engaged in previous patrol missions. With respect to patrol work, he stated, "it is all right at first but then I started getting too much; that's all, I couldn't take any more" (R17). He asked both his platoon and company commanders to be relieved

for a couple of days. His request was refused. On 17 November he was present at a roll call of the platoon whereat the members were informed they were to proceed on a patrol. He left without permission "and went around the corner and the only thing I suddenly felt was that I couldn't go on patrol" (R17,18). He had never been subjected to a psychiatric examination (R18).

The court on its own motion directed a psychiatric examination of accused and then adjourned. Upon reconvening of the court, Captain Charles C. Talbot, Medical Corps, 616th Clearing Company, Seventh Army Neuropathic Center #1, testified as a witness for the court that on 13 February 1945 he made a psychiatric examination of accused (R22). In his opinion accused was sane, was able to understand the proceedings of a court-martial and to cooperate with counsel in conducting his defense and was responsible for his acts (R23,24). He suffered from a constitutional psychopathic state; a defect in conscience. He possessed ability to distinguish between right and wrong but he might not follow the right course, not because he was insane (R25) but because his conscience was dull as to his responsibilities (R28).

5. a. The determination of the issue with respect to accused's mental responsibility for his conduct was essentially one of fact for the court. Inasmuch as the evidence, including the testimony of the psychiatrist, is substantial that he was sane and responsible for his acts at the time of the commission of his offense, the findings of the court on this issue as reflected in its findings of guilty will not be disturbed upon appellate review (CM ETO 5747, Harrison, Jr).

b. Accused with knowledge of the fact that he was ordered to depart on a reconnaissance patrol which in all probability would encounter the enemy and thereby become involved in combat with him, deliberately left his command without authority. His departure was prompted by one motive alone, viz, the desire to avoid the hazards and perils of patrol duty. A mere summary of the facts is all that is necessary to demonstrate accused's guilt of the offense charged (CM ETO 7500, Metcalf and Wloczewski, and authorities therein cited).

6. The charge sheet shows that accused is 21 years of age. He enlisted 19 March 1941 at Montgomery, Alabama. No prior service is shown.

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

8. The penalty for desertion in time of war is death or such

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

Judge Advocate

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

BOARD OF REVIEW NO. 1 2 JUN 1945

CM ETO 8055

UNITED STATES	80TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 80, U.S. Army, 21 February 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JOHN H. COSTIGAN (31059473), Battery C, 633rd Antiaircraft Artillery Automatic Weapons Battalion, Mobile	

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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 John H. Costigan, Battery C, 633rd AAA AW Battalion, did, without proper leave, absent himself from his post and duties, in the vicinity of Jezainville, France, from about 26 September 1944 to about 30 September 1944.

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

Specification: In that * * * did, in the vicinity of Jezainville, France, on or about 30 September 1944, desert the service of the United States, by quitting and absenting himself without proper

leave from his organization and place of duty, with intent to avoid hazardous duty, to-wit: participation in operations against an enemy of the United States, and did remain absent in desertion until he surrendered himself in the vicinity of La Rochette, Luxembourg on or about 8 February 1945.

He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of both charges and specifications. Evidence was introduced of one previous conviction by summary court for being drunk and disorderly in a public place in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved only so much of the findings of guilty of Charge II and Specification as found the accused guilty of desertion as charged, with the intent charged, from 30 September 1944 to 4 December 1944, and from 20 December 1944 to 4 January 1945, such absences being terminated in a manner not stated, in violation of Article of War 58, 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 uncontroverted evidence, including accused's voluntary pre-trial statement, shows that he absented himself without leave from his organization at the place and for the period alleged in the specification of Charge I. It also shows that on or about 30 September 1944, when his unit was in contact with the enemy after having crossed the Moselle River and received enemy artillery fire, he reported back from his previous absence. On that day his section leader, acting under the platoon leader's instruction, directed accused to take his equipment and proceed to battalion headquarters, whose location the section leader explained to him, as he was no longer a member of his former platoon. He packed his equipment, asked the section leader to care for it until he could pick it up and, carrying his rifle, departed in the direction of Toul, France. He did not return to military control until 4 December 1944. Subsequently, without authority, he left the stockade where he was confined and was apprehended near Paris some time in January 1945.

The record presents a typical battleline situation, and the court was fully justified in concluding that accused left his organization without authority with the intent alleged (CM ETO 8610, Blake, and authorities therein cited).

4. a. Accused's voluntary pre-trial statement was evidently reduced to writing (R10), but the official investigating officer was permitted to testify as to its contents. The failure of the defense to object on the ground that the oral testimony was not the bestevidence could properly be regarded by the court as a waiver of the objection (MCM, 1928, par.116a, p.120; CM ETO 8690, Barbin and Ponsick; CM ETO 5765, Mack; CM ETO 739, Maxwell). It is therefore unnecessary to consider whether the statement amounted to a confession or merely to admissions.

b. The reviewing authority in his action divided the period of absence in desertion alleged in the Specification of Charge II (30 September 1944 to 8 February 1945) into two separate periods (30 September 1944 to 4 December 1944 and 20 December 1944 to 4 January 1945), thereby attempting to create an additional offense not alleged, to wit: desertion with the intent charged commencing 20 December 1944 and terminating 4 January 1945. This attempt to change the identity of the offense charged, which by the court would have been nugatory (MCM, 1928, par.78c, p.65), was likewise of no effect when made by the reviewing authority, and only so much of the findings of guilty as approved by the reviewing authority as involves findings of guilty of desertion as charged from 30 September 1944 to 4 December 1944 is supported by the record (CM 235559, Bartold, 22 B.R. 121 (1943), II Bull.JAG 380; CM ETO 2829, Newton; Cf: CM ETO 10331, Hershel W. Jones).

5. The charge sheet shows that accused is 30 years of age and was inducted 14 January 1942 to serve for the duration of the war plus six months. No prior service is shown.

6. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I, its Specification and Charge II and so much of the findings of guilty of the Specification of Charge II, as approved by the reviewing authority, as involves findings of guilty of desertion as charged from 30 September 1944 to 4 December 1944, and legally sufficient to support the sentence.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO.1

30 MAR 1945

CM ETO 8083

U N I T E D S T A T E S	35TH INFANTRY DIVISION
v.	Trial by GCM, convened at Sustersseel, Germany, 16 February 1945.
Private First Class CLARENCE A. CUBLEY (34778541), Company I, 134th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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 First Class Clarence A. Cubley, Company I, 134th Infantry, did at Hellimer, France, on or about 23 November 1944, desert the Service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: Combat conditions in actual encounter with the enemy, and did remain absent in desertion until on or about 24 December 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 Specification. Evidence was introduced of two previous convictions: one by summary court for absence without leave for two days in violation of Article of War 61, and one by special court-martial for absence without leave for one day while on orders to a port of embarkation stated to be in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The charges were served on accused on 16 February 1945 and he was arraigned and tried at 1130 hours on the same day (R2). The record of trial shows that he personally stated in open court that he did not object to trial at that time (R3). Under such circumstances no prejudice to substantial rights of accused is disclosed (CM ETO 5004, Scheck; Cf: CM ETO 4564, Woods, Jr.; CM ETO 4756, Carmisciano).

4. Competent substantial evidence for the prosecution proved the following facts:

On 23 November 1944 (Thanksgiving Day) accused was a BAR man in the second platoon of Company I, 134th Infantry. On the previous evening (22 November) the company was alerted and moved to an assembly area on a hill near Hellimer, France, about 20 miles south-southwest of Saarbrucken (Sheet V-1, 1:100,000, Map Series, GSGS 4416, coordinates WQ3344, WQ3848). The platoon leaders were notified at that time that the platoons must be ready to move to the attack on the enemy on 30 minutes notice and that the advance would be made the next day (Thanksgiving Day) immediately after dinner. The enemy was eight kilometers distant (R9,11). Through the chain of command

> "the platoon leaders oriented the platoon sergeants and they oriented the squad leaders who oriented their men" (R10).

The company, then part of the battalion reserve, moved out of Hellimer shortly before noon on 23 November (R11). Its mission was to relieve the tank units then located near St. Jean Rohrbach (approximately three and one-half miles distant) which it did on 24 November. It engaged the enemy near that village and captured a town northeast of it. After a short pause it advanced to the Saar River, crossed the Saar and Blois rivers and attacked into Germany. The Board of Review takes judicial notice of the fact that such movement was the commencement of

a major military operation (CM ETO 7413, Gogol, and authorities therein cited).

As the company moved through Hellimer on its advance to the attack its first sergeant made personal investigation and determined that accused was absent from his unit. He departed without authority or permission, and was not with his company during the fighting which immediately ensued. On 24 December 1944 he was escorted under guard to the battalion command post where he was taken into custody by the first sergeant and brought back to the company (R9,10).

In a pre-trial voluntary extrajudicial statement given to the investigating officer the accused stated in pertinent part:

> "On or about November 23rd 1944, I was a member of Co I 134th Infantry. On November 23rd 1944 I Company was on a hill, we had just moved up & had dug in. On that same day we were getting ready to move out on the road & move up to the front.I took off and went to Hellimer France & stayed there until about a week, I just dont remember how long & on about December 3rd I went to Nancy and the M.Ps picked me up, I dont remember the date & took us finally to Metz on December 24th 1944. I cant remember dates. At Metz on December 24th 1944, the M.Ps turned us over to the 134th Infantry. It was about ten oclock November 23rd 1944 when I left I Co. About twelve oclock November 23rd, 1944 Company I moved out on the road to go up to the front" (R12; "Gov".Ex.B).

Accused's oral statement was reduced to writing by the investigating officer and was thereafter read to him because he was unable to read. The investigating officer testified accused clearly understood it. He subscribed his name to the statement (R12,13).

5. After his rights were explained, accused elected to make an unsworn statement through defense counsel. The relevant part thereof was as follows:

> "On the 23rd of November, they were dug-in on a hillside in a very heavy rainstorm. With another member of the company, the accused left his foxhole in the mud and tried to find a place in a small town where he could dry. While in this town,

the company moved up and although the accused did not know they had been alerted or what the specific mission was, he knew the company moved up to another position. He attempted to find them later but was unsuccessful in his efforts in that respect. Realizing that he was already absent from his organization, and somehow feeling that the penalty would be no greater should he remain away for a few days longer, it was not until later that he returned to his organization" (R14).

6. Prosecution's evidence is clear and convincing that accused without authority left his organization immediately prior to an advance movement directed against the enemy. By his own admission contained in his pre-trial statement, the company on 23 November was "getting ready to move out on the road and move up to the front" when he "took off and went to Hellimer, France". The facts proved by the testimony of the first sergeant coupled with accused's incriminating admission were substantial evidence from which the court was fully justified in inferring that accused, with full knowledge that his organization was about to advance to an attack upon the enemy, which was located but a few miles distant, deliberately absented himself without authority in order to avoid the battle perils and hazards which he knew were facing him. His guilt was proved beyond all doubt (CM ETO 7378, Fisher and Wilhelm; CM ETO 6623, Milner; CM ETO 5394, Quinn).

Accused's unsworn statement, made through defense counsel at the trial, denied that when he absented himself he had knowledge that his company had been alerted or that he knew it was about to engage in a specific mission. This statement conflicted with his pre-trial statement. It was for the court to determine the weight and value to be given the unsworn statement (MCM, 1928, par.76, p.61).

7. The charge sheet shows that accused is 23 years of age and was inducted 10 July 1943 at Camp Croft, South 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 accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

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

8083

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

B Franklin Pitts Judge Advocate

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

8083

CONFIDENTIAL

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

BOARD OF REVIEW NO. 1

7 APR 1945

CM ETO 8091

U N I T E D S T A T E S	)	III CORPS
	)	
v.	)	Trial by GCM, convened at APO 303, U. S. Army, 5, 12 February 1945.
Private (formerly Private First Class) MELVIN HELMICK (35739050), Battery A, 731st Field Artillery Battalion	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification 1: (Finding of not guilty)

Specification 2: In that Private Melvin Helmick, then Private First Class, Battery "A", 731st Field Artillery Battalion, did, at Beckerich, Luxembourg, on or about 1 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Technician Grade 5 Alvin R. Schumacher, Battery "A", 731st Field Artillery Battalion, a human being by shooting him with a carbine, calibre .30.

CHARGE II: Violation of the 93rd Article of War.
(Disapproved by reviewing authority.)

Specification: (Disapproved by reviewing authority.)

8091

He pleaded not guilty to all charges and specifications and was found not guilty of Specification 1, Charge I, guilty of Specification 2, Charge I, except the words "with malice aforethought, deliberately, with premeditation;" of the excepted words not guilty, not guilty of Charge I, but guilty of a violation of the 93rd Article of War, guilty of the Specification of Charge II, except the words "with intent to do him bodily harm;" of the excepted words not guilty, and not guilty of Charge II, but guilty of a violation of the 96th 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, forfeit all pay and allowances due or to become due, and be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority disapproved the findings as to the Specification of Charge II and Charge II, 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. To support a finding of guilty of the crime of voluntary manslaughter, it was necessary that Schumacher be living at the time accused shot him, since no injury to a corpse can constitute homicide (29 CJ, sec.6, p.1050; 1 Wharton's Criminal Law (12th Ed., 1932), sec.431, p.668).

Miss Anna Waxweiller testified that just before accused fired at the deceased, Schumacher "was almost dead, he sighed" (R56). Lieutenant Colonel Peter Manjos, Medical Corps, 7th Medical Laboratory, who performed the autopsy on the body of deceased, testified that the cause of death "was the bullet wound which pierced through the neck and injured the heart and large blood vessels". From the results of the autopsy, Lieutenant Colonel Manjos was confident that Schumacher was alive at the time the bullet passed through his body (R7). In the opinion of the Board of Review, this is substantial and convincing evidence that Schumacher was alive when accused shot him and is adequate to support the finding that deceased died as a result of the bullets discharged into his body by accused.

4. The charge sheet shows that accused is 24 years of age and that he was inducted 6 October 1942 at Clarksburg, West Virginia, 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 designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

B. Franklin Riter Judge Advocate

Wm. T. Burrer Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

8091

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

BOARD OF REVIEW NO. 2

5 MAY 1945

CM ETO 8104

U N I T E D S T A T E S v. Private HARRY T. SHEARER (13031467), Battery A, 633rd Antiaircraft Artillery Automatic Weapons Battalion, Mobile	80TH INFANTRY DIVISION Trial convened at APO 80, U.S. Army, 25 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that Private Harry T. Shearer, Battery A, 633d AAA AW Battalion, Mobile, did, in the vicinity of Michelbuch, Luxembourg, on or about 15 January 1945, 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: participation in operations against an enemy of the United States, and did remain absent in desertion until he surrendered himself at

Savelborn, Luxembourg on or about 29 January 1945.

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

Specification: In that * * * having been restricted to the limits of his gun section, did, at Michelbuch, Luxembourg, on or about 15 January 1945, break said restriction by leaving the area of his gun section.

He pleaded not guilty and all the members of the court present when the vote was taken concurring, was found guilty of the Specification of Charge I excepting the words, "surrendered himself at Savelborn, Luxembourg on or about 29 January 1945", substituting therefore the words, "surrendered himself to military authorities at Nancy, France, on or about 23 January 1945", of the excepted words "Not Guilty" and of the substituted words "Guilty", and guilty of Charge I and of Charge II and its specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave from 8 October to 26 October 1944 and through neglect losing a rifle, belt and first aid pouch in violation of Articles of War 61 and 84 respectively. 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 be confined at hard labor at such place as the reviewing authority may direct for 30 years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution's evidence shows that during the month of January 1945 accused's battery was providing air protection for the field artillery and infantry units of a combat team as well as giving them ground support. His absence for the period from 15 January to 29 January was shown by properly introduced extract copies of the morning reports of Battery A, 633rd Antiaircraft Artillery Automatic Weapon Company; the report for 17 January, showing his unauthorized absence from duty as of 15 January and the report of 29 January (R7) showing his return from such absence to duty as of that date. The company records show that at the time accused went absent he was under restriction to the limits of his gun section (R7-8). On 15 January accused's duties consisted solely of cooking for the gun crews at a location some 300 to 500 yards from the gun section (R9,10,11,12). He was

supposed to feed the crews in turn as they relieved each other. He was also a regular member of the gun crew (R10).

4. No witness was called by the defense and accused, after being advised of his rights as a witness, remained silent.

It was stipulated between the prosecution, the defense and the accused in open court that if the Commanding Officer of the 60th Military Police Company were present and sworn as a witness, he would testify that accused "turned himself in to military control at Nancy, France on 23 January 1945" (R13).

5. "Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service" (MCM, 1928, par.130a, p.142; AW 28).

It was necessary in this case to prove (a) that accused absented himself without leave, as alleged and (b) that he intended at the time to avoid hazardous duty. While accused was a member of a gun crew stationed to give air protection as well as ground support to certain infantry units, the record is devoid of any indication of enemy action, of any troop movements or anything other than the inference of being in a position to furnish security and support if needed. Accused was relieved of any duties with the gun section and was charged solely with the duty of cooking. At mealtime, their food was not prepared and accused's absence was then discovered. The burden is on the prosecution to establish the intent alleged (CM 224765, Butler) and is not discharged by a mere general showing that accused's organization engaged in some combat activities during the month in which the absence occurred. The evidence therefore is sufficient to sustain only so much of the findings of guilty of the Specification of Charge I as involves the lesser included offense of absence without leave in violation of Article of War 61 (CM ETO 7532, Ramirez). That he went absent without leave while he was properly restricted to the limits of his gun section as alleged in the Specification of Charge II, is not disputed.

6. The charge sheet shows accused to be 23 years of age. Without prior service, he enlisted in the Army of the United States 15 December 1941.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affected the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification of Charge I and Charge I as involves the

lesser included offense of absence without leave in violation of Article of War 61, legally sufficient to support the findings of guilty, of Charge II and its Specification, and the sentence.

8. The penalty for absence without leave in violation of Article of War 61, is such punishment, less than death, as a court-martial may direct. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

16 JUN 1945

CM ETO 8147

UNITED STATES	)	80TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 80, U. S. Army, 26 February 1945.
Private HAROLD L. PIERCE (38546004), Company F, 318th Infantry	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification 1: In that Private Harold L. Pierce, Company F, 318th Infantry, did, in the vicinity of Ville Au Val, France, on or about 18 September 1944, desert the service of the United States, by quitting and absenting himself without proper leave from his organization and place of duty with intent to avoid hazardous duty, to-wit: participation in operations against an enemy of the United States and did remain absent

in desertion until he surrendered himself to military authorities at 93d Replacement Battalion, APO 873, U. S. Army, on or about 1 November 1944.

Specification 2: In that * * * did, in the vicinity of the 93d Replacement Battalion, APO 873, U. S. Army, on or about 1 November 1944, desert the service of the United States, by quitting and absenting himself without proper leave from his place of duty with intent to avoid hazardous duty, to-wit: participation in operations against an enemy of the United States and did remain absent in desertion until he surrendered himself at or near Scieren, Luxembourg, on or about 31 December 1944.

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

Specification: In that * * * did, without proper leave, absent himself from his organization and place of duty at or near Scieren, Luxembourg, from about 0430 hours, 3 January 1945, to about 1800 hours, 3 January 1945.

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

Specification: In that * * * having been duly placed in arrest of quarters on or about 1210 hours, 1 January 1945, did in the vicinity of Scieren, Luxembourg, on or about 0430 hours, 3 January 1945, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of Specification 1, Charge I, except the words "93d Replacement Battalion, APO 873, U. S. Army, on or about 1 November 1944" and substituting the words "Seine Section, Communications Zone, APO 887, U. S. Army, on or about 22 October 1944", of the excepted words not guilty and of the substituted words guilty; guilty of Specification 2, Charge I, except the words "at or near Scieren, Luxembourg, on or about 31 December 1944" and substituting

therefor the words "to military authorities at 19th Replacement Depot, APO 176, U. S. Army, on or about 14 December 1944", of the excepted words not guilty and of the substituted words guilty; and guilty of Charge I and of Charges II and III and the specifications thereunder. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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 competent evidence for the prosecution, so far as material, was substantially as follows:

The only witness in the case, the first sergeant of accused's company, testified that accused joined the company as a replacement about August 1944 (R10). About 15 September 1944 the unit was located at Ville Au Val, France, whence it moved to Bratte, France, and attacked the enemy. It proceeded from Bratte to Manoncourt, France, and pursued the enemy to Saarbrucken, whence it went to a rest area where it remained for about one week. Thereafter, the company moved to the extreme right flank of the Third Army at Schmittville, France, and then was sent to stop the German drive in the vicinity of Bastogne about 24 December (See CM ETO 6934, Carlson; CM ETO 7413, Gogol). Thereafter, it proceeded to Scieren, reorganized, moved to Niederfeulen and went to Warken, Bourschied, Wiltz, Beaufort and Mettendorf (all in Luxembourg), during all of which time it attacked the enemy (R7,8).

About 18 September, witness, who was informed by accused's platoon leader that accused was sick, sent him to "the medics", located in the town of Ville Au Val (R7,9). Witness did not see him again, despite the fact that he checked the medical personnel and all platoons and was continuously present for duty with the company, until January 1945 in the rear area of Scieren upon his return by regimental headquarters. As there were active enemy patrols in the vicinity during this time, witness first listed accused as missing in action and later discovered he was absent without leave (R7,8). Accused returned to military control on 22 October 1944 (R9; Pros.Ex.C).

On 1 November, accused absented himself from Detachment 93, Ground Force Replacement System, evidently a subdivision of

the 93rd Replacement Battalion, APO 873, U. S. Army (R10; Pros. Ex.E). He returned to military control on 14 December 1944 (R9; Pros.Ex.C).

On 2 January 1945, accused was returned to his company in the rear area of Scieren. The company commander informed him he was absent without leave and placed him in arrest of quarters. The following day at about 0430 hours, when the company fell out in order to relieve another company in the line, accused was missing. Witness made a search but was unable to find him (R7-9). He was absent without leave (Pros.Ex.D). The record is silent as to the time of the termination of this unauthorized absence, but witness did not see accused again until the time of trial (R8,10).

4. After an explanation of his rights (R10-11), accused elected to make an unsworn statement through counsel to the effect that on or about 18 September 1944 he was not sent to "the medics" for treatment, but because he was worried by a letter from his wife stating she desired a divorce, he was unable to think of anything else and felt he must "go off by myself and think of what to do". He attempted to contact her through the American Red Cross but was informed this was impossible (R11).

5. The record of trial is singularly unsatisfactory in that much of the evidence adduced is incompetent and the proof is not particularized as to the specific location, tactical situation and activity of accused's unit at the inception of his first two absences.

a. Specification 1, Charge I: The testimony of the first sergeant of accused's company shows that accused absented himself without authority from his unit or from medical channels on or about 18 September at a time when enemy patrols were active in the vicinity of his unit and that at an undisclosed time thereafter the company moved forward and attacked the enemy, with which it remained in contact more or less continuously until after the termination of his absence. The absence without leave thus shown to have commenced may be presumed to have continued until terminated by accused's return to military control (MCM, 1928, par.130a, p.143). The morning report entry of accused's company of 31 December (Pros.Ex.C), to the admission of which the defense stated there was no objection, showing such termination by confinement by military authorities at Seine Section, Communications Zone, as of 22 October 1944, was proof only of return to military control (MCM, 1928, par.113a, p.113; CM 199641, Davis (1932), 4 B.R 145; see CM ETO 10331, Hershel W. Jones). Absence without leave from 18 September to 22 October 1944 was established.

The record is utterly barren, however, of evidence that at the time accused absented himself he intended to avoid hazardous duty. His unit was not shown to be engaged in combat at that time, as in CM ETO 6637, Pittala, and CM ETO 7312, Andrew, nor was it shown that combat was reasonably imminent or that accused was aware of its imminence. The testimony sheds no light upon the activity or tactical situation of the company or medical units on the day the accused left. The record is therefore legally insufficient to support the findings of guilty of desertion as alleged (CM ETO 6039, Brown; CM ETO 5234, Stubinski), but is sufficient to support so much thereof as involves findings of guilty of absence without leave.

b. Specification 2, Charge I: The morning report entry of 1 November 1944 of Detachment 93 (Pros.Ex.E), to the admission of which the defense stated there was no objection, is competent to prove that accused absented himself without leave from the 93rd Replacement Battalion on that date (CM ETO 6342, Joseph R. Smith, and authorities therein cited). The morning report entry of accused's company of 31 December 1944 (Pros.Ex.C) showed termination of this absence by return to military control on 14 December 1944. Absence without leave from 1 November to 14 December 1944 was thus established.

Again, however, the record is barren of evidence that at the time accused absented himself he intended to avoid hazardous duty. The same deficiencies of proof obtain as in the case of Specification 1 and in addition there is no indication whatever as to the location or status either of the 93rd Replacement Battalion or of the company at the time the absence commenced and no indication of any enemy activity at that time.

The record is therefore legally insufficient to support the findings of guilty of desertion as charged, but is sufficient to support so much thereof as involves findings of guilty of absence without leave.

c. Specifications, Charges II and III: The evidence supports the findings that accused, having been duly placed in arrest of quarters at the place alleged, broke his arrest at the time alleged and went absent without leave. The failure to show the time or place of the termination of the unauthorized absence is immaterial (Cf: CM ETO 2473, Cantwell), particularly as the absence was alleged to have begun and terminated on the same day (CM ETO 5764, Lilly, et al).

6. The record shows (R2) that the trial was held only four days after the charges were served on accused. In view of his

express consent to trial at that time (R6) and in the absence of indication of injury to his substantial rights, the error if any was harmless (CM ETO 8083, Cubley, and authorities therein cited).

7. The charge sheet shows that accused is 19 years six months of age and was inducted 18 November 1943 to serve for the duration of the war plus six months. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted herein, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1, Charge I as involves findings of guilty of absence without leave at the place alleged from 18 September 1944 to 22 October 1944; only so much of the findings of guilty of Specification 2, Charge I, as involves findings of guilty of absence without leave at the place alleged from 1 November 1944 to 14 December 1944; and only so much of the findings of guilty of Charge I as involves findings of guilty of violation of Article of War 61; and legally sufficient to support the findings of guilty of Charges II and III and their specifications, and the sentence.

9. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

27 JUN 1945

CM ETO 8156

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Technician Fifth Grade TOMMIE M. PEAD, Jr. (34655801), 3394th Quartermaster Truck Company	Trial by GCM, convened at Granville, Manche, France, 31 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW, 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 Technician Fifth Grade Tommie M. Pead Jr., 3394th Quartermaster Truck Company, did, at Monthuchon, Manche, France on or about 4th September 1944, forcibly and feloniously, against her will, have carnal knowledge of Mlle. Renee Danlos.

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

8156

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

3. The evidence in the case may be summarized as follows:

On the afternoon of 4 September 1944, near Monthuchon, France, Mademoiselle Renee Danlos, 24 years of age, walked along a country road pushing a bicycle when an American truck stopped alongside her and accused, who was driving the truck, motioned to her to get in. She did not stop but continued past the truck. The truck moved out, went by her and was stopped again, directly in front of her. The accused got out and immediately grasped Mademoiselle Danlos tightly by the arm, took her bicycle with his other hand, and pulled her off the road to a little clearing in a wooded area which bordered the road. At that place he pushed her to the ground. She asked him to let her alone. He said nothing (R7,12-20). Until then she did not know his purpose (R21).

After she was on the ground he got on top of her (R18), unbuttoned his trousers, lifted up her dress (R14,20), tore away her underpants completely (R12,15) and tried continually to spread her legs apart and "take her by force" (R15). This struggle lasted for some time, perhaps half an hour. He managed to "open" her legs and at one time insert his penis a small way into her private parts, but only for a moment because she was able to pull away from him (R15,34). At one time she heard somebody pass by and she cried for help (R21). A 14 year old boy who walked down the road about 30 meters from the clearing heard cries for help and entered the woods. He saw the girl underneath the accused who had one hand on her face, partly over her nose and mouth. In the other hand he held a stick (R23,25,27) about three feet long with which he was attempting to strike her (R24). The boy went away and returned with a man from one of the nearby fields. The man looked into the clearing and saw the young woman with her legs spread apart, her arms along her sides, and a soldier "moving" on top of her with his hand on her mouth. He observed this for about two minutes. He returned to the road.

A small crowd collected and an American Army car was stopped (R7,9,27,28,29). An American officer got out of the car, entered the clearing with a carbine and found the accused on top of Renee with her arms pinned down. The accused arose slowly, withdrawing his penis, which was erect, from between her legs. The officer marched the accused on to the road and returned to find the girl in a sitting position (R7,9), very exhausted, her clothing very dirty, her elbows bruised, her eyes very red (R7,8). There was a fresh mark on her forehead (R7,10) and a little blood on her face from scratches on her cheek which, apparently, she had received from the shrubbery (R31). The ground was torn up (R7,10).

4. After his rights were explained to him accused elected to remain silent and offered no evidence in defense (R32,33).

5. The elements of proof of rape require proof (1) that accused had carnal knowledge of a certain female, as alleged, and (2) that the act was done by force and without her consent (MCM, 1928, par.148b,p.165). It is obvious in the present case that the accused had carnal knowledge of Mademoiselle Danlos for "any penetration, however slight of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not" (Ibid). The evidence bearing on lack of consent requires consideration.

> "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 designs 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).

At no point in her testimony did Mademoiselle Danlos state that she never consented to intercourse but the whole trend of her testimony justifies the inference that she gave no permission at any time. Whether her resistance was below the standard required to negative even implied consent depends largely on her own testimony concerning her efforts to frustrate accused in his purpose. She testified that she would have tried to run away at the time the accused "pulled" her into the clearing and laid the bicycle down but she was "afraid" for the bicycle, which belonged to her cousin. In addition accused did not give her time for he put her on the ground right away and got on top of her (R14,16,18,22). She testified further that he hurt her back when he threw her to the ground (R20); that he tore away her underpants; that she resisted when he entered her private parts by trying to push him away and by trying to hold his hands but that "he was on top of me and I couldn't do anything, I couldn't pull myself away" (R15,16). She weighed only 104 pounds (R13). She did not try to strike him, because she was afraid of him (R18). When she heard someone on the road she cried out but she could not continue because he seized her by the throat. "He grabbed me twice by the throat when I tried to call out, and the third time he menaced me with his fist" (R21). At one time he took a piece of wood to frighten her after he had "taken me by the throat near the end" (R21). He tried to strike her with his fist, but did not succeed (R22).

Mademoiselle Danlos apparently did not strenuously resist the accused until he threw her to the ground. Until then she seems not to have been sure of what accused was planning to do. Up to that point she was apparently confused in her own mind and her testimony reflects some conflict in her own motives. However, after she was thrown to the ground, she seems to have resisted as strongly as she could. She was small in size, the accused was on top of her, she feared him and he justified her

fear by grabbing her by the throat, by threatening her with a stick and again with his fist. The fact that so small a woman was able to struggle against the accused for approximately half an hour and prevent complete consummation of his brutal purpose is proof that her resistance was effective.

The question whether accused engaged in sexual intercourse with the young woman by use of force and without her consent was essentially one of fact for the court.

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

In the opinion of the Board of Review all of the elements of the crime of rape were established by substantial competent evidence (CM ETO 8837, Wilson, supra, and authorities therein cited).

6. The charge sheet shows that accused is 21 years 11 months of age and was inducted 18 May 1943 to serve for the duration of the war plus six months. He had no prior service.

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

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

B. Jones Peters, Judge Advocate

Wm. J. Lee, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

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

BOARD OF REVIEW NO. 1 14 MAY 1945

CM ETO 8161

U N I T E D S T A T E S	)	95TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 95, U. S. Army, 23 January 1945.
Private SALVATORE FIORENTINO (35244688), Company B, 377th Infantry	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Salvatore (NMI) Fiorentino, Private Co B, 377th Infantry, did, at Uckange, France, on or about 9 November 1944 desert the service of the United States by absenting himself without proper leave from his organization with the intent to avoid hazardous duty, to wit: combat with an armed enemy and did remain absent indesertion until about 8 December 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for nine days (Oct. 10-19, 1944) 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 shot to death with musketry. The reviewing authority, the Commanding General, 95th Infantry Division, approved the sentence and forwarded the record of trial "under the provisions of Article of War 50½". The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but owing to special circumstances in the case commuted the same to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Although the reviewing authority declared in his action that the record of trial was forwarded "under the provisions of Article of War 50½", it was in fact forwarded to the confirming authority for action under Article of War 48 and it will be so considered by the Board of Review.

4. The undisputed facts proved by the prosecution show that Company B, 377th Infantry, of which accused was a newly assigned member, on 9 November 1944 was ordered to cross the Moselle River near Uckange, France, charged with the mission of capturing high ground on the opposite side of the river then in possession of the enemy. Accused attempted to make the river crossing in a boat with other soldiers. The swift current of the river rendered the boat unmanageable and it floated downstream. In the course of the process of returning to the starting point on the near shore of the river, the group was subjected to enemy fire. Upon reaching the shore accused's party was detailed as guards of the battalion command post. Prior to guard mount that evening accused left without authority and remained absent until 8 December when he surrendered himself to military control at Charleroi, Belgium. Accused confessed that his departure was due to fright. During his absence his company actively engaged the enemy and experienced heavy casualties.

The facts thus shown present a typical "battle line" desertion case and establish beyond doubt accused's guilt of absence without leave with intent to avoid hazardous duty (CM ETO 4701, Minnetto; CM ETO 5318, Bender; CM ETO 5396, Nursement).

5. The charge sheet shows that accused is 28 years of age. He was inducted 8 March 1944 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. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

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

B. Franklin Kite Judge Advocate

Wm. F. Burrow 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 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private SALVATORE FIORENTINO (35244688), Company B, 377th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 8161. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 8161).

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

(Sentence as commuted ordered executed. GCMO 175, ETO, 26May 1945.)

4605 8161

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

BOARD OF REVIEW NO. 1

14 MAY 1945

CM ETO 8162

U N I T E D S T A T E S	95TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 95, U. S. Army, 20 January 1945.
Private JAKE YOCHUM (38130993), Medical Detachment, 377th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Jake Yochum, Medical Detachment, 377th Infantry, did, at or near Uckange, France, on or about 9 November 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: the duties of a member of a Medical Detachment attached to a unit then engaged in combat against an armed enemy, and did

8162

remain absent in desertion until he surrendered himself at Reims, France, on or about 2 December 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 95th Infantry Division approved the sentence and forwarded the record of trial "under the provisions of Article of War 50½". (The Board of Review treats the record as having been forwarded to the confirming authority for action under Article of War 48.) The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but, owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The uncontroverted evidence established the following: On the evening of the date and at the place alleged accused, an aid man, absented himself without leave from the squad to which he was attached for duty and remained absent until he surrendered on the date and at the place alleged. On the morning of the day he left, the squad, including accused, had unsuccessfully attempted, under enemy fire, to cross the Moselle River in an assault boat. After it returned to the east bank and while intermittent enemy fire was falling nearby, accused left. Thereafter the company completed its crossing of the river and participated in the drive on Metz, sustaining heavy casualties. Accused stated in his pre-trial statement, which amounted to a confession and which the court was warranted in deeming voluntary (Cf: CM ETO 9345, Haug et al, and authorities cited therein), that he left because he was afraid to make a second attempt to cross the Moselle, that he knew he did wrong and that one more chance would make him a real soldier. The Board of Review is of the opinion that the evidence clearly warranted the findings that accused absented himself without leave with the specific intent of avoiding hazardous duties as a member of a medical detachment attached to troops engaged in combat as alleged (CM ETO 8161, Fiorentino; CM ETO 5396, Nursement; CM ETO 5394, Quinn; CM ETO 5318, Bender; CM ETO 4570, Hawkins; and authorities therein cited).

4. The charge sheet shows that accused is 24 years of age and was inducted 9 July 1942 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 offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted.

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 and Cir.210, WD, 14 Sept 1943, sec VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(38)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private JAKE YOCHUM (38130993), Medical Detachment, 377th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 8162. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 8162).

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

(Sentence as commuted ordered executed. GCMO 178, ETO, 26 May 1945.)

8162

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

BOARD OF REVIEW NO. 1

14 MAR 1945

CM ETO 8163

U N I T E D S T A T E S v. Private TOMMIE DAVISON (34485174), 427th Quartermaster Troop Transport Company	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Granville, Department of Manche, France, 9 December 1944. Sentence: To be hanged by the neck until dead.

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

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review, 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 on the following charges and specifications:

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

Specification: In that Private Tommie NMI Davison, 427th Quartermaster Troop Transport Company did, at Prise Guinment, France, on or about 23 August 1944 forcibly and feloniously, against her will, have carnal knowledge of Mme. Madeleine Quellier.

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

Specification: In that * * * did, at Prise Guinment France on or about 23 August 1944 with intent to do him bodily harm commit an assault upon M. Henri Duqueroux, by shooting at him with a dangerous weapon to wit, a pistol.

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

Specification: In that * * * did, at Prise Guinment, France attempt to assault a warrant officer, CWO Earl E. Lane Jr., with a pistol while said warrant officer was in the execution of his office.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of Charges I and III and the specifications thereof, guilty of the Specification of Charge II except the words "with intent to do him bodily harm and shooting", substituting therefor the words "wrongfully pointing", and not guilty of Charge II but guilty of a violation of the 96th Article of War. Evidence was introduced of four previous convictions: three by summary court-martial for absences without leave of two, one, and one days, respectively, in violation of Article of War 61, and one by special court-martial for absence without leave for 15 minutes in violation of Article of War 61, attempt to break arrest stated to be in violation of Article of War 69, and being drunk and disorderly. All members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

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

On 23 August 1944, Madame Madeleine Quellier and her husband were living with her sister on the latter's farm near the hamlet of Prise Guinment, France. Several other people also resided there, including Henri Duqueroux, his wife, and their two children (R18,20,24,30). A little before five pm French time (1900 hours Army time), accused, armed with a pistol, came to the farmyard and asked Madame Quellier for cognac. Being told that she had none, he asked for a chicken (R19,30, 32,64). Just then the others who had been working in the fields returned for their evening meal. Two of the women fetched a hen which accused rejected, insisting upon a pullet. They found one for him and also gave him a piece of rope for the purpose of tying the chicken's legs (R19,20,21,24,26,30). During this time, accused was very arrogant and cross, with a "nasty look, bad eyes". Three other colored soldiers were present, one of whom warned Duqueroux of danger. Accused was talking about "fucking" and "zig-zig", accompanying his remarks with suggestive gestures. He asked Duqueroux for a mademoiselle and exhibited 500 francs in American invasion currency (R9,10,13,18,20, 21,24,46).

The French people were frightened and Duqueroux told the women to run away and hide. Accused left temporarily and, taking advantage of his departure, Madame Quellier, her husband, and Duqueroux and his children locked themselves in the house and went upstairs. The others went across the road to the barn where they hid in the hayloft (R18,20,24,30). Accused circled the house, knocking on the back door on his way, and then broke open the front entrance (R20,25,30). Duqueroux came downstairs with his two-year-old daughter in his arms. Accused met him in the downstairs room, pointed his pistol at him, felt his pockets, and pushed him out the door. Duqueroux then proceeded to the military camp to report the incident. Accused did not fire his pistol at the time he pointed it at Duqueroux, but the latter, while en route to the camp, heard a shot (R20-25,30).

Meanwhile, Madame Quellier, her husband, and Duqueroux's ten-year-old son remained upstairs (R25,30). Accused mounted the stairs, pushed Quellier aside threatening him with his pistol, and kicked the little boy. He then took Madame Quellier by the arm and forced her to precede him downstairs. Quellier ran back to the window and shouted for help (R25,26,28,30,35). As Madame Quellier reached the bottom of the stairs, she and her husband both heard a shot, and later a bullet was found lodged in the staircase (R28,30,33). Madame Quellier ran out of the house to a nearby apple crushing mill. There she saw another colored soldier to whom she appealed for help and who told her to hide. The accused followed her, pushing the soldier aside. By this time, at the suggestion of the other soldier, accused had picked up the chicken and, holding it in one hand along with his pistol, he seized Madame Quellier by the shoulder with the other. He forced her to accompany him down a path into the meadow some 60 meters from the house. She cried out and shouted but was so frightened she was unable to remember the number of times. Accused put his pistol to her cheek and her breast, threw her to the ground, and had intercourse with her. Penetration was accomplished. To stifle her cries, he put his hand over her mouth. Madame Quellier neither consented nor voluntarily submitted to the intercourse. Her submission was the result of her fright at being menaced by accused's pistol. She thought he was going to kill her (R30-36).

The above evidence was adduced through the testimony of the French civilians. It is corroborated in part by three enlisted members of accused's battalion, two of whom had come to the farm to secure articles of clothing they had previously left for laundering (R7,8,10). The reason for the presence of the third soldier is unexplained except that there is some indication that he was a friend of accused (R7,8). All three witnessed the incidents up to the time accused, having obtained the chicken, temporarily left and the French people went into the barn and farmhouse. At this point, the two who had come for their laundry departed, warning accused to come away before he got himself into trouble (R7-11,12,13,15). The third remained. He paid for the chicken and while doing so heard a shot. He then saw a man carrying a baby emerge from the house. Next, a lady came out followed by

accused with his gun in hand. The lady appealed to the soldier for help, but accused caught her by the arm and took her down the road. She cried and begged the soldier to come with her. By this time, accused had returned his pistol to its holster and was carrying the chicken in his free hand. The soldier left to return to camp (R15-17). All three of the enlisted men agreed that they first saw accused at the farmhouse shortly after 1800 hours Army time (R7,9,12,17).

Chief Warrant Officer Earl E. Lane, Jr., personnel officer of accused's battalion, was advised of the incident at about 1830 or 1900 hours and immediately went out to the farm, accompanied by the battalion surgeon. The surgeon gave Madame Quellier an injection and some medicine to calm her. An identification parade was arranged in the battalion area to which Lane brought the French people. Accused was in the lineup and, as Lane approached, he stepped out with his hands in the pockets of his raincoat. Lane ordered him to take his hands from his pockets. He refused and, when asked by Lane what he had in his pocket, replied that he had a gun which he partially withdrew and pointed at Lane through his coat. Lane grabbed the gun and forced down its barrel. Accused refused to relinquish it, a struggle resulting in which Lane and two other members of the organization finally succeeded in wresting the gun from accused. During the altercation, accused struck Lane and, after being subdued, broke loose and attempted to strike him again. Both Duqueroux and Madame Quellier recognized accused in the lineup (R35-45, 47).

4. Accused, after being warned of his rights and conferring with defense counsel, elected to take the stand and testify under oath (R56, 57). He stated that on the afternoon of 23 August he went walking with five specifically named members of his organization. They left at about 1400 hours and stopped at some houses to buy eggs and cider. He had his pistol with him but did not fire it. They did not stop at the house where the incidents described by the prosecution's witnesses occurred, nor did they buy a chicken. All six returned to camp "something like 5:30 or 6 o'clock". Accused had been drinking pretty heavily and went to sleep in his tent after telling some of the boys to fix his eggs. He next remembered being pulled out of bed to participate in the lineup. There, he relinquished his pistol to the first sergeant when Lane asked for it. They then hit him on the head, knocked him down, and got on top of him. When he came to, he said "I am not trying to fight you, sir". Lane then walked off and would not talk to him. He did not attempt to pull a gun on Lane or strike him (R58-63).

Other evidence for the defense consisted of the testimony of two of his companions. They corroborated his account of his movements in the afternoon, both fixing the time of their return to camp at 1815 hours. Neither was present at the identification parade and neither gave any testimony relative to accused's whereabouts after their return to camp (R50-56).

5. Every element of the offense of rape is amply proved by competent substantial evidence. The record of trial is therefore legally sufficient to support the findings of guilty reached by the court. While there is no evidence that accused inflicted serious bodily injury upon the victim apart from the violation of her person, nevertheless it is apparent that he accomplished his purpose by means of threats and terror and that the woman resisted to the utmost extent required by the menacing situation in which he had placed her. The case therefore falls squarely within the rules of law discussed by the Board of Review in CM ETO 3933, Ferguson and Rorie and CM ETO 4661, Ducote.

6. The identity of accused as the perpetrator of the rape and also the assault upon Duqueroux is placed in issue by his attempted establishment of an alibi. This, however, resolves itself into a question of the relative credibility of the witnesses. Those for the defense, except accused himself, agree that accused was in camp as late as 1815 hours. Accused, however, admits that he may have returned from his walk as early as 1730 hours. The prosecution's witnesses divide into two groups on the issue, one consisting of the three soldiers who say accused was at the farm shortly after 1800 hours, and the other composed of the French civilians who place his time of arrival nearer 1900 hours. The timing therefore is close and, while the version of the civilians can probably be reconciled with that of the defense, thus destroying the alibi, it is impossible to give credence to both the defense and the military witnesses of the prosecution. However, the resolution of conflicting evidence on the issue of identification of an accused, as the Board of Review has frequently held, is within the exclusive province of the court whose findings will not be disturbed upon appellate review if supported by competent substantial evidence (CM ETO 1621, Leatherberry; CM ETO 3200, Price; CM ETO 3837, Smith; CM ETO 4172, Davis et al; CM ETO 5068, Rape and Holthus). The evidence identifying accused as the culprit is both credible and substantial.

7. In addition to the rape, accused was found guilty by exceptions and substitution of a simple assault upon Henri Duqueroux, in violation of Article of War 96, and was also found guilty of an attempted assault upon Chief Warrant Officer Lane, in violation of Article of War 65. The findings as to both these offenses are fully supported by the evidence adduced on trial. Furthermore, in the case of Lane, the evidence clearly would have supported a charge of assault with the pistol rather than attempted assault, had such charge been made. While at common law there was no such offense as attempted assault, an assault in itself being but an attempted battery (5 CJ, sec.222, p.741; 16 CJ, sec.90, p.111), the offense exists in military law by virtue of the explicit provisions of Article of War 65. This Article was added in the 1916 revision of the Articles of War and its purpose was "to enhance the respect of the private soldier for his non-commissioned officer" (see Report No.130, United States Senate, 64th Congress, Feb. 9, 1916, p.73). According to the Manual for Courts-Martial, 1921, the part of the article relating to assaults covers any unlawful violence against a warrant or noncommissioned officer in the execution of his office whether such violence is merely threatened or is

advanced in any degree toward application (see CM ETO 314, Mason). Presumably, therefore, an attempted assault within the meaning of the article includes any offer of violence which falls somewhere between a mere threat and an assault as ordinarily defined in law.

8. The following procedural matter is worthy of comment:

It appears that the charges were served on accused only two days before trial. However, defense witnesses were brought for the trial from Liege, Belgium, a journey which consumed four or five days (R51). It may be assumed, therefore, in the absence of complaint by accused, that sufficient time to prepare was provided and that such time was not confined to the two-day period between service of the charges and the trial. Moreover, the defense affirmatively stated that accused had no objection to being tried at that time (R3).

9. The Specification, Charge III, omitted the date of the offense charged. On motion of the prosecution, to which defense did not object, the court permitted amendment of the Specification to allege that the offense occurred on or about 23 August 1944 (R5,29). No continuance was requested by the defense. Such amendment was properly allowed (CM ETO 2188, Prince).

10. The charge sheet shows that the accused is 30 years one month of age and was inducted at Camp Shelby, Mississippi, 2 December 1942, to serve for the duration of the war plus six months. He had no prior service.

11. The court was legally constituted and had jurisdiction of the person and 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.

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

B. Franklin Riter, Judge Advocate

[illegible], Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private TOMMIE DAVISON (34485174), 427th Quartermaster Troop Transport Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement, and the record of trial, which is delivered to you herewith. The file number of the record in this office is CM ETO 8163. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 8163).

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

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

Sentence ordered executed, GCMO 86, ETO, 24 Mar 1945.)

8163

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

BOARD OF REVIEW NO. 3 28 APR 1945

CM ETO 8164

U N I T E D S T A T E S	)	IX AIR FORCE SERVICE COMMAND
	)	
v.	)	Trial by GCM, convened at Headquarters IX Air Force Service Command, APO 149, U. S. Army, 12 December 1944. Sentence: Dismissal, total forfeitures, confinement at hard labor for three years. United States Disciplinary Barracks, Greenhaven, New York.
Captain WILLIAM J. BRUNNER (O-461495), Air Corps, 13th Replacement Control Depot	)	

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

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

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

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

Specification: In that Captain WILLIAM J. BRUNNER, 134th Replacement Battalion (AAF), IX AFSC, then 463rd Service Squadron, IX AFSC, did, at Rivenhall, Essex, England, on or about 25 January 1944, feloniously embezzle by fraudulently converting to his own use, money, of the value of about $185.14, the property of the 463rd Service Squadron, said money being a portion of the proceeds of a check for $322.33 from the Key Field, Mississippi Post Exchange entrusted to him for said 463rd Service Squadron by said Key Field, Mississippi Post Exchange.

8164

CHARGE II: Violation of the 57th Article of War.

Specification: In that * * *, being then in command of the 463rd Service Squadron, and it being his duty to render to superior authority a return of the state of the funds of said 463rd Service Squadron, for the period 1 December 1943 to 31 January 1944, did, at Rivenhall, Essex, England, on or about 20 February 1944, knowingly make a false return for said period, which return was false in that it showed that a check for $322.33 from the Key Field, Mississippi Post Exchange had been applied in its entirety to expenditures of said 463rd Service Squadron for the month of January 1944, when as he, the said Captain WILLIAM J. BRUNNER, then well knew not more than $137.19 of the proceeds of said check has been so applied.

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

Specification 1: In that * * * did, at Rivenhall, Essex, England, on or about 20 February 1944, with intent to deceive whoever should officially inspect the Council Book of the 463rd Service Squadron, officially report in such Council Book that a check for $322.33 from the Key Field, Mississippi Post Exchange had been applied in its entirety to expenditures of said 463rd Service Squadron for the month of January 1944, which report was known by the said Captain WILLIAM J. BRUNNER to be untrue in that he then well knew that not more than $137.19 of the proceeds of said check had been so applied.

Specification 2: Finding of Guilty disapproved by Confirming Authority.

Specification 3: Finding of Not Guilty.

He pleaded not guilty and was found not guilty of Specification 3, Charge III, and guilty of the remaining charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for three years. The reviewing authority, the Commanding General, IX Air Force Service Command, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under

Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, disapproved the finding of guilty of Specification 2 of Charge III, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The following evidence was presented by the prosecution:

Accused was commanding officer of the 463rd Service Squadron from June, 1943 until April, 1944. He was also custodian of the squadron fund (R14,38,60). During the period relevant to this case, the organization was stationed at Rivenhall, England, until 23 December 1943, and then at Keeval, Wiltshire, England, until 24 January 1944, when it returned to Rivenhall (R16).

On 1 December 1943, there was no balance in the squadron fund (R52,53; Prox.Ex.G-8). On or about 17 December 1943, a check in the amount of $322.33 payable to the custodian of the fund was received from the Key Field Exchange, Meridian Air Base, Mississippi, representing post exchange dividends (R20,45; Pros.Ex.G-2). The check was not then cashed or deposited, but was kept in the organization safe, and no entries relative to it were made in the council book (R20,21).

Shortly before Chirstmas, 1943, while the organization was at Rivenhall, it was planned to give Christmas parties for the children of the community and a collection was taken for this purpose among the officers and enlisted men. The money thus collected did not become a part of the squadron fund. Despite the squadron's departure from Rivenhall on 23 December 1943, the parties were given, and since there were funds left over, three dances were held for the squadron members in Keeval, one at Christmas, one on 7 January 1944, and one on 15 January 1944. Expenses for these parties were defrayed in part from the surplus funds left over from the Rivenhall collection, but these were insufficient for the January dances, so various of the enlisted men contributed additional sums to finance them. Shortly after the dance of 7 January 1944, the first sergeant, who had charge of the financial arrangements, asked accused whether the Key Field check could be used to defray the unpaid expenses of the party as well as the cost of the contemplated dance of 15 January 1944. Accused replied that he thought it could. Nothing was done about it for the moment, however, and the party bills were paid out of contributions by the men, made apparently with the understanding that they would be reimbursed when the check was cashed (R27,46,60-63, 65,75).

Sometime between 15 and 24 January, accused asked the first sergeant for the check so that he could cash it. He was informed that it was still in the safe. The squadron moved on 24 January 1944 from

Keeval back to Rivenhall. Accused made the trip via London and when he reached Rivenhall on or about 25 January 1944, he told the first sergeant that he had succeeded in cashing the check. He produced 34 pounds, stating that some of the money was missing because it had been used in exchanging dollars for pounds and because an officer accompanying accused to London had been short of money on the trip. He said he was sorry and would pay back the money as soon as possible. However, it was not repaid (R63-65, 72,77-79).

Meanwhile, no entries were made in the squdron fund council book in December and January. On 11 February 1944, the Administrative Inspector's Office of the 309th Service Group made an inspection of the Squadron's activities. The report of inspection called attention to the fact that the council book showed no record of the receipt of funds from the Key Field Post Exchange. Accused instructed the squadron adjutant to bring the council book up to date, showing receipts and disbursements, but made no suggestions as to how this should be done (R21-22,40,52; Pros.Ex.G-2). Shortly afterwards, accused asked the first sergeant what should be done about"the disbursements of the council book with regard to the Key Field check". The sergeant suggested that once the money had been repaid by accused, it would be possible to get vouchers from the post exchange officer covering the purchases of supplies for the squadron's previous parties, all of which, however, had earlier been paid for out of the contributions of the enlisted men and officers of the squadron. Accused said he would return the money as soon as possible and hoped that vouchers could be obtained in the suggested way (R65-66).

The first sergeant then had four vouchers prepared in the form customarily used for such documents. Three of them showed the disbursement to the post exchange of sums purporting to be in payment for supplies and one showed a payment to the manager of an orchestra engaged for the party of 15 January. All of these were fictitious in that none of the expenditures so recorded were made out of squadron funds, but were rather paid from the contributions of the squadron members. Furthermore, those purporting to reflect purchases from the post exchange bore no relationship to actual transactions, but on the contrary were adjusted so that the aggregate amount shown exactly equalled the amount of the check received from the Key Field Exchange. This amount, however, was less than the total sum actually expended for the dances and parties. All the vouchers were dated 22 January 1944 (R41, 47,65-69; Pros.Exs.G-4,G-5,G-6,G-7).

The vouchers were then delivered to the squadron adjutant who made corresponding disbursement entries in the council book for the month of January 1944. At about the same time, a voucher was prepared showing the receipt on 17 December 1943 of the sum of $322.33 representing Post Exchange dividends from the Key Field Exchange and a corresponding receipt entry was made in the council book for the month of December (R20,41,47;Ex.G-1). The council book entries for December 1943 thus showed

receipt of $322.33 as well as an item under the statement of account as of the end of the month, "Cash in my personal possession (check) - $322.33". Those for January 1944 showed disbursements aggregating $322.33 and, accordingly, no balance as of the end of the month (R20, 24,25,88-89; Pros.Ex.G-8).

Thereupon the vouchers and the council book were delivered to accused. He signed each of the vouchers, thus certifying receipt of $322.33 from the Key Field Exchange (Prox.Ex.G-1), and disbursement of an equal sum in connection with the four transactions described in the disbursement vouchers (R24,25,41,42; Pros.Ex.G-4,G-5,G-6,G-7). At the same time, he signed the council book for December and January certifying as custodian of the fund in each case that "the foregoing account for the month of (December 1943) (January 1944) is a true and complete statement of all receipts and expenditures" and as president of the council, that the council had audited the account, found it correct and approved the expenditures made (R25,26; Pros.Ex.G-8). Accused read over the entries for December and January before signing the council book (R25,26). No one, however, told him of the manner in which the vouchers and entries were made up nor had he ever given explicit instructions that it be done in this way or in any particular way (R26,31-35,41,44, 47,73,74). The adjutant handled the situation as he did because he was "afraid of some retaliation from the captain" (R34).

After accused had signed the various documents, the disbursement vouchers were returned to the first sergeant. The signature of the manager of the band acknowledging receipt of payment for the band's services was then obtained on the voucher covering that expenditure, and, at the same time, the first sergeant forged the signature of the post exchange officer to the three vouchers relating to the transaction with the Exchange (R24,41-43,47,50-51,66-67,69). It does not appear either that accused was present when these forgeries were committed or that he learned of them later (R47,74).

Thereafter, an indorsement to the report of administrative inspection was dictated by accused to the squadron adjutant. The paragraph of the indorsement dealing with the council book, however, was prepared directly by the adjutant. It was approved by accused and read "Council book has been brought up to date " (Pros.Ex.G-3). The indorsement was not actually signed by accused since he was away at the time it was forwarded. It was signed in his absence by the acting squadron commander (R22-24,55,56).

Subsequently, the first sergeant had several conversations with accused relative to repayment by the latter of the balance of the proceeds of the check. Thus, on one occasion accused remarked "Damn, got to pay that money back". On another, he stated that he had wired to the States for money to cover the balance and expected to be able to pay it soon. Later, at the time the accused left the squadron, he asked

the sergeant whether he didn't owe him some money in connection with "that little matter of the squadron fund". The sergeant replied that it was the squadron fund to which he owed it. After leaving the squadron, accused wrote the sergeant that he thought "we could beat this thing yet". Later he also spoke with the sergeant in connection with a forgery charge brought against the latter, telling him that nothing would come of it since he would not testify against him and no one else knew that he had signed the vouchers (R70-72).

4. Accused remained silent and no evidence was introduced for the defense (R90). The record does not indicate whether accused was warned of his rights.

5. Convictions were obtained for embezzlement in violation of Article of War 93, the making of a false return in violation of Article of War 57 and the making of a false official report in violation of Article of War 95. Examination of the uncontradicted evidence as above summarized leaves no reasonable doubt that the record of trial is legally sufficient to support such findings of guilty.

As to the embezzlement, it was shown that accused, in his capacity of custodian of the squadron fund, was entrusted with money which he properly obtained by cashing a check constituting a part of the assets of the fund. Part of this money appears to have been paid into the fund, but the remainder, amounting to $185.14, was converted or appropriated by accused to his own use. The exact use to which he put the money so converted does not clearly appear, but the evidence establishes beyond any possible doubt that it was used for his own benefit and not for the legitimate purposes for which he was entrusted with it. This was embezzlement as the term is used in Article of War 93. Although there is some evidence that he intended ultimately to repay the money, it does not appear that he ever actually did so. In any event this is immaterial to the issue of guilty. Similarly immaterial is the question whether he had "custody" or "possession" of the funds since nothing more is necessary to constitute embezzlement than that the party charged have control or care of the money (CM ETO 1302, Splain).

The false return for which accused was convicted under Article of War 57 is alleged to have consisted of the entries in the council book showingapplication of the entire proceeds of the Key Field check to proper expenditures of the squadron. There is no question that such entries were false and that accused knew it. It is true that he was not shown to have been aware that the signature of the post exchange officer on various of the vouchers was forged, or that the expenditures shown on such vouchers bore no accurate relationship to actual purchases by the squadron. However, he was most definitely aware that the entries certified by him as correct were false and fraudulent in that they accounted for the legitimate expenditure of the entire amount of the check, whereas in fact the fund had never received the greater part of such amount since he himself had embezzled it. The only question, therefore, is whether

the council book constituted a "false return" within the meaning of the Article of War. Although no reported cases were found on the point, the words of the statute itself are clearly broad enough to include this type of report. It provides that "Every officer whose duty it is to render to * * * superior authority a return of the state of the troops under his command or of the * * * funds * * * thereunto belonging, who knowingly makes a false return thereof shall be * * *". Fund custodians are required both by Army Regulations and, in the instant case, by local rule, to keep account of the funds with which they are entrusted, such account being subject to periodic inspection by "superior authority". That accused was well aware of this purpose of the council book is shown by the very fact that the preparation of the entries and his certification thereof were occasioned by such an inspection and were undoubtedly designed to forestall further criticism by superior authority. Such certification, therefore, constituted a false return within the meaning of the Article.

The charge under Article of War 95 was essentially the same as that laid under Article of War 57 and hence no further discussion of the facts is necessary. There is of course no impropriety in making the same transaction the subject of charges both under Article of War 95 and some other applicable article (CM 252773, Jonas, 34 BR 189,1944). Moreover, the Manual for Courts-Martial specifically provides that the deliberate making of a false official statement constitutes conduct unbecoming to an officer and a gentleman within the meaning of the Article (MCM, 1928, par.151, p.186). As previously indicated, the statements made by accused were known by him to be false and were designed to deceive superior authority. Since they were made in the course of an official report, there is no doubt that they constitute violation of Article of War 95 (CM ETO 2777, Woodson,1944).

6. Several procedural and evidential matters require comment.

Over objection by the defense, the prosecution was permitted to introduce two witnesses who testified as to the good reputation for truth and veracity of prosecution's witness, Lieutenant Wadas. Under the rule adopted by the Board of Review, such testimony is admissible where the witness in question has been impeached, whether such impeachment be accomplished by evidence of the witness' bad character, prior convictions or inconsistent statements (CM 211228, Wyatt, 10 BR 31, 1939). The question, therefore, is whether Lt. Wadas was impeached. In this connection, the witness was asked on cross-examination whether he had been punished under Article of War 104 for his part in the transactions to which he testified. Thereupon the following exchange of remarks occurred between counsel:

8164

"TJA : I believe the defense is bringing that out for impeachment, is that correct:

D C : To show the interest of the witness.

TJA : For impeachment purposes would be the only reason valid. I have no objection for that purpose.

D C : Right" (R33).

Although punishment under Article of War 104 falls short of a conviction of crime and hence evidence thereof is not ordinarily admissible for impeachment purposes (CM 235380, Bane, 21 BR 377, 1943), it is apparent that such evidence was offered by defense and was received in this case for that very purpose. Therefore it may properly be said that the defense placed the witness' character in issue from the point of view of truth and veracity and thereby opened the door for rebutting evidence of the kind offered by the prosecution. In any event, even assuming the evidence to have been improperly admitted, the guilt of accused is so clearly established by uncontraducted evidence that findings of the court could not have been affected by it. Hence, no prejudice resulted (See CM 203036, Gemeke, 7 BR 37, 1935).

Objection was made by the defense to proof by parol evidence of the receipt of the Key Field Exchange check. Receipt of this check, however, was merely collateral to the real issues of the case. There was no necessity or intent to prove its contents and the evidence was offered merely to show its delivery to accused and to explain the manner in which he came into possession of its proceeds. Under these circumstances, the parol evidence was acceptable (1 Wharton's Criminal Evidence (11th Ed.1935), sec.407,p.650).

The record does not show that accused was warned of his rights either by the law member or defense counsel. However, in view of the competence with which he was represented by defense counsel, as well as the fact that he himself was an experienced officer and a graduate of the United States Military Academy, it may be assumed that his failure to testify was not attributable to any lack of understanding of his rights in the matter. Under these circumstances, it is not legally required that the court explain his rights, although it is of course always the better practice to do so (MCM, 1928, par.49g, p.38).

7. The charge sheet shows that accused is 42 years and 11 months of age and entered active duty 17 April 1942 in the grade of Captain, Army of the United States. Previous military service included attendance at the United States Military Academy from 12 June 1919 to 12 June 1924, and duty as a second lieutenant, 16th Infantry, from 12 June 1924 to 4 March 1925.

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

9. Dismissal, total forfeitures and confinement at hard labor for three years are authorized upon conviction of violation of either Article of War 57 or 93. A sentence of dismissal is mandatory upon conviction of violation of either Article of War 57 or 95. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec. VI as amended).

Benjamin R. Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. V. Levy Jr. Judge Advocate

(56)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 28 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Captain WILLIAM J. BRUNNER (O-461495), Air Corps, 13th Replacement Control 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. 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 8164. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 8164).

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

(Sentence ordered executed. GCMO 133, ETO, 3 May 1945.)

8164

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

BOARD OF REVIEW NO. 3 28 APR 1945

CM ETO 8165

U N I T E D S T A T E S	83RD INFANTRY DIVISION
v.	Trial by GCM, convened at Izier, Belgium, 9 January 1945. Sentence: Dismissal.
Captain BERT P. CRADDOCK (O-436994), Service Company, 330th Infantry	

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

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Officer 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 95th Article of War.

Specification 1: In that Captain Bert P. Craddock, Service Company, 330th Infantry, did, at or near Dalheim, Luxembourg, on or about 3 November 1944, with intent to deceive Lieutenant Colonel Snyder L. Peebles, his superior officer, officially report to the said Lieutenant Colonel Snyder L. Peebles that he knew nothing about the presence of a camera in a damaged package addressed to Lieutenant William J. Ready, which report was known by the said Captain Bert P. Craddock to be untrue in that he had previously taken physical possession of said camera.

Specification 2: In that * * * did, at or near Dalheim, Luxembourg, on or about 5 November 1944, with intent to deceive Captain W. W. Allen, III, his superior officer, officially report to the said Captain W. W. Allen, III, in writing, as follows:

APO 83, U S Army
5 November 1944

C E R T I F I C A T E

This is to certify that I, the undersigned, have no knowledge of the whereabouts of camera and film allegedly missing from a package addressed to Lieutenant William J. Ready and indorsed by me for return to sender, on or about 1 September 1944.

(sgd) Bert P. Craddock
BERT P. CRADDOCK
Captain, Infantry

which report was known by the said Captain Bert P. Craddock to be misleading, in that he then had knowledge of important facts concerning the receipt and disappearance of the said camera and film which it was his duty to disclose.

Specification 3: In that * * * did, at or near Dalheim, Luxembourg, on or about 5 November 1944, with intent to deceive Captain W. W. Allen, III, his superior officer, wrongfully induce Private First Class Laurence W. Roney, Company I, 330th Infantry, to officially report to the said Captain W. W. Allen, III, in writing, as follows:

APO 83, U.S. Army
5 November 1944.

C E R TI F I C A T E

I certify that I have no knowledge of the camera and film allegedly missing from a package addressed to Lieutenant William J. Ready and checked and verified by me against Casualty Records of this office for return to sender, on or about 1 September 1944.

(Sgd) Laurence W. Roney
LAWRENCE W. RONEY
33805065
Pfc, Co.I, 330th Inf.

8165

Subscribed and sworn to before me this
5th day of November 1944

(Sgd) W W Allen III
W.W.ALLEN,III,
Captain, Infantry,
Adjutant.

which report was known by the said Captain Bert P. Craddock to be untrue in that he then knew that the said Private First Class Roney did have knowledge of important facts concerning the said camera and film.

He pleaded not guilty to and was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, 83rd Infantry Division, approved only so much of the sentence as provides for dismissal 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 and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution was as follows:

a. Specification 1 of the Charge. Lieutenant William J. Ready, Company I, 330th Infantry, was killed in action somewhere in France between 4 July and 1 August 1944 (R8,23). His mother, had sent a package to her son which arrived soon after his death and while the regiment was in the environs of Carentan, France (R15). Private First Class Laurence W. Roney who checked battle casualty mail for Company I (R14) received the package and called accused's attention to the fact that it was partly open, disclosing a camera, some films, candy and other things (R15,20). Accused said "he would take care of the camera and wrap it up and send it back to Mrs. Ready" (R15). Roney then placed the camera and film on accused's desk, wrapped up the remaining contents of the package and mailed it back to Mrs. Ready (R15). The camera and films remained on accused's desk for about a week (R15,30), but during a subsequent move of the regiment the camera was either lost or stolen from accused (R9,30). On 3 November 1944, while the regiment was at Dalheim, Luxembourg, Lieutenant Colonel Snyder L. Peebles, Executive Officer of the regiment, received a letter from Mrs. Ready, containing official indorsements, which required an investigation with reference to a camera allegedly missing from a package returned to her. In response to Colonel Peebles' inquiry regarding this matter accused stated to him over the telephone that

"he remembered the Ready package and that as he recalled it, it contained a lot of broken cookies and that the only thing he had to repair it with was some kind of tape; that he repaired the package as best he could and returned it, and, so far as he knew, he knew nothing about any camera being in it" (R7).

About five or six days later, in a casual conversation with the colonel, accused again repeated substantially the same statement (R8).

b. Specifications 2 and 3 of the Charge. At the request of Colonel Peebles, Captain William W. Allen, III, 330th Infantry, called accused on the telephone on 3 November 1944 and "asked him for statements that he knew something about the package, or that he didn't know anything about the package" (R11). Although accused told Roney on 4 November that he had lost the camera (R17), he prepared on 5 November two statements, one of which he signed certifying that he had "no knowledge of the whereabouts of camera and film allegedly missing from a package addressed to Lieutenant William J. Ready" (R11,16; Pros.Ex.1) while the other was then signed at the request of accused by Roney certifying that he had "no knowledge of the camera and film allegedly missing from a package addressed to Lieutenant William J. Ready" (R12,15,16,18-19; Pros.Ex.2). Captain Allen received both statements from accused on 5 November (R11). On or about 21 November accused voluntarily called upon Colonel Peebles and indicated that he wanted to change his former statements (R8). He said, in substance, that

"the Ready package, as it was being taken out of the mail bag, was so badly broken that a camera fell, or was falling out of it. It was called to his attention by the mail orderly; that he told the soldiers he would take care of the camera and mail it back to Mrs. Ready. This was during combat and that he and his company were quite busy, so he merely repaired the damaged package and sent it back to Mrs. Ready, and that he kept the camera on his desk, intending to send it back; that a move was made and during the process of this move the camera was either lost or stolen from his dispatch case while he was riding in the front seat of the truck" (R9).

Accused further explained he was hoping he would find the camera and return it, or pay Mrs. Ready without having anything more done about it of an official nature (R9).

4. For the defense, accused's capabilities as an officer and his good character were shown by the testimony of Major Bedford F. Foster, Regimental Intelligence Officer (R24-25), of Major Alfred I. Myerson, Regimental Surgeon (R25) and by the stipulated testimony of Lieutenant Colonel George M. Shuster (R39; Def.Ex.2), all of the 330th Infantry.

5. After his rights were explained accused testified in substance that he decided to handle the return of the camera and film personally because the mending material then available in the regiment was not adequate to repair the package and because of his friendship with Lieutenant Ready. The camera, which previously had rested on his desk in open view, was lost during one of the regimental moves at the end of August (R32). His telephone conversation with Colonel Peebles dealt principally with the handling of casualty mail in general and, as he understood it, the colonel did not ask him a direct question as to what he knew about the camera (R38). He personally drafted the statements (Pros.Ex.1 and 2) the night before they were signed by him and Private Roney (R36-37). He intended both statements to cover the "present whereabouts" of the camera (R33). He had already sent Mrs. Ready a money order for $30, the value she placed on the camera and films and explained the entire matter to her (R34).

6. a. With respect to Specification 1 of the Charge, the court's findings of guilty were supported by competent and substantial evidence that accused knowingly made an untrue official report to his superior officer with intent to deceive him, as alleged. Such conduct is clearly a violation of Article of War 95 (MCM, 1928, par.151, p.186; Winthrop's Military Law and Precedents (Reprint, 1920), p.713; CM ETO 1538, Rhodes, and authorities therein cited).

b. The court's finding of guilty under Specification 2 of the Charge was also fully supported by the evidence which showed beyond any reasonable doubt that accused made the misleading official report to Captain Allen with intent to deceive him, as alleged, an action equally as dishonoring and disgraceful as that alleged under Specification 1 and similarly a violation of Article of War 95 (MCM, 1928, par.151, p.186; CM CBI 47 (1944), III Bull. JAG, p. 238).

c. The court's findings under Specification 3 of the Charge were likewise supported by competent and substantial evidence. Inducing an enlisted man to make a false statement in an official report with intent to deceive is an offense under Article of War 95 (Winthrop's Military Law and Precedents (Reprint, 1920), p.716; CM 227910 (1943), II Bull. JAG, p.13-14).

(62)

7. The charge sheet shows that accused is 30 years of age. He enlisted 10 December 1936 at Fort Thomas, Kentucky; re-enlisted 10 December 1939 at Fort Hayes, Ohio and was commissioned second lieutenant, Infantry, AUS, 4 February 1942 at Fort Hayes, Ohio.

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

9. A sentence of dismissal is mandatory upon conviction of Article of War 95.

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 28 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Captain BERT P. CRADDOCK (O-436994), Service Company, 330th 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. All members of the court, the regimental commander, his executive officer and adjutant, both of whom were prosecution witnesses, the division adjutant, the regimental chaplain, and seven other officers of the regiment have signed recommendations that the sentence be suspended, which are 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 8165 . For convenience of reference please place that number in brackets at the end of the order: (CM ETO 8165).

E. C. McNEIL,
Brigadier General , UnitedStates Army,
Assistant Judge Advocate,General.

Sentence ordered executed. GCMO 150, ETO, 18 May 1945.)

8165

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

BOARD OF REVIEW NO. 1 14 MAR 1945

CM ETO 8166

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private OLIN W. WILLIAMS (34649494), 4194th Quartermaster Service Company	Trial by GCM, convened at Granville, Department of Manche, France, 15 December 1944. Sentence: To be hanged by the neck until dead.

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

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review, 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 92nd Article of War.

Specification 1: In that Private Olin W. Williams, 4194th Quartermaster Service Company did, at Le Chene Daniel, A Cherence Le Heron, France, on or about 0250 hours, 24 September 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Albert Lebocey, a human being by shooting him with a carbine rifle.

Specification 2: In that * * * did, at Le Chene Daniel, A Cherence Le Heron, France, on or about 0250 hours, 24 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Germaine Lebocey.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and both specifications thereunder. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

3. The evidence for the prosecution was, in pertinent summary, as follows:

On 23 September 1944 accused was a member of the 4194th Quartermaster Service Company (R20-21). About 2020 or 2040 hours on that day, he and two other colored American soldiers, all unarmed, came to the house of Albert Lebocey, at Le Chene Daniel, A Cherence Le Heron, France (R5,10,13,16,19). (Accused testified his camp was two miles or more from the house (R36)). With Lebocey lived his wife, Germaine, 44 years of age, and their young daughter (R5). The soldiers demanded cider, but as the cider on the table was not drinkable, they drank cognac which they had with them and helped themselves to coffee (R5,14-15). After about one-half to three-quarters of an hour Madame Lebocey took her daughter upstairs to bed. Hearing steps on the stairs, she descended them partway and accused attempted to grasp her but she eluded him (R6,11,15). She reproached the soldiers because she was frightened and the two soldiers other than accused left the house. She later ejected accused from the house (R6-7,15, 18), and then retired with her husband (R8).

About 0300 hours 24 September accused returned, armed with a carbine, and knocked on the front door (R8,17,19; Pros.Ex.B). Madame Lebocey threw the contents of a chamber pot at him from the window over the door (R8; Pros.Ex.B), whereupon he broke down the door and entered the house. She asked her husband to arise and defend her and, dressed only in a shirt, he preceded her downstairs (R8,17). Accused, standing near the door, fired a shot at Lebocey, who said "'Swine'". Accused then fired a second shot and Lebocey fell to the floor and died either immediately or shortly thereafter (R9,13,17,18,26-27; Pros.Ex.C). One of the shots struck the hour

"X" on a large clock in the room. The clock stopped at 3:50 (R17, 19,23-24; Pros.Ex.A). The occupants of the Lebocey home used French time, but the clock showed American time (two hours in advance of French time)(R16).

Madame Lebocey testified that after shooting her husband, accused threw her upon the floor and grasped her throat. She pushed him away, but he held her by the throat and when she shouted he placed his hand over her mouth. He then "pulled open my thigh" and, as she continued shouting, struck her in the face (R9). Accused then got upon Madame Lebocey and engaged in intercourse with her against her will. He remained upon her about ten minutes and then arose, whereupon she escaped with her daughter (R10). The victim went to her mother's house and thence to accused's camp where she saw a group of soldiers and shouted for help (R11,12). Accused was present at reveille at 0545 or 0600 hours 24 September. He was required to work on the day shift at 0700 hours (R22-23).

The victim was positive at the trial in her identification of accused, who lacked a front tooth, as the soldier who came to her home on one occasion before the night in question (R16-17),came earlier on the evening of 23 September (R10,18) and grasped her on the staircase (R11), and returned about 0300 hours on 24 September, killed her husband and raped her (R10-11). She identified him with certainty and without hesitation at two identification parades on 24 September, one in the working area and one in the company bivouac area (R10,19,21-22,29-31). At the time of the first identification she pointed at accused and said in French "'There he is. It is you who have killed my husband'" (R30). The law member cautioned the court that the quoted statement was admissible only as proof of identification by Madame Lebocey and not as proof of the truth of her statement (R30).

4. a. After an explanation of his rights, accused elected to take the stand in his own behalf. He testified in substance that he was at the house of Madame Lebocey on the evenings of Wednesday (20 September 1944) (R34) and Friday (22 September). He arrived there with two companions on the evening in question (Saturday, 23 September) around 2000 or 2030 hours and they drank cognac of their own and cider and coffee offered them by the Leboceys, who were present with their daughter. All three soldiers left about 2230 hours and returned to their bivouac area, two miles or more from the house. When accused arrived at the area he saw a jeep driver named Barmore. Accused went to the mess hall and thence to his pup tent where he went to sleep . He did nothing with his carbine before the "CID got it" (R35-36), and fired it on only one occasion which was before they moved to the area. The following morning (24 September) he arose about 0530 or 0600 hours and attended reveille. Thereafter he and others turned in their arms and went to work (R37).

b. The following additional testimony was introduced for the defense: Technician Fourth Grade Ozell Baker, cook of accused's company, testified he saw accused in the mess hall or tent about 2230 or 2300 hours 23 September (R38).

Private John T. Barmore, also of accused's company, testified he saw accused in the mess hall about 2330 or 2400 hours 23 September. Accused helped him load chow on a truck, left and went back towards his tent (R39-41).

c. A motion by the defense for a finding of not guilty as to the Charge and specifications (R32) was overruled by the court (R33).

5. a. Specification 1:

Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par.148a, pp.162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (1 Wharton's Criminal Law, 12th Ed., sec.426, pp.654-655), and an intent to kill may be inferred from an act of the accused which manifests a reckless disregard of human life (40 CJS, sec.44, p.905, sec.79b, pp.943-944).

The evidence shows that after the earlier unsuccessful visit to the Lebocey home on the evening in question accused, whose identity was firmly established, returned to his bivouac area two miles away, secured his carbine and went again to the house. Then followed accused's deliberate, purposeful, cold-blooded shooting of Albert Lebocey, with the aim of eliminating him as his wife's protector and thus as a potential interferer in accused's plan to secure intercourse with the woman. The record fully supports the findings of guilty of murder (CM ETO 5584, Yancy, and authorities there cited).

b. Specification 2:

Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration of her genitals is sufficient carnal knowledge, whether emission occurs or not. The force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM, 1928, par.148b, p.165).

The evidence shows that after eliminating threats of interference from her husband by shooting him, accused threw himself upon

Madame Germaine Lebocey, struggled with her, held her throat, attempted to stifle her cries, struck her, mounted her and engaged in intercourse with her against her will. Her testimony is clear and convincing and is not disturbed by the attempted alibi evidence introduced by the defense, which utterly fails to account for accused's whereabouts or actions at the time of the offenses and for a considerable period before and after the same. The record fully sustains the findings of guilty of rape (CM ETO 5584, Yancy; CM ETO 7252, Pearson and Jones; and authorities cited in those cases).

c. The issue of accused's identity as the slayer and rapist raised by his testimony denying his presence at the time and place of the offenses was determined against him by the court. In view of the strong evidence in support of such determination the same will not be disturbed by the Board of Review upon appellate review (CM ETO 3832, Bernard W. Smith).

6. The charge sheet shows that accused is 23 years of age and was inducted 20 March 1943. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

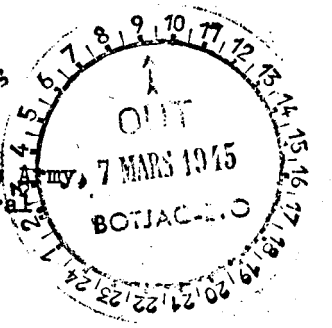
War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private OLIN W. WILLIAMS (34649494), 4194th Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 8166. For convenience of reference, please place that number in brackets at the end of the order : (CM ETO 8166).

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

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



1 Incl:
Record of Trial.

(Sentence ordered Executed. GCMO 85, ETO, 24 Mar 1945.)

8166

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

BOARD OF REVIEW NO. 2

CM ETO 8171

18 MAY 1945

U N I T E D S T A T E S	45TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 45, U. S. Army, 13 February 1945.
Private JOHN RUSSO (20204297), Headquarters Company, 645th Tank Destroyer Battalion	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private John Russo, Headquarters Company, 645th Tank Destroyer Battalion, did at or near Naples, Italy, on or about 8 August 1944, desert the service of the United States, by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: Combat operations against elements of the German Army, and did remain absent in desertion until he returned to military control on or about 21 August 1944.

Specification 2: In that * * * did at or near Naples, Italy, on or about 21 August 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: Combat operations against elements of the German army, and did remain absent in desertion until he returned to military control on or about 16 January 1945.

He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty "of the specification and the charge". No evidence of previous convictions was introduced. All of themembers 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 only so much of the findings of guilty of desertion from 8 August 1944 to 12 August 1944, 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 establishes that on 8 August 1944 accused was a member of Headquarters Company, 645th Tank Destroyer Battalion, which organization was located at Naples, Italy (R4,6,10). Together with the men of his company accused was aboard a Liberty ship which was anchored in the Naples harbor. All the personnel aboard had been issued extra equipment preparatory for an amphibious landing. Vehicles loaded thereon were waterproofed (R5). The company commander, who happened to see accused aboard ship on 8 August 1944, specifically told him "not to leave the ship" (R4,5). At a roll call held on deck sometime during the day accused was missing. A search was made for him but he was "nowhere to be found" (R4,5). He had no permission or authority to be absent (R5). Thereafter the ship sailed from Naples and landed on the shores of Southern France. Accused was not present with his company and did not participate in the invasion of Southern France (R5). There was received in evidence, without objection by the defense, an extract copy

of the morning report of Headquarters Company, 645th Tank Destroyer Battalion, showing accused absent without leave on 8 August 1944 (R3; Pros.Ex.A). It was stipulated by and between the defense, with the expressed consent of the accused, that his return to military control occurred on the 12th day of August 1944, following his apprehension by a member of the military police at Salerno, Italy (R6).

On 21 August 1944 accused was being held at the Peninsula Base Section Stockade located between Naples and Aversa, Italy (R7). First Lieutenant Vernon S. Smeltzer, the Executive Officer of Headquarters Company, 645th Tank Destroyer Battalion, signed a release for accused and took him back to a rear echelon area, near Giuliano. He was placed in arrest in quarters and instructed not to leave the area (R7). The lieutenant told him that a group of men were being sent to Southern France to rejoin their organizations and that he was "going to send him out then" (R7). The rear echelon remained in this area "a matter of a couple of weeks" after which it sailed for France. During this time accused's restriction was not lifted and no permission was given him to leave the area of the company rear echelon. However, he absented himself and did not accompany the members of his company in this movement (R8,10). Subsequent to their arrival in France the organization engaged in combat with the enemy (R9). Accused did not participate in this action and was not present with the company at any time between 22 August 1944 and 16 January 1945 (R9,10,11). He voluntarily returned to his organization on the latter date at Phalzburg, Alsace, France (R11). The extract copy of the morning report introduced in evidence, without objection by the defense, contains a second entry showing accused absent without leave from 22 August 1944 until 15 January 1945 (R3; Pros.Ex.A).

4. The accused after his rights as a witness were fully explained to him elected to remain silent and no evidence was introduced in his behalf (R12).

5. Competent uncontradicted evidence established that accused absented himself without proper leave from his organization on 8 August 1944 and that he remained in unauthorized absence until 12 August 1944 when he was returned to military control following apprehension by the military police. On or about 21 August 1944 he again absented himself

without leave and remained absent until he voluntarily returned to his company on 16 January 1945. At the time of his first absence accused and the members of his company were aboard a Liberty ship anchored in the harbor of Naples, Italy. Waterproofed vehicles were loaded on the ship and the men had been issued extra equipment, all of which indicated preparation for an amphibious operation against the enemy. An important mission was imminent and accused was specifically told that he was not to leave the ship. However, at a roll call held that day he was missing and could not be found. Thereafter, the ship sailed and accused's company made an amphibious landing on the shores of Southern France. It is a well-known historical fact, of which the court and the Board of Review may take judicial notice, that the first American troops participating in the invasion of Southern France, landed on 15 August 1944 (CM ETO 7148, Giombetti). The court was justified in finding that accused quit his organization with intent to avoid combat operations against the enemy.

At the time accused absented himself on the second occasion, he was under restriction at a rear echelon post in Italy awaiting orders for shipment to rejoin his organization then fighting in the south of France. He was specifically informed of the fact that he was going to be sent to France and was instructed to remain in the company area pending further instructions. He had full knowledge therefore of his impending shipment for the purpose of rejoining his organization in combat. His second unauthorized absence resulted in accused again avoiding the hazard of combat against the enemy. His organization made the landing in Southern France and was in action against the enemy. Under such circumstances, the court was fully justified in finding that on each occasion accused knew that action against the enemy was impending and that he deliberately absented himself without authority and with the specific intent of avoiding hazardous duty as such term is defined and denounced by Articles of War 28-58. The offenses of desertion are thus completely established (CM ETO 4743, Gotschall; CM ETO 6093, Ingersoll; CM ETO 6177, Transeau; CM ETO 7153, Steitz; CM ETO 7230, Magnanti).

6. The charge sheet shows that accused is 24 years of age and enlisted on 20 November 1939 at Brooklyn, New York. No prior service is shown.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1 27 JUN 1945

CM ETO 8172

U N I T E D S T A T E S	45TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 45, U. S. Army, 8 February 1945.
Private BRUCE ST. DENNIS (12081085), Company G, 180th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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 Bruce St. Dennis, Jr., Company G, 180th Infantry, did at or near Ambreau, France, on or about 31 August 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat operations against elements of the German Armed Forces, and did remain absent in desertion until he surrendered himself at or near Wimmenau, France, on or about 22 January 1945.

8172

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 12 days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the findings of guilty of the Specification as involved a finding that accused did, at or near Ambreau, France, on or about 31 August 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat operations against elements of the German Armed Forces, and did remain absent in desertion until he returned to military control at or near Bourg, France, on or about 24 December 1944, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence established the following facts:

Accused's organization, Company G, 180th Infantry, landed on the shore of southern France on "D Day", - 15 August 1944 (CM ETO 1548, Giombetti) (R5). Accused was present with his organization when it landed and was with it as it campaigned northward up the Rhone River valley in pursuit of the enemy (R5,8; Pros.Ex.B). The advance was made with rapidity (R6). On 31 August 1944 his platoon reached Ambreau - a town not far from Bourg (R4). It acted as guard of a road block - a concrete bridge over the river Rhone. Prior to reaching the bridge the company had fought a minor engagement with the enemy at a bivouac area (R5). Accused was on guard at the bridge during the morning, but when the time arrived for him to take the afternoon relief he was not present with the platoon (R5). An extract copy

of the morning report of the company which was introduced in evidence by the prosecution without objection (R3; Pros. Ex.A) showed the accused was absent without leave on 31 August 1944.

In a voluntary extrajudicial statement (R6; Pros. Ex.B) accused stated in pertinent part as follows:

> "I came in on D-day to France and was with my organization until I went AWOL in September. We had a road block on a bridge over the Rhone River. When the organization moved out, I stayed behind. They moved out toward Bourg. I was just afraid to go up. I have seen plenty of boys torn up and I did not want to get it. I stayed there about a week and then went to Lyon. I spent most of my absence touring southern France. I slept with a woman almost every night. When I was gone about a month, I decided to turn in. But I saw what was going on. There was a lot of Divisions down there and they were not doing anything. I decided that I was going to have it as soft as they were having it. I did realize that I was in trouble and I planned on returning in February. I was going to have papers fixed up to marry the girl and she wanted me to stay until February. She was with me about all the time during my absence. I was having a pretty good time. I was picked up by the Military Police in Bourg on 24 December 1944 and have been in military control since that time. I would have been in military control since that time. I would be willing to go back up to the lines, but I cannot soldier in Co. G anymore because of my wrongs. I would like to get transferred to another regiment. I have not been back up with my company and I have never been ordered back up" (Pros.Ex.B).

At four pm on 1 September 1944 accused's platoon advanced from the bridge on a motorized patrol in order to contact the enemy, but it was not found on that day (R6).

4. Accused elected to be sworn as a witness on his own behalf (R9). He testified that he informed Captain Washburn, Regimental S-1, that he wanted to go back to the

lines and assured him he would stay there. Accused asserted in court:

> "I want to go back up there and I think I could make a pretty good soldier" (R10).

5. The facts of this case form the same general pattern as those of CM ETO 5079, Powers, and CM ETO 12044, May, Sr. In neither of the cited cases did the evidence show that accused's organization was under orders or anticipated order involving hazardous duty of an immediate, definite and specific nature but it did prove that each accused was

> "awaiting orders to perform such duties for the company as might be required in the course of an advance against the enemy that was then in progress" (Powers case),

and in each case the inference was clear that the accused knew that continuous hazardous duties lay ahead, as part of the operations involved in pursuing the fleeing German soldiers across France in the summer of 1944 (see also CM ETO 7339, Conklin;and CM ETO 8300, Paxson).

In the instant case accused had with his company made the amphibious landing on the shores of southern France in mid-August and thereafter pursued the enemy as it fled northward up the valley of the River Rhone. It was an operation of continuous and rapid movement involving perils and hazards which were obvious to all who participated in the pursuit. A temporary halt was made at the crossing of the Rhone near Ambreau, where accused's platoon acted as guards to a road block formed by a bridge. In his statement accused clearly demonstrated that he knew that the perils and hazards of battle were to be met in the immediate future:

> "When the orgahization moved out I stayed behind. They moved out toward Bourg. I have seen plenty of boys torn up and I did not want to get it" (Pros.Ex.B).

When he left the platoon without authority, he sought therefore to avoid the perils and hazards which he knew existed as part of the process of pursuing the enemy. The prosecution was not required to prove that certain definite, specific hazards were immediately in prospect and that accused was cognizant of same. It sufficed if the evidence showed that accused was a member of and present with an organization which was engaged in a military mission where the hazards of death and bodily injury or of imprisonment would be involved in the usual course of events and that accused knew that these undisclosed perils awaited him and it was these perils he sought to avoid.

It would be a frustration of the purpose of Articles of War 58 and 28 if under the circumstances here disclosed the prosecution was required to prove that particular and specific hazards immediately awaited accused's organization in the performance of its prescribed mission and that accused had knowledge of the same. The statute does not require such restricted interpretation. Article of War 28 denounces absence without leave "to avoid hazardous duty". If the prosecution proves that accused was engaged in the performance of a duty where these hazards - although the time and place of their occurrence or existence were unknown when an accused left his organization - existed and that by course of prior events or as a result thereof he must have known of their future existence the burden of proof is sustained by the prosecution. The Board of Review is satisfied that the situation thus described is well within the ambit of the battlefield desertion cases decided by it (CM ETO 5565, Fendorak; and authorities cited in paragraph 5 (d) of CM ETO 5958, Perry and Allen). In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty.

6. The charge sheet shows that accused is 21 years of age and enlisted 25 May 1942. His service period is governed by the Service Extension Act of 1941. No prior service is shown.

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

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

14 MAY 1945

CM ETO 8181

U N I T E D S T A T E S	95TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 95, U. S. Army, 16, 17 January 1945.
Private BERNARD E. ANDRESKI (7032841), Company I, 378th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Bernard E. Andreski, Company "I", 378th Infantry, did, at or near Alt Forweiler, Germany, on or about 2 December 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: Engage in combat with the enemy in his capacity as rifleman, and did remain absent in desertion until he surrendered himself at Hayes, France, on or about 21 December 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for failure to obey an order to stay out of French villages and attempting to deceive military police concerning his organization and identity in violation of the 96th Article of War. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 95th Infantry Division, approved the sentence and forwarded the record of trial "under the provisions of Article of War 50½". (The Board of Review treats the record as having been forwarded to the confirming authority for action under Article of War 48). The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but owing to special circumstances in the case commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the 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. Accused left his company at a time when it was under artillery fire and in close contact with the enemy located in the same town. Further assault on the German lines was imminent, a fact understood throughout the company. He left with permission to go to an aid station, but did not report there. While within range of enemy fire, he was ordered by an officer to return to his company and disobeyed that order. He remained in rear areas for 19 days and then surrendered 30 miles behind the lines. During this period, there was hard action with heavy casualties. Such conduct was a cowardly avoidance of his duty to his country and his comrades. From these facts, the court could properly infer that he absented himself without leave with intent to avoid hazardous duty, which makes the case desertion under the 28th and 58th Articles of War (CM ETO 4165, Fecica; CM ETO 1664, Wilson; CM ETO 1404, Stack; CM ETO 105, Fowler).

4. The charge sheet shows that accused is 23 years and four months of age and enlisted 25 June 1940 at Detroit, Michigan, to serve for three years plus 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 as commuted.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

8181

(86)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private BERNARD E. ANDREWSKI (7032841), Company I, 378th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 8181. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 8181).

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

(Sentence as commuted ordered executed. GCMO 177, ETO, 26 May 1945.)

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

BOARD OF REVIEW NO. 1

15 MAY 1945

CM ETO 8185

U N I T E D S T A T E S	)	95TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 95, U. S. Army, 24 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private WALTER STACHURA (36648248), Company L, 377th Infantry	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Walter (NMI) Stachura, Company L, 377th Infantry did, at Beaumarais, Germany, on or about 4 December 1944, desert the service of the United States by absenting himself without

(88)

proper leave from his organization with intent to avoid hazardous duty, to wit: combat against an armed enemy, and did remain absent in desertion until he was apprehended at Nancy, France, on or about 31 December 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification except the words "he was apprehended at Nancy, France", of the excepted words not guilty, and guilty of the Charge. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 95th Infantry Division, approved the sentence and forwarded the record of trial "under the provisions of Article of War 50½". (The record is treated by the Board of Review as having been forwarded to the confirming authority for action under Article of War 48). The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but, owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence

8185

pursuant to Article of War 50½.

3. At about 1430 hours on 4 December 1944 accused, who was assigned as an ammunition bearer in a mortar section of the weapons platoon, Company L, 377th Infantry, reported to this company at Beaumarais, Germany, after being hospitalized for three days on account of a head injury. He was ordered to hurry, get his equipment, bring it back with him and report to his squad. Sniper, machine gun, and long range artillery fire was constantly falling while the company was in Beaumarais on that day. The company had been engaged in combat with the enemy from 10 November to 1 December 1944. On the afternoon of 4 December 1944, between 1500 and 1530 hours, the company commander received an order that the company was to be ready to move out on a five-minute notice, and passed the order on to the platoon sergeants and platoon leaders. At about 1630 hours accused's section sergeant announced the order to the men of the section assembled in two rooms. Although the sergeant would not swear that accused was in one of these rooms at the time of the announcement, he did see accused there about a half hour before and a half hour after the announcement. At 1730 hours the company moved out from Beaumarais to the southwestern fringe of Saarlautern,

Germany, being under artillery fire practically all the way. Accused did not move out with the company. The evidence is clear and undisputed that accused was absent from his organization from 4 December 1944 to 31 December 1944 and that he had no permission to be absent during that period. It was a question of fact for the court whether, at the time his absence began, accused possessed knowledge of the immediate prospective movement of his company and had the intent to avoid such hazardous duty. Its determination that he then had this intent is supported by substantial evidence (CM ETO 7189, Hendershot, and authorities therein cited).

4. The charge sheet shows that accused is 20 years of age andwas inducted 6 March 1943 to serve for the duration of the war and six months. No prior service is shown.

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

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

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

C. Franklin Nutter Judge Advocate

Wm. F. Sorrow 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. 15 MAY 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army

1. In the case of Private WALTER STACHURA (36648246), Company L, 377th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 8185. For convenience of reference, please place that number in brackets at the end of the order (CM ETO 8185).

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

Sentence as commuted ordered executed. GCMO 184, ETO, 27 May 1945.)

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

BOARD OF REVIEW NO. 1

27 APR 1945

CM ETO 8187

U N I T E D S T A T E S	103RD INFANTRY DIVISION
v.	Trial by GCM, convened at APO 470, U. S. Army, 25 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class CARSTON CHAPPELL (34032464), Headquarters Company, 410th Infantry	

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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. Substantial evidence in the record of trial clearly established the larceny by accused of 5500 French francs and 400 German marks.

The primary question presented involves the process of determining the valuation of the stolen currency in terms of United States dollars. Although the usual measure of value in larceny cases is market value at the time and place of the theft (Underhill's Criminal Evidence (4th Ed. 1935) sec.513, pp.1039-1040; 36 CJ sec.229, p.801), rigid application of said rule is not feasible in the instant case since there is no legitimate market for francs or German marks in terms of dollars (Cf: CM ETO 5539, Hufendick). Although it is common knowledge that a dollar will bring upwards of 100 francs in "black market" transactions, the only legitimate rate of exchange of French francs for American dollars is on the basis of 49.5663 francs for one dollar, as set forth in War Department Circular No. 364, 8 September 1944 and Finance Circular No. 80, Office of The Fiscal Director, Headquarters European Theater of Operations, 22 January 1945. This rate is not of

8187

limited application i.e., to be used solely in connection with the payment in francs of United States forces serving in France, but is the official rate of exchange between the two governments for all transactions necessitating an exchange between the two currencies. Based on this official rate accused could have obtained from any Army Finance Officer over $110.00 in American currency for the 5500 stolen francs.

In CM ETO 6217, Barkus, the Board of Review held that a radio valued at 3500 francs was property "of some value not in excess of $50.00". The Barkus case is distinguishable from the instant case in that valuation of property can be made directly in terms of dollars and the franc-dollar rate of exchange need not be taken into consideration. When the larceny is of French currency, the official rate of exchange must be applied.

3. Accused also stole 400 German marks, including 300 marks in 100-mark notes (R20-21). No general exchange rate has been established between the Reichsmark or Allied Military Mark and the dollar. However, a provisional basis of 10 marks to the dollar is being used for purposes of calculating troop pay (Joint United States Treasury and War Dept. Press Release, 3 Oct. 1944; Finance Cir. No. 80, supra, p.9). There is no legitimate market for the exchange of German marks into Allied currencies.

Although the record of trial is devoid of direct evidence on the point, it appears almost certain that the 400 marks taken from the civilian were not Allied Military Marks. Under existing regulations in the European Theater of Operations, Army Finance Officers can accept indigenous German currency only in amounts not in excess of a value of approximately 50 marks (Finance Cir. No.80, supra, p.26). Despite the fact that accused would have found it impossible to dispose of the three 100-mark notes through legitimate channels, the marks had real value to the civilian from whom they were stolen. It is arguable that calculated in terms of real purchasing power, the value of the mark is in excess of 10 cents, but this is offset by the fact that the value of the mark is being adversely affected by the continuous defeats, administered to the Army of the Third Reich by the Allied forces, accompanied by such events as the capture of a substantial part of the German gold reserves (The Stars and Stripes (Paris Ed.), Vol. 1, No.255, Sunday 8 April 1945). In view of the myriad factors that must be considered in any valuation of the mark in terms of dollars, the Board of Review is of the opinion that the best interests of justice are served by the application of the provisional rate of 10 marks to one dollar, a rate determined after deliberation by the agencies of the United States Government charged with such decisions.

4. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substnatial rights of accused were committed during the trial. The Board

8187

of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2

2 JUN 1945

CM ETO 8189

UNITED STATES	)	71ST INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO
	)	360, U. S. Army, 24 February
Private JOSEPH E. RITTS (37480486),	)	1945. Sentences: Dishonorable
Company C, and Private JAMES L.	)	discharge, total forfeitures
FRENCH (38469501), Company D, both	)	and confinement at hard labor,
of 371st Medical Battalion.	)	RITTS for life, and FRENCH for
	)	15 years. Eastern Branch,
	)	United States Disciplinary
	)	Barracks, Greenhaven, New York.

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

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

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

RITTS

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

Specification: In that Private Joseph E. Ritts, Company C, 371st Medical Battalion, did, without proper leave, absent himself from his station at Tactical position Company C, 371st Medical Battalion, APO 360 c/o Postmaster New York, New York, from about 1500, 11 February 1945 to about 2100, 11 February 1945.

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

Specification: In that * * * did, at Tactical

CONFIDENTIAL

8189

(98)

Position Company C, 371st Medical Battalion, APO 360 c/o Postmaster New York, New York, on or about 11 February 1945, behave himself with disrespect toward First Lieutenant Reid C. Giese, his superior officer, by saying to him, "I don't think my fucking pants are a mess and I don't think that I have to say a damn thing to you, and shit I think you are a liar" or words to that effect.

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

Specification: In that * * * did, at Doudeville, France, on or about 11 February 1945, strike Elmer G. Schaertel, Captain, his superior officer, who was then in the execution of his office, on the face with his fist.

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

Specification 1: In that * * * did, at Doudeville, France, on or about 11 February 1945, with intent to do him bodily harm, commit an assault upon Private Earl S. McRoberts, Company C, 371st Medical Battalion, by willfully and feloniously striking the said Private Earl S. McRoberts on the face, neck and chest with his fist.

Specification 2: In that * * * did, at Doudeville, France, on or about 11 February 1945, with intent to do him bodily harm, commit an assault upon Private Pasquale M. Salvagna, Company A, 371st Medical Battalion, by willfully and feloniously striking the said Private Pasquale M. Salvagna on the face with his fist.

Specification 3: In that * * * did, at Doudeville, France, on or about 11 February 1945, with intent to do him bodily harm, commit an assault upon Private First Class Charles W. Gillette, Company A, 371st Medical Battalion, by willfully and feloniously striking the said Private First Class Charles W. Gillette on the face with his fist.

Specification 4: In that * * * did, at Doudeville, France, on or about 11 February 1945, with intent to do him bodily harm, commit an assault

upon Private First Class John T. Gauletier, Company A, 371st Medical Battalion, by willfully and feloniously striking the said Private First Class John T. Gauletier on the face with his fists.

Specification 5: In that * * * did, at Doudeville France, on or about 11 February 1945, with intent to do him bodily harm, commit an assault upon Private James E. Oliver, Company B, 371st Medical Battalion, by willfully and feloniously striking the said Private James E. Oliver on the face with his fist.

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

Specification: In that * * * having received a lawful order from Captain Wesley N. Wasgatt, Medical Corps, to stand at attention while being questioned, the said Captain Wesley N. Wasgatt being in the execution of his office, did, at Tactical Position Company C, 371st Medical Battalion, APO 360, on or about 11 February 1945, fail to obey the same.

FRENCH

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

Specification: In that Private James L. French, Company D, 371st Medical Battalion, did, without proper leave, absent himself from his station at Tactical Position Company D, 371st Medical Battalion, APO 360 c/o Postmaster, New York, from about 1700, 11 February 1945 to about 2000, 11 February 1945.

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

Specification 1, 3, 4, 5 are identical with Specifications 1, 3,4,5 of Charge IV against accused Ritts except for the substitution of the name and company of accused French.

Specification 2: Nolle prosequi.

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

Specification: In that * * * having been restricted to the limits of the Company Area, did, at Tactical Position Company D, 371st Medical Battalion,

APO 360 c/o Postmaster New York on or about 1700 11 February 1945, break said restriction by going to Doudeville, France.

Each accused pleaded not guilty, and two-thirds of the members of the court present when each vote was taken concurring, each was found guilty of all charges and specifications preferred against him. A nolle prosequi was entered as to Specification 2 of Charge II preferred against French. Evidence was introduced against Ritts of two previous convictions by special court-martial, one for taking and using a government vehicle without authority, and the other for breaking restriction, assault and battery and wrongful possession of another soldier's pass, all in violation of Article of War 96; and against French, of four previous convictions, two by summary court-martial for absences without leave for one and three days respectively in violation of Article of War 61, and two by special court-martial, one for using a government vehicle without authority in violation of Article of War 96, and the other for absence without leave for two days in violation of Article of War 61. Three-fourths of the members of the court present when each vote was taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, Ritts for the term of his natural life, and French for 15 years. The reviewing authority approved each 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. a. There was ample evidence to prove absence without leave as alleged against accused Ritts (R18,19,21; Ex.1) and accused French (R10,13,14,16; Exs.1,2).

b. The prosecution adequately proved breach of restriction by accused French at the time and place alleged (R7,8,9,11).

c. The prosecution likewise proved that accused Ritts behaved himself with disrespect toward his superior officer by using language substantially as alleged (R19,20,22,24,25). The elements of the offense were clearly established (AW 63; MCM, 1928, par.133, p.147).

d. Accused Ritts' failure to obey the order of Captain Wasgatt to stand at attention while being questioned at the time and place alleged, was abundantly proved. The order was repeated three times. The first two times he merely made no attempt to comply. The third time he not only failed to obey but also remarked, "Fuck it, go ahead and ask me what you want to" (R20,22,25,55).

e. Captain Elmer G. Schaertel, Chaplain of the 371st Medical Battalion, was attending a moving picture in Doudeville, France, on the evening of 11 February 1945. He was sitting in the front part of the theater. During an intermission there was a commotion several rows back. The Chaplain turned around and saw accused Ritts fighting with another soldier. He walked back and ordered them to stop. The other soldier obeyed but accused went up to the Chaplain menacingly. The Chaplain told him to sit down but he persisted in his menacing attitude. The Chaplain then said to him, "Sit down or I will call the MPs". When he refused to comply, the Chaplain asked him, "Do you know who I am?" and accused replied, "Yes, I know you, you're the Captain", or he may have said, "Chaplain". The officer was wearing his captain's and chaplain's insignia and a sweater. He pulled down the sweater to make sure that accused saw the insignia and was not mistaken about his identity. Accused said, "Yes, I know who you are", but still refused to sit down. The Chaplain then turned to his clerk and directed him to get the military police. Accused thereupon struck the Chaplain in the face. The Chaplain saw the "blow coming and turned with it and id didn't do much damage". Accused then ran out of the theater (R27,28).

It was clearly proved that accused Ritts struck Chaplain Schaertel, a captain, on the face as alleged, that the Chaplain was accused's superior officer at the time, and that he was then in the execution of his office. These facts establish a violation of Article of War 64 (MCM, 1928, par.134a, p.148). As an officer, the Chaplain had power to quell quarrels, frays and disorders among persons subject to military law. He was therefore in the execution of his office when he ordered accused to stop fighting and to sit down (AW 68).

f. The alleged violations of Article of War 93 present the problem of the legal sufficiency of the evidence to establish the intent to do bodily harm. The prosecution proved that Ritts struck Private Earl S. McRoberts several times about the face with his fist, and that French struck the same soldier twice with his fist. McRoberts was standing in the street with some other soldiers when he was attacked (R30,31,33,35). Private First Class Charles W. Gillette was standing in the street and was about to read a booklet he had in his hands when French came up to him saying, "Here is a man who snitched on me at a court-martial". Ritts thereupon hit Gillette on the nose with his fist several times. After Ritts had finished, French punched Gillette two or three times on the neck and nose. As a result of these blows Gillette sustained a nosebleed. He had never been a witness against French (R38,39,41,43). Private First Class John T. Gauletier, who was with Gillette, asked what the trouble was. Ritts said, "Do you want to know what the trouble is?" and thereupon struck Gauletier in the left side of the neck with the side of his hand. French held Ritts back and he in turn struck Gauletier on the front of the head with his fist (R41,43,47). Private

First Class Pasquale M. Salvagna was asked by Ritts, "Do you want it too?" and Salvagna said, "No". Ritts nevertheless hit him on the nose (R47). French saw Private James E. Oliver and said that "there was a fellow he wanted to whip", and started after him. Oliver told French he did not want any trouble, but French hit him once. Oliver ran up the street and Ritts and another soldier chased him. He stopped when told to do so by Ritts who then went up to him and struck him. French and the third soldier joined Ritts and the three hit Oliver. Ritts struck him over the eyes an unknown number of times. Oliver finally got away from them and fled (R49,50,52). These incidents occurred on the streets of Doudeville in the evening of 11 February 1945 while it was still daylight. All of the soldiers accused are charged with assaulting are members of the same organization with accused. There was no provocation or apparent reason for any of these assaults. Although other soldiers were present, none attempted to restrain or subdue either accused. While the evidence indicates that both accused were to some extent under the influence of intoxicating liquor on the evening they committed these assaults and the other offenses, the evidence is also clear that they were not so drunk as not to know what they were doing (R11,15,16,17,20,22,25, 28,29,45,48,51). Their actions indicated that they possessed effective muscular control and co-ordination.

Except for the nosebleed suffered by Gillette the record does not show that the blows caused any injuries. None of the victims was knocked down. The record is entirely silent on the force with which the blows were struck. It must be concluded that the evidence proved only assault and battery on each of the persons named in the specifications and was insufficient to prove that any of the assaults was committed with the requisite specific intent to do bodily harm. A nosebleed of unknown severity, without more, is insufficient to prove that the blow or blows with the fist that caused it were struck with such force as to justify the inference that they were struck with intent to do bodily harm (CM 229366, II Bull. JAG 99; CM ETO 1177, Combess; CM ETO 1690, Armijo; CM 238970, Hendley, 25 B.R. 1). In the opinion of the Board of Review the evidence is legally insufficient to sustain a conviction of either accused of assault with intent to do bodily harm in violation of Article of War 93, but legally sufficient to support findings of guilty against each accused of the lesser included offense of assault and battery in violation of Article of War 96 as to each specification under Charge IV (Ritts) and as to each specification (except Specification 2 which was nolle prossed) under Charge II (French).

4. The charge sheets show that accused Ritts is 20 years of age and was inducted 22 May 1943 at Fort Cook, Nebraska, and that accused French is 26 years of age and was inducted 5 May 1943 at Fort Sill, Oklahoma. Neither had prior service.

5. The court was legally constituted and had jurisdiction of the persons and offenses. Except as herein specifically noted, no errors injuriously affecting the substantial rights of either accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 1, 2, 3, 4, and 5 of Charge IV against accused Ritts, and Specifications 1, 3, 4, and 5 of Charge II against accused French as involves findings of guilty as to each specification of assault and battery in violation of Article of War 96, and legally sufficient to support the findings of guilty of the remaining charges and specifications and the sentences.

6. The penalty for striking a superior officer who is in the execution of his office is death or such other punishment as a court-martial may direct (AW 64). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1 3 MAY 1945

CM ETO 8234

U N I T E D S T A T E S v. Sergeant MEREL A. YOUNG (42052111), Technician Fourth Grade LEONARD J. FRENCH (38546054), Private First Class THOMAS G. HARPER (36773972), and Privates EDWARD N. WAGNER (17157863) and FRED C. JONES (35846966), all of Company C, 716th Railway Operating Battalion)	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Paris, France, 11 January 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor: YOUNG for 45 years; FRENCH, HARPER, WAGNER and JONES, each for 40 years. Place of confinement not designated.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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 jointly tried upon the following Charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Sergeant Merel A. Young, Private Edward N. Wagner, Technician Fourth Grade Leonard J. French, Private Fred C. Jones, and Private First Class Thomas G. Harper, all members of Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Dreux, France, and at or near Paris, and at various and sundry places between said places, between 1 September 1944 and 30 November 1944, jointly and in con-

CONFIDENTIAL

8234

(106)

junction with each other and other members of the 716th Railway Operating Battalion and other operating personnel, agree and conspire to defraud the United States through pillaging, division of spoils, and mutual inaction against pillaging by each other, through wrongful conversion to their own joint and several purposes and profit, of military supplies and equipment, the property of the United States in the possession and custody of military agencies, furnished and intended for the military service thereof, while such supplies and equipment were enroute to military forces engaging the enemy and other military forces of the United States, during a critical combat period in the theater of active military operations; and pursuant thereto, did, at divers times and places as herein alleged wrongfully divert such supplies and equipment from the military purposes for which such supplies were intended, to their own purpose of personal profit. (As amended at trial)

Specification 2: In that Sergeant Merel A. Young, Technician Fourth Grade Leonard J. French, Private Fred C. Jones and Private First Class Thomas G. Harper, all members of Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, jointly and in the execution of a conspiracy previously entered into between themselves, at or near Dreux, France, between 1 September 1944 and 30 November 1944, wrongfully dispose of four hundred (400) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces, during a critical period of combat operations.

Specification 3: In that Sergeant Merel A. Young, TechnicianFourth Grade Leonard J. French, Private Edward N. Wagner, and Private First Class Thomas G. Harper, all members of Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, jointly and in the execution of a conspiracy previously entered into between themselves, at or near Paris, France, between 1 October 1944

8234

and 30 November 1944, wrongfully dispose of two thousand (2,000) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces, during a critical period of combat operations.

Specification 4: In that Private Edward N. Wagner, Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at Paris, France, on or about 15 September 1944, wrongfully dispose of five hundred (500) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces, during a critical period of combat operations.

Specification 5: In that Sergeant Merel A. Young, Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at Paris, France, between 1 September 1944 and 30 September 1944, wrongfully dispose of two hundred (200) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to of a shortage in cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces, during a critical period of combat operations.

Specification 6: In that Private Fred C. Jones, Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, between Dreux, France and Paris, France, on or about 1 October 1944, wrongfully dispose of two hundred (200) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces, during a critical period of combat operations.

Specification 7: In that Private Fred C. Jones, Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, between Dreux, France, and Paris, France, on or about 7 October 1944, wrongfully dispose of two hundred (200) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces, during a critical period of combat operations.

Each accused pleaded not guilty. Three-fourths of the members of the court present at the times the votes were taken concurring, all accused were found guilty of the Charge; accused Young was found guilty of Specifications 1, 2, 3 and 5; accused French and Harper were found guilty of Specifications 1, 2 and 3; accused Wagner was found guilty of Specifications 1, 3 and 4; and accused Jones was found guilty of Specifications 1, 2, 6 and 7. No evidence of previous convictions was introduced as to any accused. Three-fourths of the members of the court present at the times the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, Young for 45 years and French, Harper, Wagner and Jones each for 40 years. The reviewing authority approved each of the sentences, but did not designate any place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution summarizes as follows:

On 28 August 1944 an order was issued by Headquarters, Transportation Corps, 2nd Military Railway Service, which assigned the 716th Railway Operating Battalion to the mission of operating and maintaining the military railroad of the United States in France from Chartres as far eastward in the direction of advancing military forces as conditions and circumstances would permit (R16). On 15 September 1944, the battalion was ordered to operate and maintain military railways from Dreux to Versailles and from Versailles to Maintenon with headquarters at Dreux. On 18 September the battalion was directed to operate and maintain military railways from Dreux to and including Paris and on 23 October the following additional territory was added to the battalion's jurisdiction: east switch Dreux to last connecting switch east of Valeton and from Matelot Yards to last connecting track switch east and north of Batignolles

Yards. Immediately after the issuance of said orders the battalion entered upon the performance of the duties required thereby. The battalion was charged with furnishing personnel for actual operations of trains and maintenance of tracks, road bed and equipment. It was customary to charge one company with the duty of operation of trains, another company with the responsibility of maintenance of tracks and road bed and another with the task of maintenance of equipment (R16-17).

Sometime prior to 12 September 1944 there was established in Paris, France, Quartermaster Depot Q-177 which warehoused and distributed practically all the food and Post Exchange supplies to troops in Paris and the surrounding area. It also shipped large quantities of subsistence rations and Post Exchange supplies to Reims, Liege and other places for distribution to combat troops at the front. During a period in October and November 1944 it furnished rations directly to Advance Section, Communications Zone, and First and Third United States Armies. This merchandise was received from the continental United States at Cherbourg, Rouen and railheads which served the beaches in that area and was shipped by railroad via Dreux, Versailles and Paris to Depot Q-177. Post Exchange supplies included cigarettes, chocolate, candy, smoking tobacco, toilet accessories and other articles usually sold in Post Exchanges. Such supplies were at that stage of handling and distribution property of the United States. Included in the food handled, stored and distributed by Depot Q-177 were "10 in 1" rations. Such rations were packed in cases. Each case included food sufficient to feed ten men for one day and also cigarettes and soluble coffee. A case (or box) of cigarettes contained fifty cartons or 500 packs (R18-20). Ration Accessory (RAC) Kits were also part of the merchandise handled (R18,19). Each kit contained cigarettes, razor blades, razor, smoking tobacco, chewing tobacco, chewing gum, soap, toothpaste, toothbrush (R21). There were 20 cartons of cigarettes or 200 packs of cigarettes in a kit (R20).

From 12 September to 30 November 1944 some of the freight cars which arrived at Depot Q-177 showed signs of having been opened and rifled. During said period there were at least 12 occasions when trains arrived with "badly pilfered" cars. These cars had contained such items as cigarettes, "10 in 1" rations, RAC Kits and Post Exchange supplies. Pilferage could be detected by the fact that there were empty spaces near the doors of the cars which indicated cases or boxes had been removed. In other instances RAC Kits had been opened and only cigarettes removed. From 12 September to 30 November "badly pilfered" trains arrived at Depot Q-177 at intervals of five or ten days (R18,19).

French civilian laborers were employed at Depot Q-177 but they were inspected by military guards on leaving the premises. In addition, guards were posted at each cigarette car (R19).

During the period from 1 September to 30 November 1944 the stock of cigarettes handled and distributed by the Quartermaster, European Theater of Operations, was inadequate to meet the demands of military personnel. There was also a shortage of the 12 basic items contained in the RAC Kits (R20,21).

As a result of the obvious pilfering and theft of government property during the course of its transportation by railroad from French ports of debarkation to Depot Q-177, undercover agents were infiltrated into the ranks of the 716th Battalion during the month of November 1944. These operatives appeared in the roles of enlisted men of the battalion (R21,27).

Second Lieutenant Robert P. O'Reilly, Corps of Military Police, Criminal Investigation Division, Provost Marshall's Office, became ostensibly a private in the battalion and was on or about 9 November assigned to Company C as a fireman. He served until 26 November (R21,23,25). He reported for duty at Dreux (R22). None of the accused was a member of his train crew (R23) and during his duty as an undercover agent he did not become acquainted with them (R22). Neither did he see any of them pilfering or carrying merchandise from the trains (R26). He never heard any of them discuss the thefts from the trains nor admit that they had taken articles therefrom (R27). However, among the membership of the battalion the important topic of conversation involved the money which could be made by pilfering from the trains and sale of supplies thus taken. Dreux was the point where the 716th Battalion assumed operation of trains which arrived from the west. On the occasion when he reported for duty (9 November) the crew awaited arrival of a train which, it had been reported, carried Quartermaster supplies. It was planned that when the train reached Villiers, a station between Dreux and Paris, that an effort would be made "to get at" the contents of the train (R22).

On other occasions witness inquired of personnel of the battalion as to the methods used to transmit to the United States the profits which would accrue from sale of supplies and expressed apprehension that if money orders were used the mail censor would discover the exorbitant amount of money which was transferred. He was told "not to worry about that, that every one was in on the deal" (R22-23). However, the operative never saw a train pilfered, but he saw cars which had been pilfered. In one instance, in investigating such condition, he discovered that 31 or 32 cars of a train of 39 or 40 cars had been opened. The seals were broken on the car doors and they were pushed ajar. Boxes and cases were opened and the contents of the cars were in disorder. Cigarettes, chocolate, coffee and other rations had been taken (R23).

Excessive amounts of cigarettes were in possession of the battalion personnel. Witness had received cigarettes from them (R23). He also saw large sums of money in their possession (R24).

Witness described in detail three methods pursued by the train crew "with the assistance of the men who were stationed along the line at different way stations" in pilfering trains (R24, 25). The ratio of employment of American crews to French crews was five to one. Trains operated by French crews were pilfered the same as those operated by American crews. French civilians had access to freight cars equally with the Americans (R26,27).

Another undercover operative of the Criminal Investigation Division of the Provost Marshall General's Department assigned to the 716th Battalion was Bruno James Cozzati. He assumed the role of an enlisted man and was sent to the battalion to act as a locomotive fireman. Her performed this duty from 7 November to 30 November 1944. On his first trip he was involved in a transaction with the train crew whereby cigars and cigarettes were removed from the railroad car. He received two boxes of cigars and twelve cartons of cigarettes as his share (R27). The crew had been informed previously at Dreux that this car contained cigarettes and Post Exchange rations. When the train arrived at a point one-half mile west of Villiers it was stopped for the purpose of obtaining water and servicing the locomotive. Instead of the locomotive and tender proceeding into the station, the train was "cut" behind the eleventh car and eleven cars were taken into the station. It was then that the eleventh car was looted (R29). Members of the station crew removed cigarettes from the car. The train crew took possession of them and sold or disposed of them in Paris. Accused was with the crew members in Paris as they were enroute to sell the cigarettes, but none of the accused was in the group and none of accused ever informed witness where he could sell cigarettes. Witness had seen three of the accused in the battalion, but he never saw any of them remove cigarettes from a freight car, nor did he see any of them do "anything in connection with any of the pilfering activities or the sale or disposition of Government property" (R28,30). He never heard any of them making any plans or schemes for robbery of trains (R30). During his tour of duty he saw members of the battalion in possession of excessive amounts of cigarettes and money. This was a general condition (R28). There was also a general activity among the membership in sending to the United States large sums of money (R29).

The prosecution also presented as a witness Private Seymour C. Schlossberg, Headquarters and Headquarters Company, 716th Railway Operating Battalion, who had been arrested and confined in connection with pilfering charges. He was promised immunity from prosecution

in consideration of his testimony. The witness stated that the battalion arrived in France in August 1944 and he first acted as a telephone switchboard operator at Dreux. Over the telephone circuit on one occasion he heard an unidentified operator "make a remark that there is a train coming through with 10 in 1 rations or coming through with cigarettes on there" (R32,34). It was at St. Cyr that he first saw freight cars with their door seals broken and saw American soldiers take boxes of merchandise from the cars (R32). Afterwards while stationed at St. George he saw coffee and milk taken from the trains by American soldiers. He saw soldiers bring 10 in 1 rations and coffee into his billet (R33). Upon cross-examination the witness asserted:

> "I don't think there was any actual conspiracy that I know of involved at any time. * * * And never did I know any of the boys to plan anything before the fact. * * * I think it was planned on the spur of the moment; not planned, I think, but it was more or less on the spur of the moment. There was one case where two boys have awaited the arrival of a train, but I really don't remember whether they conspired to do it before the train arrived or not, although I was under the impression that they knew that the train did carry cigarettes" (R35,36).

Witness saw the accused in Camp Cushing, Texas, on the transport and in France but he did not remember that he had seen any of them take any government property (R36).

Technician Fourth Grade Howard J. Darr Jr., Company C, 764th Railway Shop Battalion, during October and November 1944 was stationed in the Paris area. He was engaged in the repair of railway rolling stock. On one occasion in the vicinity of Matelot and Versailles he saw American soldiers remove several cases of cigarettes from box cars. He also saw soldiers take food and ham from a car, load the same on a half-track and haul the merchandise away (R37,38). The half-track was loaded directly from a car while it stood in the yard. There were six soldiers with the half-track but accused could not identify them (R39). On another occasion he saw a case of cigarettes removed from a car by soldiers (R37). The events occurred about 26 September. The witness believed the soldiers who were engaged in these acts were members of the 716th Battalion (R38).

Over objections by defense counsel the prosecution introduced in evidence signed statements of each accused (R41-42, Pros.Ex.1, Young; R44, Pros.Ex.3, R45, Pros.Ex.4, Jones; R47, Pros.Ex.5, French; R49, Pros.Ex.6, Wagner; R50, Pros.Ex.7, Harper). Pertinent excerpts from the several statements are as follows:

YOUNG

"My first assignment was as 'Conductor' at Dreux. The crew of which I was a member comprised of T/4 Leonard J. French, Engineer, Pfc. Thomas G. Harper Brakeman, Pfc. Jones, Brakeman and a Fireman whose name I dont remember. While at Dreux I took a case of P.X. rations (20 cartons cigarettes) and about an hour later another member of the crew stole another case of P.X. rations. These two cases were split among the members of the crew. My 1/5th share was 8 cartons of cigarettes. I sold my share of the cigarettes for 4000 francs. I'm not sure if the other crew members sold their shares but they did receive a share each.

The following day at Paris I took a P.X. ration case. I took this case from a freight car placed it in my barracks bag and took it back to Dreux. I did not have time to sell it at Dreux so waited until my next trip to Paris. On my next trip to Paris I sold the 20 cartons of cigarettes 4 boxes of Chocolate and received 10,800 francs for these items.

Again while at Dreux I took 1 case of PX rations (my next trip) and sold the contents at Paris. I received 10,000 francs for the cigarettes.

I was then transferred to Matelot Yard. My present crew comprised of T/4 Leonard French, T/5 Swindell, Pfc Thomas Harper, and Pvt. Wagner. I had been there about two weeks before the first incident took place. This crew and I during the following six weeks stole approximately ten or twelve P.X. cartons (20 cartons of cigarettes in each case). Of the 200 cartons of cigarettes that were contained in these boxes I sold approximately 20 cartons, receiving 500 francs per carton. Pvt Wagner sold the balance of the cigarettes. The money received from the sales was pooled and split

five ways, each member of the crew received an equal share.

While at Matelot Yard I took a PX Ration Box containing 20 cartons of cigarettes and gave this box to S/Sgt Possi, he was Yardmaster at Matelot. Possi asked to be taken care of, he stated he knew we were receiving cigarettes. He took the box and proceeded in the direction of the billets.

I sold all the cigarettes to unknown French civilians" (Pros.Ex.1, 5 December 1944).

In his statement Young also admitted possession of 12 United States postal money orders each in the amount of one hundred dollars which were introduced as evidence by the prosecution (R43; Pros.Ex.2).

JONES

"I wish to state in this supplementary statement the articles I had in my possesstion at the time I was apprehended. Money Order Receipts #9624 1 Oct 1944 50.00 (Mother) Mrs. W. E. Jones #18611 4 Nov 1944 100.00 (Mother) Mrs. W. E. Jones Money Orders #9625 1 Oct 1944 $100.00 Mrs. W. E. Jones. #18610 4 Nov 1944 $100.00 (Mother) Mrs. W. E. Jones. I also had in my possession 5,750 French Francs, and $63.00 in American Currency" (Pros.Ex.3, 6 Dec. 1944).

"I have worked on these train crews from about 1 Sept. 1944 until now, running from Dreux to Paris. When we first started this run we had no rations and we were taking rations to eat from the train, while doing this, we learned there were PX rations & cigaretts in the cars also. There were always Frenchmen around trying to buy any thing they could. I heard that there were plenty of Rations around and that the Frenchmen paid a good price for them. I decided to take a few & sell them. The first box I took I divided with Sgt M. A.

CONFIDENTIAL

Young and Pfc. Harper. I received 10 cartons as my share. I sold these to Frenchmen along the run for 500 to 600 francs a carton. The candy, soap, tooth powder, shaving cream & tooth brush I kept for my own use & to distribute among the men of my Co. This was about the middle of September 1944. About the 1st of October 1944 I took another case of rations, I did not divide this one, I sold everything in it except the soap. For this box of rations I received 11,500 Franc's or approximately $230.00. About a week later I took another case of rations from a train, this case I divided with Pvt Culver, my part I sold to different cafes and 4 or 5 cartons of cigarettes I remember I sold to Frenchman in the Hotel de Paris, 3 Cite Pusy St. Paris France, I do not remember the names of the other places I sold cigarettes. I do not know where the other men in my crews who I divided rations with disposed of their share. Pvt Charles McCoy and Pvt Forrest Scott both of my organization and Co. Took a case of rations at the same time I got mine.

I remember on one trip T/4 Neff, was Eng. and T/5 or Pvt Sweatman, Fireman, Sgt. M. A. Young conductor, on this trip Sgt Young and I split a case of rations.

When I arrived in France I had $63. in American currency, I have never changed any of this. I have sent home $150. in Money orders. I had in my possession at the time I was picked up (2) two money order receipts, numbers 9624 and 18610 for the money I sent home. (2) two money orders for $100.00 each. Number 18611 and 9625, 6,250 franc's and the $63. in American currency I brought with me to France. I have received also (3) three Mo. pay, approximately $90. All except my pay and the $63. I brought with me I received from the sale of cigarettes and rations taken from the trains by me" (Pros.Ex.4,5 December 1944).

FRENCH

"After spending a week at a receiving area

I was sent to Dreux. I was then assigned as an engineer operating between Lundan, Dreux and Paris.

From the period of the 15th of October 1944 to about the 26th October 1944, I received as my share about eight hundred, ($800.00) from the sale of cigarettes. The other members of my crew were Merel A. Young, Edward W. Wagner, Thomas G. Harper and Paul Swindell. These men received the same amounts as I did from the sale of cigarettes. Wagner would usually find the car and then he would take out two or three boxes. Then Wagner, Young and myself would carry them away and place them in an empty box car somewhere in the Matalot Yards. While we were working, Wagner would take the cigarettes and dispose of them. Where he would go with them I don't know. When we finished working the money from the sale of the cigarettes would be divided among us. I have received money about four of five times from the sale of cigarettes taken from the cars at Matelot Yards. Sometimes there would be chocalates in the boxes of cigarettes and these I would either eat or give away. My share in the cigarettes that were taken from the freight cars amounted to about eighty cartons (80). This money I received from the sale of cigarettes I used for a good time. The five hundred dollars ($500.00) that I sent home was money that I won in dice games and not one cent of it came from the sale of cigarettes.

When I was taken into custody I had on my person 11,650 francs. Of this amount 4450 francs represents pay I received since I have been in France. * * *

I at no time broke or entered any freight cars of the U.S. Government or French Government" (Pros.Ex.5, 5 December 1944).

WAGNER

"While at Dreux, France a switchman in the yards whose name I don't know took a case

of rations containing 20 cartons of cigarettes and various other items. I am pretty sure the switchman took this case of rations off a freight car. We split this case of rations among the crew consisting of myself and 4 other men whom I don't know their names. I used these rations for my own personal needs.

On or around the early part of September 1944, I took from a freight car in the Paris yards 1 case of cigarettes containing 50 cartons of Lucky Strike cigarettes. I took this case of cigarettes to Paris where I sold about 40 cartons to a French civilian for about 450 francs to 500 francs a carton.

During the later part of September 1944, and the month of October 1944, I took about 10 or 12 cases of 200-1 rations consisting of cigarettes and other ration items. Sgt. M. Young, T/4 L. J. French, T/5 Paul Swindel Pvt T. Harper and I split the above mentioned cases of rations. We are all from Co. C, 716 Ry Opn Bn. I sold the above mentioned cases of rations to French civilians the names of whom I don't know. I only sold the cigarettes from the cases of rations receiving 500 francs a carton. I split the money five ways among Sgt. Merle Young, T/4 L. J. French, T/5 Paul Swindel, and Pvt.T. Harper" (Pros.Ex.6, 6 December 1944).

HARPER

"I * * * was a brakeman on the train from Paris to Dreux from about the 1st of September, until the middle of October. Thereafter I was a watchman at Matelots Yards.

Sometime in September Meryl Young, Fred C. Jnoes, Leoard French and I took a case of PX cigarettes and chocolate (20 cartons of cigarettes and 2 boxes choc.). We split this 4 ways and I sold my share of cigarettes for 500 francs per carton. We took these cigarettes from a gondola car at Dreaux.

About a week after the above incident Sgt. Paul W. Hart and I took a box of 20 cartons of cig-

(118)

arettes out of a box car on the road from Dreaux to Paris, when we stopped for the road to clear. This car had already been broken into. I sold my share of 10 cartons for 500 francs per carton in Paris on the Street.

About the middle of October I went to Matelot yards as a switchman. Young, French, Swindell & Wagner were the other crew members. From the middle of October until I was picked up, Meryl Young, Leonard French and I took from the cars about 10 or 12 cases of PX containing 20 cartons of cigarettes each and some of them contained boxes of chocolates. We always split evenly on these and I sold my share at 500 francs per carton" (Pros.Ex.7, 5 December 1944).

The court was particularly instructed by the law member that each statement should be considered only as inculpatory of the maker thereof and should be disregarded as evidence against other accused (R42,49,51).

4. Each accused after his rights were explained to him elected to remain silent (R51).

5. The record of trial presents certain procedural and evidential questions which require preliminary consideration and disposition:

a. Defense counsel challenged for cause Colonel John A. Hoag on the ground that Colonel Hoag sat as a member of a court which tried military persons other than the instant accused on charges similar to those involved in the present case and that in the process of said previous trials the prosecution presented evidence to establish the corpus delicti of the offenses then in issue of the same kind and quality as would be presented in the instant case. The contention of the defense was premised on the proposition that inasmuch as the challenged member had judicially determined that the evidence was sufficient to establish the corpus delicti, he had prejudged the present case and therefore accuseds' rights would be substantially prejudiced by his presence on the court.

Colonel Hoag was sworn as a witness. He admitted that as a member of the court in a previous case he had heard evidence with respect to a conspiracy to dispose of government property but asserted that said evidence would not influence his verdict on the present case and that he was not prejudiced against the instant accused (R4). The court, following the procedure prescribed by

MCM, 1928, par.58f, p.46, denied the challenge. It will be assumed that the former cases presented the exact issues of law and fact involved in the present case and that the evidence in proof of the corpus delicti in the former cases and in the instant case is identical. Such assumption is not sustained by the record of trial but it permits the contention of accused to be considered in its most favorable aspect. It will also be assumed that defense counsel challenged each member of the court on the same ground and that similar procedure and action followed as in the case of Colonel Hoag. It is the function of the court to determine the existence or non-existence of the alleged grounds of challenge and the burden of maintaining a challenge rests on the challenging party (MCM, 1928, par.58f, p.46; CM 260253 (1944) III Bull. JAG 377).

> "In the criminal law, neither the fact that a juror has served as such on a previous trial of the same party for a separate instance of the same offence or for a similar offence; nor that he has taken part in the trial and conviction of another and distinct offender separately indicted for an offence of the same character; nor even that he has similarly acted upon the trial of an accomplice jointly indicted for the same offence but who has been permitted to sever for trial, - is held to be a 'principal cause' of challenge, i.e. necessarily to disqualify the juror. A challenge 'to the favor', however, may be allowed in such cases, where it is satisfactorily shown that the juror, by reason of having heard the testimony on the first trial, or otherwise, had actually become biased by an opinion for or against the present defendant.
>
> In cases of this class at military law a similar test is to be employed. While it is certainly not per se valid ground of challenge to a member that he has taken part in a previous trial of the accused for a like offence, or in a trial for the same offence of another officer or soldier between whom and the present accused there had been criminal concert, yet if the previous hearing has induced the formation of an opinion as to the guilt or innocence of such accused, the member is of course properly subject to exception" (Winthrop's Military Law and Precedents (Reprint, 1920), p.227).

8234

(120)

It is clear that in this challenge "to the favor" an issue of fact was created as to Colonel Hoag's eligibility. It was for the court to determine whether the challenged member was actually biased against accused. Its finding under the circumstances will not be disturbed on appellate review (35 CJ sec.458, p.404; CM 244946, Forbes 29 B.R. 73,79, (1943)). Considering separately the challenges for cause addressed to each member of the court, a similar conclusion must be reached.

However, the record presents sufficient grounds to permit the challenge of defense counsel to be considered as a challenge to the array (R2-3). Challenges to the array are not permitted in courts-martial (Winthrop's Military Law and Precedents (Reprint, 1920), p.207; AW 99; CM 243215, Owen, 27 B.R. 305,309 (1943)). It therefore follows the denial of such challenge was proper.

Under the rule adopted in CM ETO 804, Ogletree et al, the failure of the defense to exercise its peremptory challenge (R5) might well be treated as a waiver by it of its challenge for cause of Colonel Hoag. However, the Board of Review has elected to consider the challenges on their merits.

b. Subsequent to arraignment but prior to pleading to the charges the defense moved on behalf of each of the accused severally and separately for a severence of trial. Upon the authority of CM ETO 895, Davis et al and CM ETO 3147, Gayles et al (reference to the holdings in which cases is hereby made for detailed discussions of the legal principles involved) the motion was properly denied.

c. Defense counsel moved on behalf of each accused to strike Specification 1 on the ground that "it is vague and indefinite and it is impossible for the accused to anticipate what evidence will be offered under it" (R9). During the argument on the motion which followed, the trial judge advocate agreed to amend the Specification as originally drafted by striking therefrom the phrase "724th Railway Operating Battalion, 728th Railway Operating Battalion, 757th Railway Shop Battalion, 764th Railway Shop Battalion" and substituting in lieu thereof the phrase, "and other operating personnel". Defense counsel agreed to the amendment but renewed his motion against the amended pleading. The motion was denied (R14). The amended specification obviously alleged facts constituting both common law conspiracy and conspiracy under section 37, Federal Criminal Code (18 USCA 88) (Williamson v. United States, 207 US 425, 447, 52 L.Ed.278,290 (1908); Crawford v. United States, 212 US 183, 53 L.Ed. 465 (1909); Nash v. United States, 229 US 373, 57 L. Ed. 1232 (1913); Glasser v. United States, 315 US 60, 86 L.Ed.680 (1942)). It was not necessary to allege in this case (of an unlawful and corrupt understanding,

arrangement or agreement) the specific acts of diversion, conversion and disposition of supplies. (Crawford v. United States, supra). Inasmuch as the specification alleged facts constituting the offense of conspiracy the motion was properly denied.

d. The defense on behalf of each of the accused also moved to strike each specification inasmuch as they were laid under the 96th Article of War instead of the 94th Article of War. Conspiracy to defraud the United States by obtaining, or aiding others to obtain the allowance or payment of any false or fradulent claim is obviously an offense under the 94th Article of War (MCM, 1928, par.150c,p.182). The conspiracy here charged is not of that nature as no "false or fradulent claim" is involved. Hence it was properly laid under the 96th Article of War (Cf: CM 215630 Romero, 11 B.R. 1, 24 (1941), Romero v. Squier (CCA 9th 1943), 133 F (2nd) 528, cert. denied 318 US 785, 87 L.Ed. 1152 (1943); CM 199293, Hall and McPadden 3 BR 353 (1932)). With respect to Specifications 2 to 7 inclusive, consideration of the motion will be included in the discussion of the case against accused on its merits (See par.7, infra).

e. Defense objected to the testimony of Lieutenant Colonel John L. Pickett, Quartermaster Corps, with respect to theft of government property and of the looting of railroad trains occurring during the time and at the locations alleged in the specifications. The objection was based on the premise that such evidence was immaterial and irrelevant and was not connected with accused or either of them (R19). The evidence served to inform the court as to the surrounding facts and circumstances of the offenses with which accused were charged.

> "All evidence is relevant which throws, or tends to throw, any light upon the guilt or innocence of the prisoner. And relevant evidence which is introduced to prove any material fact ought not to be rejected merely because it proves, or tends to prove, that at some other time or at the same time, the accused has been guilty of some other separate, independent and dissimilar crime. The general rule is well settled that all evidence must be relevant. If evidence is relevant upon the general issue of guilt, or innocence, no valid reason exists for its rejection merely because it may prove, or may tend to prove, that the accused committed some other crime, or may establish some collateral and unrelated fact. Evidence of other acts to be available must have some logical connection and reveal evidence of knowledge, design, plan, scheme, or conspiracy

> of the crime charged; or circumstantial evidence of identity of the person charged with the crime; or tend to corroborate direct evidence admitted" (Underhill's Criminal Evidence (4th Ed. 1935) sec.184, pp.333-335).

The Board of Review in CM ETO 895, Davis et al and CM ETO 7549, Ondi adopted the foregoing principle. In the holding in the Davis case there is an illuminating citation of authorities which support the rule. There was no error in the admission of the evidence in question.

f. Second Lieutenant Robert P. O'Reilly, during the course of his description of conditions in the 716th Railway Operating Battalion which he discovered while acting as an undercover agent stated:

> "From the first day that I was assigned to the 716th until the day that I left the 716th the most important topic of conversation was the amount of money we could make from the pilfering and sale of United States supplies aboard the trains" (R22).

He further testified:

> "While at the station in Dreux the only topic of conversation among myself and the other members of the crew was as to what the contents of the train would be that was coming into Dreux" (R22).

The defense objected to this evidence on the grounds that it was hearsay because not made in the presence of accused and was not connected with them. The objection was overruled by the law member (R22). The testimony as to the declarations of unknown third persons was rank hearsay and its admission in evidence was erroneous. The existence of a conspiracy cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged conspirators done or made in his absence unless there is proof aliunde that he is connected with the conspiracy (Kuhn v. United States (CCA 9th 1928), 26 F (2nd) 463; United States v. Renda (CCA 2nd 1932), 56F(2nd) 601; Minner v. United States (CCA 10th 1932), 57 F (2nd) 506; Feigenbutz v. United States (CCA 8th 1933), 65 F (2nd) 122; Nibbelink v. United States (CCA 6th 1933), 66 F (2nd) 178; Hauger v. United States (CCA 4th 1909), 173 Fed 54; Pope v. United States (CCA 3rd 1923), 289 Fed 312, cert. denied 263 US 703, 68 L.Ed.515 (1923)).

"Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence" (Glasser v. United States, 315 U.S. 60, 75; 86 L.Ed. 680, 701 (1942)).

Likewise for the same reason his testimony as to conversations with unidentified persons concerning transmittal to the United States of profits to be made from sale of supplies and their assurances that he should "not worry about that that everyone was in the deal" should have been excluded. In the same category is Schlossberg's vague testimony with respect to telephonic conversations overheard by him. All of the foregoing evidence should have been excluded from the case and it is not considered by the Board of Review. In view of the probative weight of competent substantial evidence present in the case and of the admission of each accused, the Board of Review does not believe that such erroneously admitted evidence prejudiced the substantial rights of accused nor influenced the results (AW 37).

g. The defense objectedto the admission in evidence of the respective extrajudicial statements made by accused on the ground that the prosecution had failed to prove the corpus delicti of any of the offenses charged (R42,44,45,47,49,50). Consideration of this objection will be included inthe discussion of the charges on their merits (See par.6e, p.25, infra).

6. Specification 1 alleges that accused did,

"at or near Dreux, France and at or near Paris, France and at various and sundry places between said places, between 1 September 1944 and 30 November 1944, jointly and in conjunction with each other and other members of the 716th Railway Operating Battalion and other operating personnel, agree and conspire to defraud the United States through pillaging, division of spoils, and mutual inaction against pillaging by each other, through wrongful conversion to their own joint and several purposes and profit, of military supplies and equipment, the property of the United States in the possession and custody of military agencies, furnished and intended for the military service thereof, while such supplies and equipment were enroute to military forces engaging the enemy and other military forces of the United

States, during a critical combat period in the theater of active military operations; and pursuant thereto, did, at divers times and places as herein alleged wrongfully divert such supplies and equipment from the military purposes for which such supplies were intended, to their own purpose of personal profit".

a. Specification 1 alleges facts constituting the crime of conspiracy under section 37, Federal Criminal Code (18 USCA 88) inasmuch as the concluding clause

"and pursuant thereto, did * * * wrongfully divert such supplies and equipment from the military purposes for which said supplies were intended, to their own purpose of personal profit"

alleges the necessary overt acts. (See authorities cited in par. 5c, supra). It also alleges facts constituting the common law offense (CM 112560, CM 120543 (1918), Dig.Op. JAG, 1912-1940, sec.454 (23), p.351). Conspiracy is an independent substantive offense both at common law and under the Federal statutes.

"A conspiracy is the corrupt agreeing together of two or more persons to do by concerted action something unlawful either as a means or an end" (MCM, 1928, par.150c, p.182).

"/It/has been repeatedly declared * * * that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. * * * The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is nonetheless punishable. * * * And it is punishable as conspiracy, though the intended crime be accomplished. * * * A person may be guilty of conspiring, although incapable of committing the objective offense * * * And a single conspiracy might have for its object the violation of two or more of the criminal laws, the substantive offenses having, perhaps, different periods of limitation

(United States v. Rabinowich, 238 U.S. 78, 85,86, 59 L.Ed.1211,1214 (1915)).

b. Of vital importance in the instant case is the application of the following principle:

> "But in conspiracy cases, the unlawful combination, confederacy, and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged. It is, therefore, primarily essential to establish the existence of a confederation or agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained. This statement requires no citation of authorities. It is equally true that 'extrajudicial confessions or admissions are not sufficient to authorize a conviction of crime, unless corroborated by independent evidence of the corpus delicti'. Martin v. United States (CCA 8) 264 F 950. This has been the consistent holding of this court, in harmony with uniform decisions in other jurisdictions" (Tingle v. United States (CCA 8th 1930), 38 F (2nd) 573, 575).

The rule above set forth, viz., that the corpus delicti of a conspiracy is "the unlawful combination, confederacy and agreement between two or more persons" is affirmed in the following cases: Dahly v. United States (CCA 8th 1931), 50 F (2nd) 37; Davidson v. United States (CCA 8th 1932), 61 F (2nd) 250; Langer v. United States (CCA 8th 1935), 76 F (2nd) 817; Cartello v. United States (CCA 8th 1937), 93 F (2nd) 412; Forte v. United States (App. D.C. 1937), 94 F (2nd) 236.

c. The relevant provisions of the Manual for Courts-Martial,1928,are:

> "Should it, however, be shown that an admission against interest was procured by means which the court believes to have been of such character that they may have caused the accused to make a false statement, the court may either exclude or strike out and disregard all evidence of the statement" (MCM, 1928, par.114b, p.117).

> "An accused cannot be convicted upon his unsupported confession. * * * in other words, there must be evidence of the corpus delicti other than the confession itself" (Ibid, par.114a, p.115).(Underscoring supplied).

It will be thus seen that the Manual for Courts-Martial does not treat the subject of admissions (as distinguished from confessions) in connection with the question of quantum of proof necessary to sustain a conviction. It is necessary therefore to discover the prevailing rule of the Federal courts. A careful search and analysis of the decided cases reveal that it is a generally accepted doctrine that to warrant conviction of a crime both confessions and admissions made after the commission of the alleged criminal act must be corroborated by some independent evidence. The requirement of some independent proof as applied both to confessions and admissions after the crime has not been relaxed merely because the facts seem to indicate that the disclosures have been voluntarily made by accused (Naftzger v. United States (CCA 8th 1912), 200 Fed. 494,498; Goff v. United States (CCA 8th 1919), 257 Fed. 294,296; Martin v. United States (CCA 8th 1920), 264 Fed. 950,951; Tingle v. United States (CCA 8th 1930), 38 F (2nd) 573,575; Jordan v. United States (CCA 4th 1932), 60 F (2nd) 4,5; cert. denied 287 US 633, 77 L.Ed.549 (1932); Forte v. United States (App.D.C. 1937), 94 F (2nd) 236,237; Pines v. United States (CCA 8th 1941), 123F(2nd) 825,829).

However, the foregoing rule applicable to admissions after the crime does not apply to admissions made prior to the crime. In commenting upon the distinction the United States Supreme Court said:

> "The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist [Wigmore, supra]. Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weakness of confessions or admissions after the fact. Cases in the circuits are cited by petitioner to the contrary. In Gulotta v. United States, [(CCA 8th) 113 F (2nd) 683], the decision turned on the similarity of confessions and admissions rather than upon any differences between admissions before and after the fact. In Duncan v. United States [(CCA 9th) 68 F (2nd) 136] and in

> Gordnier v. United States [(CCA 9th) 261 F 910] the conclusion was reached without any comment upon this difference. Our consideration of the effect of admissions prior to the crime leads us to the other conclusion [Cf: Miles v. United States, 103 US 304,26 L Ed 481]" (Warszower v. United States, 312 U.S. 342, 347, 85 L.Ed. 876,880).

(Cf: Fotie v. United States (CCA 8th 1943), 137 F (2nd) 831,837; United States v. Kertess (CCA 2nd 1944), 139 F (2nd) 923,929).

d. The prosecution's case with respect to proof of the corpus delicti must rest upon and be subject to the following legal principles:

> "The fact of a conspiracy may be proved by any competent evidence. The conspiracy may of course be shown by direct evidence, and, it is apprehended should be so proved if this character of evidence is attainable. Direct evidence is, however, not indispensable. Circumstantial evidence is competent to prove conspiracy. Proof of the combination charged, it has been said, must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation. The nature of the crime usually makes it susceptible of no other proof, and the rule which admits this class of evidence applies equally in civil and criminal cases. Circumstantial evidence if sufficiently strong may outweigh the positive statement of a party or witness" (12 CJ sec.226, pp. 633,634).

> "Circumstantial evidence is equally available with direct evidence to prove the conspiracy, but suspicion or conjecture cannot take the place of evidence. Guilt must be established beyond a reasonable doubt, and, where the evidence is as consistent with innocence as with guilt, no conviction can properly be had. Even participation in the offense which is the object of the conspiracy does not necessarily prove the

participant guilty of conspiracy. The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful agreement and participation therein, with knowledge of the agreement" (Dahly v. United States (CCA 8th 1931), 50 F (2nd) 37,43).

"Conspiracy may be established by circumstantial evidence or by deduction from facts. The common design is the essence of the crime, and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but ever leading to the same unlawful result. If the parties acted together to accomplish something unlawful, a conspiracy is shown, even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others. All of the conspirators need not be acquainted with each other. They may not have previously associated together. One defendant may know but one other member of the conspiracy. But if, knowing that others have combined to violate the law, a party knowingly cooperates to further the object of the conspiracy, he becomes a party thereto" (Allen v. United States (CCA 7th 1925) 4 F.(2nd) 688,691), cert. denied 267 US 598, 69 L.Ed. 806 (1925)).

"It need not be shown that the parties actually came together and agreed in express terms to enter in and pursue a common design. The existence of the assent of minds which is involved in a conspiracy may be, and, from the secrecy of the crime, usually must be, inferred by the jury from proof of facts and circumstances which, taken together, apparently indicate that they are merely parts of some complete whole. If it is proved that two or more persons aimed

by their acts towards the accomplishment of the same unlawful object, each doing a part so that their acts, though apparently independent, were in fact connected and co-operative, indicating a closeness of personal association and a concurrence of sentiment, a conspiracy may be inferred, though no actual meeting among them to concert means is proved. Evidence of actual participation, rather than mere cognizance, acquiescence or approval of an unlawful act, is required to sustain conviction for conspiracy" (Underhill's Criminal Evidence (4th Ed, 1935), sec.773, pp. 1401-1405). (Underscoring supplied).

"In a case where circumstantial evidence is relied upon to establish the corpus delicti, it is not sufficient that the circumstances proved coincide with and account for, and therefore render probable, the hypothesis, of the guilt of the accused. The evidence must be such as to establish the corpus delicti to a reasonable certainty, and exclude every other possible hypothesis except that of guilt; that is, the evidence must be such as to establish so positively the corpus delicti as to exclude from the minds of the jury all uncertainty in regard to it. But to do this it is not necessary that each particular circumstance be established thus conclusively. It is sufficient if the combined effect of all the circumstances proved in a case is such as to produce the same degree of certainty in regard to the corpus delicti, as would be established by direct and positive proof" (1 Wharton's Criminal Law (12th Ed, 1932) sec.355, p.461)

e. The Board of Review must also give heed to the following injunction of the Manual for Courts-Martial, 1928:

"the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt * * * " (MCM, 1928, par.78, p.63).

The above principle has been consistently applied by the Federal

8234

courts in conspiracy cases (Turinetti v. United States (CCA 8th 1924), 2 F (2nd) 15; Donovan v. United States (CCA 3rd 1931),54 F (2nd) 193; Davidson v. United States (CCA 8th 1932) 61 F (2nd) 251; Kassin v. United States (CCA 5th 1937), 87 F (2nd) 183).

In considering the question whether there was proof of the corpus delicti of the conspiracy, it should be noted that prosecution's evidence, independent of accused's statements, did not identify any of the accused as among the thieves. There is also a total absence of testimony that they were ever seen in possession of incriminating articles. Further, there is no proof that any of them engaged in reported conversations with respect to the theft of supplies or sale of same. But proof of the corpus delicti need not directly connect an accused with the conspiracy (Ryan v. United States (CCA 8th 1938), 99 F (2nd) 864,870, cert. denied 306 US 635,668, 83 L.Ed.1037,1063 (1939); Anderson v. United States (CCA 6th 1941), 124 F (2nd) 58,66, reversed on other grounds 318 US 350, 87 L.Ed.829 (1943)), and it was not necessary that accused or any other member of the group who are parties to the conspiracy participate in all of the acts (American Medical Ass'n. v. United States 317 US 519 87 L.Ed. 434 (1943); United States v. Holt (CCA 7th 1940), 108 F (2nd) 365,368, cert. denied 309 US 672, 698, 84 L.Ed. 1018,1037 (1940); United States v. Valenti (CCA 2nd 1943), 134 F (2nd) 362,365).

The evidence (excluding the illegally admitted evidence), convincingly proved that during the period of time alleged there were widespread and frequent thefts of cigarettes and Post Exchange merchandise (all property of the United States) from railroad cars during their transit from Dreux to Paris. The cars were opened and the merchandise removed therefrom without authority. The looting was of the same general style and pattern and the articles stolen were of the same type and kind. Specific testimony of eye witnesses disclosed the looting of freight cars within the battalion's operating district and the removal of certain of their contents by American soldiers. Pertinent testimony indicated that during the period of the persistent looting, members of the 716th Battalion were seen in possession of extraordinary amounts of money and cigarettes. In one instance certain members of the battalion carried[a] considerable quantity of cigarettes to Paris for purpose of sale to unauthorized buyers.

It is difficult to reconcile the uncontradicted evidence of looting and larceny with the idea that such trespasses and thefts were disconnected and independent episodes. They were not of the variety which would be expected from isolated instances of freight car plundering which by coincidence happened within the same period of time and at or about the same place. The raids upon the merchandise trains and the thefts therefrom followed too closely the same style and pattern and were too closely related both as to

8234

time and place to permit a fair and rational hypothsis that they were the result of causes other than a preconcerted arrangement of a group of American soldiers engaged in the operation of the trains.

While the proof of the existence of the conspiracy in the instant case must depend primarily upon evidence of a series of illegal acts, it is a reasonable inference therefrom that there was "a closeness of personal association and a concurrence of sentiment" on the part of the wrongdoers. It was not necessary for the evidence to show either that there was a formal agreement and understanding between them, nor an "actual meeting among them to concert means" to effectuate the purpose of the conspiracy. It may be assumed that this conspiracy did not have its origin or inception in a deliberately organized plot to defraud the Government. However, the tresspasses and thefts, due to their repetition, without secrecy or stealth and free from hindrance, in a comparatively short period of time welded themselves into a complete "concurrence of sentiment" among the group of soldiers involved. Its focal point was a recognized non-feasance in the form of mutual inaction of the railway operatives and maintenance men whereby each was permitted to seek his own advantage without fear of detection or retribution. Such attifude resulted from the repeated commission by them of the illegal acts, which were notoriously open and within the knowledge of a substantial part of the membership of the battalion.

> "if the evidence of successive details of the scheme as it was carried out indicates with the requisite certainty the existence of a preconceived plan, it is sufficient to constitute an unlawful conspiracy, and it is not essential that all contribute alike either to the making of the scheme or to its fulfillment, and what one does, pursuant to their common purpose, all do" (United States v. Holt (CCA 7th 1940) 108 F (2nd) 365,368, cert. denied 309 US 672,698, 84 L.Ed.1018,1037 (1940)).

The Board of Review therefore concludes that the prosecution by sufficient independent evidence established the corpus delicti of the offense of conspiracy. The extra-judicial voluntary statements of accused (Pros.Ex.1-7) were therefore properly admitted in evidence. They definitely connected each accused with the conspiracy alleged and proved. Each accused admitted that he either broke and entered freight cars, took cigarettes and other merchandise therefrom, sold the same and retained the proceeds, or participated in and shared with others in the illicitly gained profits from similar transactions. Each accused admitted the commission of one or more overt acts in the furtherance of the conspiracy.

8234

(132)

A casual reading of the statements without considering them in connection with the prosecution's evidence as to the formation and nature of the conspiracy may lead to the conclusion that the prosecution alleged one large conspiracy and proved several different and disconnected smaller ones. Such procedure has been condemned as a fatal variance by one line of authorities (Telman v. United States (CCA 10th 1933), 67 F (2nd) 716,718; Mercante v. United States (CCA 10th 1931), 49 F (2nd) 156,157; United States v. Wills (CCA 3rd 1929), 36 F (2nd) 855,857; Wyatt v. United States (CCA 3rd 1928), 23 F (2nd) 791,792; cert. denied 277 US 588, 72 L.Ed. 1002(1928); Terry v. United States (CCA 9th 1925), 7 F (2nd) 28,30; United States v. McConnell (E.D. Pa. 1923), 285 Fed 164). In commenting upon these cases the Supreme Court in Berger v. United States, 295 US 78,81,79, L.Ed.1314,1317(1935) said:

> "This view, however, ignores the question of materiality; and should be so qualified as to make the result of the variance depend upon whether it has substantially injured the defendent".

Should the evidence in this case, including accused's statements, be construed as proving a series of disconnected smaller conspiracies, it is obvious that the doctrine of the Berger case when considered in connection with the relevant provisions of the 37th Article of War (which is a counterpart of section 269 of the Federal Judicial Code, 28 USCA 391, with reference to errors which "affect the substantial rights of the accused") affords a complete answer to the contention. However, in the opinion of the Board of Review, the evidence when properly considered and applied does not show several disconnected and smaller conspiracies but rather one large conspiracy involving known and unknown personnel of the 716th Battalion and possibly soldiers of other organizations and the direct participation of the accused in that general conspiracy. The Circuit Court of Appeals (10th Cir. 1938) in Martin v. United States, 100 F (2nd) 490, cert. denied 306 US 649, 83 L.Ed. 1048, (1939), wrote in reference to a situation closely resembling the one in the instant case:

> "In respect to the question of variance there was evidence from which the inference could be reasonably drawn that the system existed throughout a large part of the United States; that all of appellants understood it and participated in it; and that they stood ready to further it by maintaining intercourse with all others through the issuance and acceptance of transfers. A variance is not to be treated as material unless there is a substantial departure of the proof

> from the charge of a character which could mislead the defendant at the trial. Berger v. United States, 295 US 78, 55 S.Ct. 629, 79 L.Ed. 1314. There was no departure of that kind here * **"(p.495).

The conclusion here stated is further supported by United States v. Valenti (CCA 2nd 1943), 134 F (2nd) 362,365; Oliver v. United States (CCA 10th 1941), 121 F (2nd) 245,247, cert. denied 314 US 666, 86 L.Ed. 533 (1941); United States v. Beck (CCA 7th 1941), 118 F (2nd) 178,182, cert. denied 313 US 587, 85 L.Ed.1542 (1941); Short v. United States (CCA 4th 1937), 91 F (2nd) 614, 112 ALR 969; Lefco v. United States (CCA 3rd 1934), 74 F (2nd) 66,69; Telman v. United States (CCA 10th 1933), 67 F (2nd) 716,718, cert. denied 292 US 650, 78 L.Ed. 1500 (1934); McDonnell v. United States (CCA 1st 1927), 19 F (2nd) 801,803, cert.denied 275 US 551,72 L.Ed.421 (1927); Allen v. United States (CCA 7th 1924), 4 F (2nd) 688,692).

The Board of Review therefore concludes that the prosecution fully sustained the burden of proving beyond reasonable doubt that each accused was guilty of the offense charged whether it be considered as a common law conspiracy (CM 112560, CM 120543 (1918), Dig.Op. JAG 1912-1940, sec.454(23) p. 351) or one under section 37 of the Federal Criminal Code (18 USCA 88).

7. Specifications 2 to 7 inclusive charge that the several accused did at the times and places alleged

> "wrongfully dispose of [cigarettes] properly of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces, during a critical period of combat operations".

a. Of primary importance is the determination of the nature of the offenses alleged. The Board of Review in its appellate function has the power to construe and interpret specifications (CM ETO 6694, Warnock and authorities therein cited). With respect to the offenses denounced by the 96th Article of War under the clause "all disorders and neglects to the prejudice of good order and military discipline", the Manual for Courts-Martial, 1928 states:

> "The disorders and neglects include all acts or omissions to the prejudice of good order and military discipline not

made punishable by any of the preceding articles" (MCM, 1928, par.152a, p.187).

Winthrop, in defining the phrase "all disorders and neglects" asserts:

> "In this comprehensive term are included * * * dishonesty; fraud or falsification * * *; in fine all such 'sins of commission or omission' * * * as * * * are not expressly made punishable in any of the other ('foregoing') specific Article of the Code, while yet being clearly prejudicial to good order and military discipline" (Winthrop's Military Law and Precedents (Reprint, 1920), p.722).

Of peculiar relevance is the following comment of the Board of Review (sitting in Washington):

> "In Smith v. Whitney (116 U.S. 167,183) the United States Supreme Court said:
>
> 'Under every system of military law for the government of either land or naval forces, the jurisdiction of courts martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business.'
>
> The principle applies equally to noncommissioned officers. In cases where the specifications allege conduct such as that charged in the instant case, it is peculiarly for the court-martial to determine whether the evidence establishes the offense; in other words, whether the conduct charged and the evidence in support thereof show a breach of that part of Article of War 96 which denounces 'all disorders and neglects to the prejudice of good order and military discipline' and 'all conduct of a nature to bring discredit upon the military service', and the approved findings of the court in that respect may not properly be disturbed by The Judge Advocate General or the Board of Review where there is

substantial evidence to support the findings and no error was committed during the trial which injuriously affected the substantial rights of the accused" (CM 199391, Klima 4 B.R. 45 (1932)).

The specifications when considered as a whole allege something more than the unauthorized disposal of Government property furnished or intended for the military service thereof under the 9th paragraph of the 94th Article of War. There is the additional declaration that the property involved was provided not only for military service but also for the purpose of sustaining the morale of the military personnel during a critical period of combat operations. The allegation that accused wrongfully disposed of the cigarettes in effect specifies that accused wrongfully diverted them from the usual and proper channels of distribution. The offenses are not identical with but are of the same general nature and of the same degree of seriousness as the offense of destroying and injuring national defense materials, as denounced by Congress in the Act of April 20, 1918, c.59, sec.5, as added by Act Nov. 30, 1940, c.926, 54 Stat. 1220 (50 USCA 105). Therefore the conclusion that the specifications charged the accused with conduct which interfered with or obstructed the national defense and the prosecution of the war, is both logical and reasonable under the circumstances.

Under such interpretation of the specifications the value of the property of which wrongful disposition was made is immaterial. Likewise the source of accused's possession of the property has no bearing on their guilt (Cf: Horowitz v. United States (CCA 2nd 1919), 262 Fed. 48,50, cert. denied 252 US 586, 64 L.Ed. 729 (1920)).

b. A question of vital importance is whether the prosecution proved the corpus delicti of the offenses alleged in Specifications 2 to 7 inclusive. The basic principles of law here involved have been set forth above (See par.6e, supra), and will not be repeated.

The evidence clearly reveals that the War Department had determined prior to the dates of the offenses charged that cigarettes were necessary materiel for use by the combat forces and had supplied the same in abundant quantities. It is not for the Board of Review to enter into a consideration of the question whether cigarettes are a necessary item of war materiel or whether they do or do not possess value as a morale builder among combat and other troops. The determination by the War Department, by its action in

supplying cigarettes, answered both questions in the affirmative and such determination must be conclusively accepted by the Board of Review (Wann v. Ikes, (App.D.C. 1937), 92 F (2nd) 215; United States v. Black, 128 US 41; 32 L.Ed. 354 (1888); Perkins v. Lukens Steel Co., 310 US 113, 127, 84 L.Ed. 1108,1114 (1940)).

Evidence, independent of accuseds' statements showed that there had been wholesale thefts of cigarettes, chocolate and assorted food supplies from railroad trains at the times and places alleged in the specifications. These thefts resulted in a diversion of the stolen articles from the usual and legitimate channels of distribution which eventually would have delivered them to combat and other troops for consumption. There was therefore a direct and positive interference with and obstruction of the national defense and of the war effort. Whether this interference and obstruction was great or small or whether it was effective or futile in its impact upon the course of events is an immaterial matter. The guilt of an accused should not turn upon the narrow issue of whether his acts, in and of itself, affected the course of combat with the enemy. The evidence revealed that a most deplorable condition existed during the periods and at the places alleged in the specifications with respect to the transportation of quartermaster supplies. The thefts were not only of such common occurrence but they were also conducted in such open, notorious and brazen manner, without interference or hindrance that after a time such practices were accepted as usual events in transportation operations. The soldiers who engaged in such illegal transactions for their own individual gain and profit grossly violated the trust imposed in them and inflicted direct injuries upon their government and their fellow soldiers. The distinctive and peculiar quality of the immorality and perfidy of their acts cannot be ignored. Their offenses embraced the moral turpitude of larcenous conduct denounced by the 9th paragraph of the 94th Article of War and also the elements of sabotage and sedition in that they displayed a total lack of patriotism and loyalty which have always been the pride of the soldiers of the Republic. While not traitors they were certainly saboteurs who consciously and deliberately stole property intended for combat and other soldiers in the theater in order that they might profit thereby.

The diversion of war supplies from their intended purpose is a cumulative evil. It was to prevent diversions from reaching a cumulative total whereby they would produce undesirable results that Congress denounced certain conduct as criminal by specific (50 USCA 105, supra) and by general (AW 96) legislation. The Board of Review believes that the corpus delicti of each of the offenses charged in Specifications 2 to 7 inclusive were proved by substantial evidence, and therefore concludes that accuseds' statements (considered either as admissions or as confessions) were properly admitted in evidence on the issue of accuseds' guilt of the offenses alleged in said specifications.

c. The guilt of each accused (with the exception of accused, French) of the offenses charged against him in Specifications 2 to 7 inclusive is fully sustained by their statements (Pros.Exs.1-7). For convenience each confession of guilt is allocated to the relevant specification in the following tabulation:

8234

The statements show that each accused except French admitted overt acts by himself which directly convict him of the offenses with which he is charged. Franch, however, made no admissions which can be connected with Specification 2. The confessions of the other accused obviously are not proof of French's guilt of this specification (CM ETO 134, Stump et al). The record of trial is legally insufficient to support the findings of French's guilt of Specification 2, but legally sufficient to support the findings of his guilt of Specification 3 and legally sufficient to support the findings of guilty as to accused Young, Wagner and Jones of the specifications numbered 2 to 7 inclusive under which they are charged with an offense.

8. a. Neither the offense of conspiracy (Specification 1) nor any closely related offense is listed in the table of maximum punishments contained in paragraph 104c, Manual for Courts-Martial, 1928. The offense of conspiracy without force and violence (Cf: Singer v. United States ___US___, ___L.Ed.___, 65 Sup.Ct.Rep.282, 284,285 (Jan.2,1945)) is denounced by section 37, Federal Criminal Code (18 USCA 88) and the punishment there prescribed is a fine of "not more than $10,000, nor imprisonment of not more than two years or both". Paragraph 104c of the Manual for Courts-Martial, 1928, provides that offenses the punishment for which is not otherwise therein prescribed "remain punishable as authorized by statute or by the custom of the service".

> "It is the custom of the service, where no limit of punishment for an offense is specifically prescribed in the Executive Order, to follow Congressional expression of what constitutes appropriate punishment" (CM 199369, Davis 4 BR.37, 42, 1932; see also CM 212505 Tipton 10 BR 237(1939)).

Therefore by reference to section 37, Federal Criminal Code the sentence of a court-martial upon conviction of the offense of conspiracy should not include confinement in excess of two years. The question whether conspiracy under section 37 of the Federal Criminal Code is a crime or offense not capital under the 96th Article of War, is specifically reserved inasmuch as the application of paragraph 104c, Manual for Courts-Martial, 1928 suffices in the instant case.

b. Likewise neither the offense of interfering with or obstructing the national defense or prosecution of the war by diverting supplies furnished and intended for the military service from their regular channels of distribution to combat and other troops during a critical period of military operations (Specifications 2-7) nor any closely related offense is listed in the table of maximum punishments. The maximum punishments prescribed for the offense

Specifications				Statements			
Spec.	Accused	Place and Date	No. of Packages	Pros. Ex.	Accused	Place and Date	No. of Packages
2	Young *French Jones Harper	at or near Dreux, 1 September to 30 November 1944	400	1 5 4 7	Young *French Jones Harper	at or near Dreux 1st September 1944	400
3	Young French Wagner Harper	at or near Paris 1 October to 30 November 1944	2000	1 5 6 7	Young French Wagner Harper	Matelot Yards latter part of September 1944	2000
4	Wagner	Paris 15 September 1944	500	6	Wagner	Paris early September 1944	500
5	Young	Paris 1-30 September 1944	200	1	Young	Paris September 1944	200
6	Jones	Dreux-Paris 1 October 1944	200	4	Jones	Dreux-Paris 1 October 1944	200
7	Jones	Dreux-Paris 7 October 1944	200	4	Jones	Paris 7 October 1944	200

* legally insufficient

of wrongfully or knowingly selling or disposing of property of the United States furnished or intended for the military service thereof in violation of Article of War 94 (MCM, 1928, par.104c, p.100) are inapplicable as the offense here charged constitutes not only a violation of that Article but as herein indicated a far more serious offense involving malignant injury to the nation in violation of Article of War 96 (Cf: CM ETO 3801, Edward H. Smith). However, Congress has denounced the offense of willfully injuring or destroying or of attempting to injure or destroy, with intent to injure, interfere with or obstruct the national defense, national defense materials, national defense premises and national defense utilities and has prescribed as the punishment upon conviction of one of such offenses a fine of "not more than $10,000 or punishment of not more than ten years or both" (Act April 20, 1918, c.59, sec.5, as added by Act Nov.30,1940, c.926, 54 Stat.1220, 50 USCA 105). Congress by said statute has indicated its policy as to appropriate punishment for the types of offenses with which accused were charged and of which they were found guilty under Specifications 2 to 7 inclusive. By custom of the service (sub.par.a, supra), therefore, the sentence of courts-martial should not include confinement in excess of ten years for each offense.

In connection with the determination of the maximum punishment which may be imposed it is informative also to note that Congress has provided that the theft from railroad cars containing inter-state or foreign shipments of freight or express shall be punished by a fine of not more than $5,000 or imprisonment of not more than ten years or both (Act Jan.21,1933, c.16; 47 Stat. 733, 18 USCA 409).

c. The maximum permissible periods of confinement of each accused is as follows:

Years for each Specification:

Accused	1	2	3	4	5	6	7	total years
Young	2	10	10		10			32
French	2	*	10					12
Harper	2	10	10					22
Wagner	2		10	10				22
Jones	2	10				10	10	32

*legally insufficient

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

Name	Years	Months	Enlistment (E) or Inductment (I) Place and Date	
Young	36	8	(I) New York City 5 November 1943	Young, French, Jones and Harper were inducted and Wagner enlisted for the duration of the war plus six months. The service period of each accused is governed by the Service Extension Act of 1941. No prior service of any of the accused is shown.
French	33	-	(I) Houston, Texas 19 November 1943	
Harper	26	10	(I) Chicago, Illinois 19 November 1943	
Wagner	22	2	(E) Fort Snelling Minnesota 14 December 1942	
Jones	19	4	(I) Clarksburg, West Virginia 1 December 1943	

10. The court was legally constituted and had jurisdiction of the persons and the offenses. No errors injuriously affecting the substantial rights of any of the accused were committed at the trial, except as to accused French as hereinabove stated. The Board of Review is of the opinion that the record is legally sufficient to support the findings of guilty of all accused of the Charge and of accused Young as to Specification 1,2,3 and 5; of accused French as to Specifications 1 and 3; of accused Harper as to Specifications 1,2 and 3; of accused Wagner as to Specifications 1,3 and 4; and of accused Jones as to Specifications 1,2,6 and 7; legally insufficient to support the findings of guilty of accused French as to Specification 2, and legally sufficient to support so much of the sentences as involve dishonorable discharge, forfeitures of all pay and allowances due or to become due, and confinement at hard labor: Young for 32 years, French for 12 years, Harper for 22 years, Wagner for 22 years and Jones for 32 years.

11. Confinement in a penitentiary is authorized upon conviction of the crime of conspiracy by Article of War 42 and section 37, Federal Criminal Code (18 USCA 88). The entire sentence of confinement as to each accused may be executed in the penitentiary (AW 42).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

5 MAY 1945

CM ETO 8236

U N I T E D S T A T E S	)	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Staff Sergeant ALEXANDER W. FLEMING (42080278), Technician Fourth Grade WILLIAM R. SMITH (31446204), and Privates ARTHUR T. NELSON (32685084) and WILLIAM T. DAVIDSON (36892644), all of Company B, 716th Railway Operating Battalion	)	Trial by GCM, convened at Seine Section, Paris, France, 9 January 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor, FLEMING and SMITH each for 50 years and NELSON and DAVIDSON each for 45 years. No place of confinement designated.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Staff Sergeant Alexander W. Fleming, Private Arthur T. Nelson, Private William T. Davidson, and Technician Fourth Grade William R. Smith, all of Company B, 716th Railway Operating

8236

(142)

Battalion, European Theater of Operations, United States Army, did between 22 October 1944 and 31 October 1944, at or near Versailles, France, enter into an agreement and conspiracy to take, carry away and unlawfully dispose of and to apply to their own use and benefit rations, cigarettes and supplies, property of the United States, furnished and intended for the military service thereof, and to divert the same from military use in the theater of operations.

Specification 2: In that * * * did, jointly and in the execution of a conspiracy previously entered into between themselves, at or near Versailles, France, between 22 October 1944 and 31 October 1944, wrongfully dispose of two thousand (2,000) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to the creation of a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of personnel of the armed forces, during a critical period of combat operations.

Specification 3: In that * * * did, jointly and in the execution of a conspiracy previously entered into between themselves, at or near Versailles, France, on or about 5 November 1944, wrongfully dispose of two thousand (2,000) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to the creation of a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of personnel of the armed forces, during a critical period of combat operations.

Specification 4: In that * * * Fleming * * * Nelson and * * * Smith, * * * did, jointly and in the execution of a conspiracy previously entered into between themselves, at or near Versailles, France, between 1 November 1944 and 10 November 1944, wrongfully dispose of two (2) cases of rations, commonly known as "D" rations, property of the United States and intended for use in the military service thereof, thereby diverting vital food supplies from use in the theater of operations and contributing to a shortage of food supplies, during a critical period of combat operations.

Specification 5: In that * * * Fleming * * * Davidson and * * * Smith * * *, did, jointly and in the execution of a conspiracy previously entered into between themselves, at or near Versailles, France, on or about 22 November 1944, wrongfully dispose of nine (9) cases of rations commonly known as "Ten in One" rations, property of the United States and intended for use in the military service thereof, thereby diverting vital food supplies from use in the military operations and contributing to a shortage of vital food supplies, during a critical period of combat operations.

Specification 6: (Stricken by court on motion of defense)

Each accused pleaded not guilty, and each was found guilty of the Charge; accused Fleming and Smith were each found guilty of all specifications; accused Nelson was found guilty of Specifications 1,2,3 and 4 and accused Davidson was found guilty of Specifications 1,2,3 and 5. No evidence of previous convictions was introduced as to any accused. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, Fleming and Smith each for 50 years, and Nelson and Davidson each for 45 years. The reviewing authority approved each of the sentences, but did not designate a place of confinement, and forwarded the record of trial for action under Article of War 50½.

(44)

3. Upon motion of defense counsel to strike from the charge sheet either Specification 1 or Specification 6 made after arraignment but prior to the pleas of the accused, the court without hearing any evidence struck Specification 6 (R6-7) which was as follows:

> "In that Staff Sergeant Alexander W. Fleming, Private Arthur T. Nelson, Private William T. Davidson, and Technician Fourth Grade William R. Smith, all members of Company B, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Dreux, France, and at or near Paris, France, and at various and sundry places between said places, between 1 September 1944 and 30 November 1944, jointly and in conjunction with each other, and other members of 716th Railway Operating Battalion, 724th Railway Operating Battalion, and other railway operating personnel, agree and conspire to defraud the United States through pillaging, division of spoils, and mutual inaction against pillaging by each other, through wrongful conversion to their own joint and several purposes and profit, of military supplies and equipment, the property of the United States in the possession and custody of military agencies, furnished and intended for the military service thereof, while such supplies and equipment were enroute to military forces engaging the enemy, and other military forces of the United States, during a critical combat period in the theater of active military operations; and pursuant thereto, did, at divers times and places as herein alleged wrongfully divert such supplies and equipment from the military purposes for which such supplies were intended, to their own purpose of personal profit."

4. Prosecution's evidence in the instant case with respect to the conspiracy closely followed the pattern of the evidence as to the conspiracy involved in CM ETO 8234, Young, et al. Reference is made to the summarization of such evidence in the holding in the Young case. It would have substantially proved the corpus delicti of the offense alleged

in Specification 6 which was stricken and would therefore have supported the admissions in evidence of the statements of accused (Pros.Exs.3-7). The question for determination is whether such evidence also established the corpus delicti of the particular smaller conspiracy alleged in Specification 1 so as to authorize the admission in evidence of accuseds' statements to connect them with that conspiracy. A quotation from the Young case with respect to the general conspiracy alleged in Specification 6 is in point:

> "It may be assumed that this conspiracy did not have its origin or inception in a deliberately organized plot to defraud the government. However, the trespasses and thefts, due to their repetition without secrecy or stealth and free from hindrance, in a comparatively short period of time welded themselves into a complete 'concurrence of sentiment' among the group of soldiers involved. Its focal point was a recognized non-feasance in the form of mutual inaction of the railway operatives and maintenance men whereby each was permitted to seek his own advantage without fear of detection or retribution. Such attitude resulted from the repeated commission by them of the illegal acts which were notoriously open and within the knowledge of a substantial part of the membership of the battalion."

The evidence in the instant case showed that this larger conspiracy was created and operated within a period (1 September 1944 to 30 November 1944) which embraced the time of formation and operation of the smaller conspiracy as alleged in Specification 1 (22 to 31 October 1944) and that participants in the large conspiracy included personnel of the 716th Battalion employed at the place or places where accused served. It was a fair and reasonable inference for the court to draw from this proof that accused in their own small confederation were a part of the general conspiracy which the evidence showed existed.

> "It suffices if with knowledge that others have combined to violate the law, one knowingly co-operates in some affirmative manner to further the purpose of the

conspiracy" (Martin v. United States (CCA 10th 1938), 100 F.(2nd) 490, 496, cert. denied 306 U.S.649, 83 L.Ed.1048 (1939)).

It is therefore the considered opinion of the Board of Review that there exists in the record of trial adequate evidence of the corpus delicti of the crime of conspiracy charged in Specification 1 to permit the admission in evidence of accuseds' statements. Relevant parts of these statements, which beyond all peradventure were given by each accused freely and voluntarily with full knowledge of his rights, are as follows:

FLEMING

"During the last week of October 1944 T/4 William R. Smith Co. B,716th Rwy Opn Bn and myself took 4 cases of cigarettes from a car that was standing on either track 11 or 12 in Matelot Yards, Versailles France awaiting repairs. Sgt Smith and myself took the four cases to our car in which we lived in Matelot Yards. That evening these four cases of cigarettes were taken to Paris in a truck driven by T/5 Wayne Miller, Co B, 716th Rwy Bn who was accompanied by T/4 William R. Smith, Pvt William T. Davidson and Arthur T. Nelson, all of who live in my box car. They told me they sold approximately 2½ cases in various cafes in Paris. The remainder of the four cases were brought back and sold to French workers in Matelot Yard by Sgt. William Smith and myself. Davidson gave the money he had received from the sale of cigarettes in Paris to me and Smith also gave me some he had received. I divided the total receipts from the complete sale of these cigarettes which amounted to 100,000 francs or its equivalent $2000.00 U.S. currency, among the following five men who received $400.00 each: (1) S/Sgt Alexander W. Fleming, (2) T/4 William R.Smith, (3) T/5 Wayne Miller, Pvt William T. Davidson and Arthur T.Nelson.

On or about 5 November 1944 Sgt R Smith and I obtained information that there was car containing cigarettes in a train that was in the Matelot

Yard, Versailles, France. We hung around this car till the M.P.s left it just before the train pulled out of the yard. There were 10 or 12 other men getting cigarettes from the same car at the same time we removed four (4) cases of cigarettes. We hid these cases for about 30 minutes while we went to get Davidson and Nelson from the car in which we all live. All four of us carried the four cases to our car. We sold these cigarettes to French yard workers for 100,000 francs ($2000.00)which we split 5 ways including T/5 Wayne Miller who we forced to take the money.

* * *

On or about 22 November 1944 Pvt. William T. Davidson T/4 William R. Smith and myself took 9 cases of 10 in 1 Rations from a box car in Matelot Yards, Versailles, France. Sgt Smith and I sold five of these to French yard workers for 7500 francs ($150.00). These other four cases were eaten by us or taken to the mess hall where we gave them to the mess Sgt.

Around the first week of Nov 1944 Pvt Arthur Nelson, Sgt William R. Smith took two cases of D ration chocolate bars from a box car in Matelot Yards, Versailles. I did not take these but I help sell them and receive and equal share of the money from the sale which was split four ways between myself, Sgt. Smith, Pvt Davidson and Pvt Nelson. We sold these for 40 francs a bar to the French yard workers. We received approximately 2500 francs apiece from this sale of government supplies" (Pros. Ex.3)

SMITH

"About 20 October 1944, I was transferred to the Matelot yards, and for the first three weeks I did not take any supplies from the trains. About 5 November 1944, the wrecking crew was established comprising the following: S/Sgt A. Fleming, T/5 W. Miller, Pvt. A. Nelson, Pvt. W. Davidson and myself, who were assigned to one car, and T/4 George Caruth, T/4 Thomas

Simard, T/4 Donald Jessie, Sgt.Donald Starr and PFC Julius Ziven were assigned to another car. The repair track is located next to our cars, and at this time a box car with cigarettes was placed on this track for repairs. Sgt. Fleming, Pvt. Davidson, Pvt. Nelson and myself took a case each from this car and brought them to our car. These four cases were disposed of to French workers in the yard, and some were taken to Paris and sold for 500 francs per carton making a total of $2000.00. This money was split 5 ways, but Cpl. W. Miller never did take part in any of these thefts and the split was forced onto him due to him being a member of our car crew. * * * about 2 days later another car was placed on the repair track and Pvt. Nelson and myself took two cases of chocolate from this car and took them to our car. These cases contained 144 bars each. This chocalate was sold to French civilians for 40 francs per bar making a total of $140.00. About two days later Sgt. Fleming learned that a ration train was in the yards and we went to the yrads and located the car containing cigarettes. The car was guarded by train guards, but they suddenly disappeared and we received four cases from some soldier who was passing them out of the car. These cigarettes were sold to French workers in the yard for 500 francs per carton for a total of $2000.00. * * * A few days later, Fleming, Nelson,Davidson, and myself and Caruth, Simard, Jessie, Starr and Ziven took several cases of 10 in one rations from a car on a train. We sold about 5 cases from our car for 1500 francs per case making a total of $150.00" (Pros.Ex.7).

NELSON

"I do not remember the exact date but it was one afternoon about the last week of October 1944 that a bad order box car was switched onto a side track for repairs. This side track was about 25 feet from the box car in I lived. S/Sgt Alexander Fleming, T/4 William Smith, Pvt. William Davidson and I took four cases of cigarettes from this box car. There were

other soldiers who I do not know getting cigarettes from this car at the same time. We carried these four cases of cigarettes to the box car where we lived. That evening T/4 William Smith, Pvt. Davidson and I went into Paris with the cigarettes on a truck driven by T/5 Wayne Miller also of Co B,716th Rwy Opn Bn, who also lived in our box car. We had put about two cases of cigarettes into two barracks bags. We sold approximately sixty (60) cartons at five hundred (500) francs a carton to a cafe proprietor on Rue Lafeyette. The remainder of the four cases of cigarettes were sold by T/4 William Smith to French civilians who worked around Matelot Yards Paris France where we lived. He received five hundred francs (500) a carton for these. The total one hundred thousand (100,000) francs received from the sale of the four cases of cigarettes was split five (5) ways between S/Sgt Alexander Fleming, T/4 William Smith, Private William Davidson, T/5 Wayne Miller and myself. We each received (20,000) twenty thousand francs from this deal. T/5 Wayne Miller did not want the money but he was forced to take it by T/4 William Smith.

The next time that I remember obtaining cigarettes from a box car was about 5 Nov 1944 at Matelot Yards, Versailles France when S/Sgt Fleming and T/4 Smith came and got Davidson and I from our car to help them four (4) cases of cigarettes which they had hid, back to our car. Smith and Fleming sold these cigarettes to the yard workers for (500) five hundred francs a carton. We split the one hundred thousand francs (100,000) from these sales five (5) ways including T/5 Wayne Miller who we again forced to take the money. * * * During the first weeks of Nov 1944 I received from T/4 William Smith about (1500) fifteen hundred francs from the sale of D ration chocolate. I do not remember being in on the stealing of these cases but I was cut in on the split" (Pros.Ex.5).

(150)

DAVIDSON

"About the last week of October 1944 at Matelot Yard, Versailles, France T/4 Smith came back to the box car where Pvt Arthur Nelson and I were and told him to come with him. As we walked he told us that S/Sgt Alexander Fleming and he had four cases of cigarettes which they had taken off a box car. We each carried a case of cigarettes back to the box car where we lived. We opened the cases and put the cartons in burlap bags. That evening we took all of the cigarettes to Paris on a truck driven by T/5 Wayne Miller. S/Sgt Fleming did not go but T/4 Smith, Pvt Nelson and I went. Arthur Nelson and I went into a cafe on Rue Laffeyette where sold approximately 40 or 50 cartons for five hundred francs (500)F a carton to the proprietor. The remainder of the cigarettes were taken back to Matelot Yards, Versailles, France where they were sold the next day to French civilians by T/4 William Smith and S/Sgt Alexander Fleming for five hundred (500) francs a carton. The one hundred thousand francs (100,000F) received from the sales of these four cases was split five (5) ways between S/Sgt Alexander Fleming, T/4 William Smith, Pvt William Davidson T/5 Wayne Miller and Pvt Arthur Nelson, each of us receiving (20,000F) twenty thousand francs. These cigarettes were taken from a car that was awaiting to be repaired which was standing on a siding near our box car.

During the first week of November, I dont recall the date, T/4 Smith came to our quarters and got Pvt: Arthur Nelson and I to go with him. Fleming and Smith had taken four cases of cigarettes from a train and the four of us carried a case apiece back to our quarters. T/4 Smith sold the biggest part of these cigarettes to French civilians who were around Matelot Yards, Paris, France. The price they were sold for was (500F) five hundred francs a carton. The (100,000) one hundred thousand francs was split up by S/Sgt Fleming and T/4 Smith among five of us; S/Sgt Fleming, T/4 Smith, Pvt Nelson, T/5 Miller and myself each receiving (20,000) twenty thousand francs.

* * *

Another time about 22 November 1944 at Matelot Yards, Versailles, France S/Sgt Fleming, T/4 William Smith and I took nine cases of 10 in 1 rations from a box car. S/Sgt Alexander Fleming sold some of these cases on the days of the raids. I did not receive any of this money as he had in his possession or hid. It had not been divided up yet" (Pros.Ex.6).

The admissions of each accused hereinabove set forth specifically connected him with the conspiracy alleged in Specification 1 and showed that he was an active participant therein. The court was instructed that each accused's admissions were binding only on him. The record of trial is legally sufficient to support the findings of guilty of each accused of such specification.

5. Specifications 2 to 5 inclusive in the instant case (hereinafter designated "diversion charges") allege offenses equivalent to those with which the accused in CM ETO 8234, Young, et al, supra were charged in Specifications 2 to 7 inclusive in that case, to wit the interference with and obstruction of the channels of distribution of necessary supplies intended for combat and other personnel of the United States military service during a period of critical operations. The evidence which proved the corpus delicti in the instant case is of the same type and probative value as the evidence supporting the proof of the corpus delicti in the Young case. In view of the detailed discussion contained in the holding in said case (to which reference is hereby made) no further comment is here deemed necessary. The corpus delicti having been shown by adequate evidence, the propriety of the admission of accuseds' statements in support of proof of the diversion charges follows as a matter of course. Each accused in his statement admitted the acts with which he is charged in the several specifications applicable to him. Excluding all references by an accused in his statement to co-accused, as must be done (CM ETO 134, Stump, et al.), the admissions, when consolidated and synchronized, and considered with other evidence in the case, form a body of substantial competent evidence that each accused was guilty of acts which interfered with and obstructed the national defense and support the findings of guilty of the accused as charged in the diversion specifications (CM ETO 8234, Young, et al.).

6. In the testimony of the witnesses Lieutenant Colonels Joseph L. Lick and John L. Pickett and of Private Seymour C.Schlossberg certain hearsay evidence was erroneously admitted in evidence. The same is of the identical type condemned in the Young case. However, for the reasons therein stated the Board of Review considers the admissions of said evidence as non-prejudicial.

7. a. The authorized maximum punishment for the crime of conspiracy (Specification 1) is dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years (CM ETO 8234, Young, et al).

b. The authorized maximum punishment for the offense of interfering with or obstructing the national defense or prosecution of the war by diverting supplies furnished and intended for the military service from their regular channels of distribution to combat and other troops during the critical period of military operations, is dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years (CM ETO 8234, Young, et al).

c. The maximum permissible period of confinement of each accused is as follows:

	Years for each Specification					
Accused	1	2	3	4	5	Total Years
Fleming	2	10	10	10	10	42
Smith	2	10	10	10	10	42
Nelson	2	10	10	10		32
Davidson	2	10	10		10	32

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

Name	AGE Years	Months	Inducted Place	Date	
Fleming	29	1	Camden, New Jersey	2 November 1943	Each accused was inducted for the duration of the war plus six months. Service period of each accused governed by Service Extension Act 1941. No prior service of any accused shown.
Smith	28	9	Providence, Rhode Island	22 October 1943	
Nelson	26	8	New York, New York	15 December 1942	
Davidson	29	-	Detroit, Michigan	1 December 1943	

9. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of any of the accused were committed at the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all accused of the Charge and of accused Fleming and Smith each as to Specifications 1 to 5 inclusive; of accused Nelson as to Specifications 1 to 4 inclusive, and of accused Davidson as to Specifications 1,2,3 and 5, and legally sufficient to support so much of the sentences as involve dishonorable discharge, forfeitures of all pay and allowances due or to become due, and confinement at hard labor; Fleming for 42 years; Smith for 42 years; Nelson for 32 years; and Davidson for 32 years.

10. Confinement in a penitentiary is authorized upon conviction of the crime of conspiracy to commit an offense against the United States by Article of War 42 and Section 37, Federal Criminal Code (18 USCA 88). The entire sentence of confinement may be executed in a penitentiary (AW 42).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

18 May 1945

BOARD OF REVIEW NO. 2

CM ETO 8242

U N I T E D S T A T E S	26TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 26, U.S. Army, 13 February 1945.
Private HOMER BRADLEY (35707078), Company F, 101st Infantry	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL AND JULIAN, 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 Homer Bradley, Company F, 101st Infantry, did at Reichlange, Luxembourg, on or about 21 December 1944, desert the service of the United States by absenting himself without leave from his organization with the intent to avoid hazardous duty and to shirk important service, to-wit; action against the enemy, and did remain absent in desertion until he was apprehended at Luxembourg, Luxembourg on or about 27 December 1944.

Specification 2: In that * * * did, at Hierheck, Luxembourg, on or about 7 January 1945, desert the service of the United States by absenting himself without leave from his organization with the intent to avoid hazardous duty and to shirk important service, to-wit; action against the enemy, and did remain absent in desertion until he was apprehended at Athus, Luxembourg, on or about 19 January 1945.

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 specifications. Evidence was introduced of one previous convictions by special court-martial for absence without leave for 34 days in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution shows that accused was a rifleman and was present with Company F, 101st Infantry on 20 December 1944 (R8) at Reichlange, Luxembourg . Prior to 21 December 1944 all the members of his platoon were assembled in a room and informed that a movement toward the enemy was impending and that the company was to be committed if the German counter-offensive made further progress (R8). About 0500 to 0530 hours on 21 December 1944, the platoon received orders to get ready to move out in a march to make contact with the enemy (R9). Accused was not present to make contact with the enemy (R9). Accused was not present in the platoon area at this time (R9), but was seen at the top of a nearby hill by a squad leader who told him to get his equipment and blankets ready as the platoon was moving out on foot to contact the enemy (R9,10). Shortly thereafter the platoon formed in a column of twos and, although the personnel was checked and the area searched, accused could not be found (R11-14). Extra ammunition for an attack had been issued to the platoon (R12). The platoon moved out (R11) and on 24 December contacted the enemy (R12). During the period from 21 December to 27 December accused was not present with his platoon (R12). A duly authenticated extract copy of the morning report of accused's organization was received in evidence showing accused absent without leave from 22 December 1944 to 30 December 1944 (Pros.Ex.A).

On 6 January when the company was located near Bavigne, Luxembourg (R15), accused was brought in by the first sergeant to join the company and remained overnight (R15,18). The next day the platoon, including accused, was informed that the enemy was ahead and that at about 1000 hours they were going to contact the enemy (R15,18). Accused was a rifleman in the first squad and was present when the company moved out about 1000 hours (R15,16,19). After advancing over 800 yards the enemy was contacted at about 1500 hours (R16). The battle continued until about 1700 hours, when the company withdrew to a line of defense due to the superior strength of the enemy (R16). At this point the men and the area were checked and accused could not be found (R16,19). He was last seen just before the enemy was contacted (R17), and was not present for duty with the company from 7 January 1945 until 19 January 1945 (R19).

4. Accused, after his rights as a witness were fully explained to him (R22), elected to be sworn and testified in substance as follows:

He is 21 years old; never attended school before entering the Army and can neither read nor write (R23). After daylight on 21 December, he came to his company area about 0630 hours and then left to get his equipment (R23,24). He returned to the bivouac area about 0700 or 0800 hours and no one was there (R24). He started to look for his company, could not find it and went to a little village. He did not remember where he was between 21 December and 27 December, except that on Christmas day he was in a village in Luxembourg (R24). On the morning of 7 January he visited Company A, remaining there until about 1100 hours. When he returned to his company area at that time, no one was there. He had not been told his company or platoon was going to attack nor had he been issued any extra ammunition (R24,25). He did not remember where he was between 7 January and 19 January. He can take an M-1 rifle apart and put it back together (R25).

On cross-examination, he testified he was inducted into the Army in 1943, went to school at Camp Atterbury, Indiana, and took Infantry Basic Training at Camp Blanding, Florida (R25,26). On the morning of 21 December he did not see the sergeant who testified he told accused to get his equipment and prepare to move out (R30). Sometime after Christmas he was picked up by the military police about three miles from Reichlange (R33). While he was gone he ate exclusively at civilian houses (R33). After returning to his company he was put in an attic to sleep and arose next morning about seven o'clock (R35, 36). He left to visit Company A without asking for permission (R36,37). Company A was located in Bavigne, and when he returned from it at 1100 hours, his company was gone (R37). He then wandered around in Bavigne for about two days and then went on to another village, eating in civilian houses (R38,39). He did not see any troops or military

police and he did not ask anyone where his outfit was (R39,40). He knew he was supposed to be with his company (R40). He was always within sound of artillery, knew fighting was going on and he was not going in the direction of the fighting (R41).

The court examined the accused at length as to his ability to comprehend ordinary facts such as where he was born and lived, the names of his brothers and sisters, his ability to readand write, his understanding of his Army pay, his receiving letters from home and his inability to answer them (R41-48).

By stipulation the report of the division neuropsychiatrist, who had examined accused was received in evidence (Def.Ex.1). Said report is as follows:

> "1. This soldier's illiteracy, background, social status, and the possibility that he has less than average intelligence prevent the development of such strong motivation for resisting the anxiety and fears of the battlefront as is desirable in an infantry rifleman. With such a background, the soldier is less likely to resist the stresses encountered by a front line soldier as effectively as a soldier with better motivation. Shortly before he went AWOL he had apparently reached the point where he no longer was effective as an infantry rifleman because of 'freezing' and may have reached the point of maximum usefulness as an infantry rifleman. He probably was not aware of the fact that his condition at the time he went AWOL was such as to enable him to seek medical attention.
>
> 2. The soldier is sane and is able to make the distinction between the right and wrong of an act, and apparently was so able at the time he went AWOL and during the period he was AWOL" (Def.Ex.1).

The court called the division neuropsychiatrist as a witness and, after being properly qualified as an expert, he testified that accused was able to distinguish between right and wrong, but that on the basis of the information available he did not know if accused could make this distinction at the time of his absence without leave. The witness stated that as soon as accused could reach a point of reasonable safety, he would be able to make such a distinction. Accused's acts were motivated by fear and at the time he went absent without leave accused may not have been in complete possession of all his faculties (R50). Accused is not of

average intelligence (R51). Witness is satisfied accused knows the difference between right and wrong and should not be referred to a sanity board (R55).

5. The absence of accused from his organization between 21 and 27 December 1944 was proved by competent evidence. Furthermore, the prosecution showed that early on the morning of 21 December a sergeant in accused's platoon told him to get his equipment ready as they were moving out to contact the enemy, and that it was shortly thereafter that accused was missing and could not be found. The court was warranted in inferring from all the facts in evidence that accused left his organization with the intent to avoid hazardous duty (MCM, 1928, par. 130a, p. 142; AW 28; CM ETO 4701, Minnetto). The morning report shows that accused's first absence without leave began on 22 December 1945. Other evidence, however, clearly established that accused absented himself on 21 December, and the facts surrounding the commencement of the absence demonstrate that it was unauthorized (CM ETO 527, Astrella; CM ETO 4915, Magee).

Concerning Specification 2 of the Charge, there is competent substantial evidence to support the findings of the court. Accused's absence on 7 January 1945 is clearly established and here again the evidence in the record justifies the inference that he left his organization without authority and with the intent to avoid hazardous duty. In addition, on cross-examination, he admitted that on this occasion he left his company area without permission and that he knew he should be with the company. Hence, all the elements of the offenses charged in both specifications are fully established by the evidence (CM ETO 1460, Pettapiece).

Accused's own testimony and that of the division neuropsychiatrist raised an issue as to accused's mental capacity. This was an issue of fact and by its findings the court resolved this question against the accused. Inasmuch as there is contained in the record competent substantial evidence to support this finding, it will not be disturbed by the Board of Review (CM ETO 1404, Stack; CM ETO 4165, Fecica).

6. The charge sheet shows that accused is 21 years and two months of age and was inducted 3 August 1943 at Louisville, Kentucky. 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. Penitentiary confinement is authorized upon conviction of the crime of desertion in time of war (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

CHARLES M. VAN BENSCHOTEN _____ Judge Advocate

JOHN WARREN HILL _____ Judge Advocate

ANTHONY JULIAN _____ Judge Advocate

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

BOARD OF REVIEW NO. 1

29 JUN 1945

CM ETO 8270

U N I T E D S T A T E S	CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Technician Fourth Grade LAWRENCE COOK (34043065), attached to 380th Replacement Company, 3rd Replacement Battalion, 2nd Replacement Depot	Trial by GCM, convened at Dijon, France, 22,23 December 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, BURROW 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 Technician Fourth Grade Lawrence Cook attached to 380th Replacement Company, 3rd Replacement Battalion, 2d Replacement Depot, did, at Mouchard, France, on or about 25 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Berthe Dugois.

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 being drunk and disorderly in station in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution is, briefly summarized, as follows:

At the time of the alleged offense, the alleged victimized female, Madame Dugois, was 74 years of age and was living at Mouchard, France. She did not at the trial identify accused as the rapist. She asserted she was uncertain at that time as to his identification (R9-10). [The offense is alleged to have been committed on 25 September 1944; the trial was held on 22 December 1944]. She testified that about three o'clock in the afternoon of 25 September 1944, a negro soldier who wore a jacket and helmet and carried a blanket under his arm suddenly appeared on the stairs leading to her apartment and then entered the apartment. She thereupon went into another room to get a chair. The negro followed, seized her and threw her on a bed. She cried for help, whereupon her assailant seized her by the throat with one hand and placed his other hand over her mouth. He then placed her legs over his shoulders, exposed his sexual organ and undertook to have sexual intercourse with her. She struggled hard throughout to prevent his entrance to her private parts but was no match for the negro in strength and soon became exhausted (R11). Due to the disproportionate size of their genitals, there was no complete coition, but her assailant did definitely effect to some degree a penetration of her genitals with his own (R11). Having apparently become vexed at his inability to effect a complete penetration, the negro pulled her from the bed to the floor,

striking her head against the floor and also injuring her elbow. At this stage of the proceedings, she escaped from his grasp and crawled out the door. She went immediately to the nearby home of Madame Jeanne Caretto and reported the incident (R10). Madame Dugois testified that twice later on the same day, once about 30 minutes later; when he came back in a motor car, and again after an additional lapse of approximately 30 minutes, when he filed before her with other negroes, she saw and "recognized" the person who had raped her (R10,11). She "knew him again quite well that day" (R10).

Madame Caretto and her son, Etienne Caretto, were both at their home when Madame Dugois arrived there crying and in a highly nervous state. Both had also been there a few minutes earlier when a negro soldier who wore a jacket and helmet and carried a blanket was there (R14,20). The son, Etienne, talked to the negro in the presence of Madame Caretto. The negro endeavored to sell to them the blanket which he carried, and when he departed, he went in the direction of the house of Madame Dugois, which was about 30 meters distant (R13,20). Madame Caretto stated that the elapsed period between the time the negro left her house and the time Madame Dugois arrived there was not more than 15 minutes (R14). Etienne ran to Madame Dugois' house immediately after she appeared at his mother's home and there saw the negro who had been at the Caretto house about ten minutes before Madame Dugois arrived there (R21). At the trial, both Madame Caretto and her son identified accused as the negro soldier who was at their home just before Madame Dugois was attacked (R13,20).

Immediately after Madame Dugois appeared at the home of Madame Caretto, Etienne went to the area where accused's organization was encamped about 400 yards to the south. He stated that while on the way he saw a negro soldier who wore a jacket and helmet and carried a blanket under his arm. The soldier was then near the center of a field or pasture that lay between the bivouac area of accused's organization and the home of Madame Dugois. He was southwest of the house in which the offense was committed and almost north of the northwest corner of the bivouac area (R21; Pros.Ex.1). Upon arriving at the bivouac area, Etienne enlisted the aid of a sentry, and together they intercepted accused just

outside the bivouac area as he approached it from a westerly or northwesterly direction. Etienne stated that upon meeting accused, after having already passed one colored soldier, he (Etienne) said to the sentry "Here is the negro that I saw in the field and at my house". Both Etienne and the sentry stated that at the time accused was so intercepted he (accused) wore a field jacket and carried a blanket underneath the jacket (R22,27). After being conducted into the bivouac area, and while other soldiers crowded around, accused disappeared for a brief time and when he returned he did not wear a jacket nor did he carry a blanket. He wore a shirt which had on it the chevrons of a staff sergeant (R22). Accused sought to strike Etienne when the latter again identified him in the presence of an officer (R22,30).

Dressed in olive drab shirt and trousers, and while wearing the chevrons of a staff sergeant (R30), accused was carried to the home of Madame Dugois, where both Madame Dugois and Madame Caretto looked at him. Upon this occasion, he was taken there in an automobile by an officer whom Madame Caretto recalled as Captain Caldwell and who was armed (R19). Later during the same afternoon accused was again carried before Madame Dugois and Madame Caretto. Upon this latter occasion he was in a line with 25 or 30 other negroes, all of whom were dressed alike in jackets and helmet liners. Madame Caretto stated that she herself recognized accused upon each of these occasions as the negro who had been at her house earlier with the blanket (R15-16,19). Asked if Madame Dugois did anything at the moment when she emerged from her house and looked at accused when he was carried there the first time, Madame Caretto replied, "Yes, she pointed him out" (R15). After stating that she herself later recognized accused in the line-up and that Madame Dugois was called from her house to see if she could identify him, Madame Caretto was asked, "Did Madame Dugois recognize the same soldier at that time?", to which she answered, "Yes" (R16). Etienne Caretto stated that at Madame Dugois' house, when accused was first brought there alone by an officer, he recognized accused as the same soldier he had previously seen at his (Etienne's) home, in the middle of the field, and approaching the bivouac area when accused was taken into custody. Asked if his mother recognized the soldier, he replied, "Yes. The two women recognized the soldier" (R22). While testifying with reference to the time

accused was in the lineup, and after stating that both he and his mother recognized the negro as the one who had been at their house with the blanket, Etienne was asked the question, "What did Madame Dugois do?", to which he answered, "The same. She recognized him" (R23). While being examined by the court, Etienne, in response to the question, "Did you see Madame Dugois identify the accused at that time?", answered, "Yes"; and to the question, "Did she point to him?", he also answered, "Yes" (R25). He said that she pointed to accused as the one who had been in her house (R25).

Captain Fred A. Skina, Commanding Officer of the organization of which accused was a member, was present at the home of Madame Dugois upon both occasions when accused was there for identification purposes. He stated that upon the first occasion, accused got out of the car and walked to within approximately 15 feet of the house and that Madame Dugois then "identified the soldier". Asked what Madame Dugois did, Captain Skina replied, "She spoke that she could not forget his face". Asked further if Madame Dugois showed signs of recognition, Captain Skina replied in the affirmative (R30).

Between the first occasion and the second upon which accused was carried to the home of Madame Dugois, it was discovered that he had removed the staff sergeant's chevrons from his shirt and the U. S. insignia from his helmet liner. Upon being questioned about it, he at first said that the officer of the day had ordered him to remove them. Upon discovering that the officer of the day was to be questioned, he stated that he had removed the insignia and given them to a guardhouse prisoner who wanted them as souvenirs (R32).

Prior to the time accused appeared before Madame Dugois in the lineup, explanation was made to her that several negroes were to appear before her and that she would be asked to identify the one who had assaulted her (R32). When the negroes had been lined up, Madame Dugois was asked to walk along the line and see if her attacker was in the line. She did so, and upon arriving in front of accused, stopped, looked him in the face and pointed her finger at him (R33). Madame Caretto followed and

also pointed out the accused (R33). While Madame Dugois and Madame Caretto were talking and not looking toward accused, the positions of accused and another negro in the line were exchanged. Captain Caldwell then pointed to the negro who had been shifted into the position formerly occupied by accused and asked Madame Dugois if he was the man. Madame Dugois again pointed to accused (R33-34).

Search was made of accused's tent for his field jacket but it was not found (R31).

4. For the defense:

A number of witnesses testified in person on behalf of accused, and the testimony of others was introduced by stipulation as to what they would testify if present. The burden of all this defensive evidence was that on the day in question accused was present with his blanket at a dice game which he was running in the bivouac area until within from 10 to 20 minutes, as variously estimated by the witnesses, before he was seen in the custody of the sentry and accompanied by the "Frenchman". When accused left the game he carried his blanket with him. There was also evidence to the effect that on the day in question accused owned no field jacket, having lost it previously, and was wearing a raincoat.

The accused, after his rights were fully explained to him, elected to remain silent.

5. Commission of rape by an American negro soldier upon the person of Madame Dugois in the manner, and at the time and place alleged in the Specification, was sufficiently established by the undisputed evidence. While Madame Dugois stated that only a slight penetration was effected, she was nevertheless positive that her assailant did penetrate her genitals with his own. Any penetration, however slight, is sufficient (MCM, 1928, par.148b, p.165).

Due to the failure of Madame Dugois at the trial to identify accused as her assailant, the only evidence to identify him as the guilty party is circumstantial in nature. The undisputed evidence bearing upon this question establishd that the rape was committed by a negro soldier who at the time of entering Madame Dugois' house wore a jacket and helmet or helmet liner and carried a

a blanket. When taken into custody as he approached his bivouac area within a few minutes after the rape was committed, accused, a negro, wore a helmet or helmet liner and a jacket and carried a blanket. At the trial, he was unequivocally identified by Madame and Etienne Caretto as the negro whom they had seen, clad as above stated and carrying a blanket, depart their house in the direction of Madame Dugois' home, some 30 meters away, within from five to 15 minutes before they learned of the attack on Madame Dugois. Immediately upon meeting accused as the latter approached the bivouac area, Etienne pointed him out to the sentry as the soldier whom he had seen at his house just before the rape and again near the middle of the field shortly thereafter. Accused approached the bivouac area from a direction not inconsistent with his having been at both places. Upon being taken into custody, he availed himself of the first opportunity to rid himself of his blanket and to change into different clothes. While wearing these different clothes, he was identified by Madame Caretto as the soldier who had been at her house and by Madame Dugois as the one who had raped her. Later during the same day he was recognized and identified by Madame Dugois, Madame Caretto, and Etienne Caretto from among 25 or 30 other negroes, all of whom were dressed alike, in an identification lineup. Madame Dugois testified, in effect, that the person who ravished her was a person whom she saw and recognized twice subsequently on the day the offense was committed, once when that person arrived at her house in an automobile and again later when he appeared before her at her house in a lineup. While she did not testify specifically that she pointed to accused or designated him by affirmative act, it is apparent from the record as a whole that this was, in part, the sense in which she, as well as Madame and Etienne Caretto, understood and used the word "recognized". As already indicated, the undisputed evidence established that accused was the person identified by her on the occasions in question.

The attempted proof of alibi did not account for accused's actions for the period of time during which the offense must have been committed. The wit-

nesses thereto testified that at about the time he left a dice game he carried a blanket.

The question of identification was a question of fact for the court. There was substantial competent evidence which was inconsistent with any reasonable hypothesis of accused's innocence and which was legally sufficient to justify the court in inferring his guilt beyond a reasonable doubt (CM ETO 3200, Price; CM ETO 3837, Smith).

Evidentiary questions as to the extrajudicial identifications of the accused must be noticed. This Board of Review held in accord with the federal and majority rule that testimony with regard thereto, including statements made by the identifying parties, should be freely accepted in evidence (CM ETO 3837, Bernard W. Smith). There is subsequent obiter dicta in two other cases, entirely unnecessary to the holding thereof, that such statements are hearsay (CM 270871, IV Bull. JAG 4; CM ETO 6554, Hill). The holdings do not conflict with the Bernard W. Smith case. The language of the Hill case was that testimony by third parties of such statements is not prejudicial where the identifying parties are present at the trial and identify the accused from the stand, and the holding was that of legal sufficiency. Thus, under the holding of the Hill case, there is no reason to disturb the testimony in the case at bar concerning the pretrial identifications by the Carettos, for they identified accused in court. Likewise, no civil or military court according to available authorities, has held that a witness at the trial may not testify to personal prior recognition of the accused as Madame Dugois has done in this case (CM ETO 7209, Williams). Therefore the only question to be decided anew (since the intervening cases) is whether it was competent evidence for third persons to testify that the prosecutrix "recognized" and "pointed out" the accused. Such actions could not be hearsay under any theory; signs of recognition are observed in facial expression and gesture. Testimony thereof was of circumstance, and it is the opinion of the Board of Review that it was properly admissible. While under the language of CM 270871, supra, and the Hill case, her statement that she "could not forget his face" might be artificially argued as hearsay, which is not conceded here, none would upset the findings because of its admission. Under

the Bernard W. Smith case, which has not been overruled, for holdings are not upset by dicta, it is competent evidence and if the defense had quarrel with the fact of the statement having been made or the concurrent verity thereof, the prosecutrix was available at the trial under oath for cross-examination.

6. The charge sheet shows that accused is 25 years of age and was inducted 24 April 1941 at Fort Oglethorpe, Georgia. His service period 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 rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

B. Franklin Peters Judge Advocate

Wm. T. Sarrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

12 APR 1945

CM ETO 8300

U N I T E D S T A T E S	)	80TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 80, U. S. Army, 26 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 40 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private CHESTER A. PAXSON (37424095), Company F, 318th Infantry	)	

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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 Chester A. Paxson, Company F, 318th Infantry, did, in the vicinity of Schmittville, France, on or about 17 December 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 to-wit: participation in operations against an enemy of the United States and did remain absent in desertion until he surrendered himself to military authorities at or near Scieren, Luxembourg on or about 25 December 1944.

Specification 2: In that * * * did, in the vicinity of Schieren, Luxembourg, on or about 1 January 1945, 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 to-wit: participation in operations against an enemy of the United States and did remain absent in desertion until he voluntarily returned to his organization in the vicinity of Niederfeulen, Luxembourg, on or about 9 January 1945.

Specification 3: In that * * * did, in the vicinity of Niederfeulen, Luxembourg, on or about 9 January 1945, 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 to-wit: participation in operations against an enemy of the United States and did remain absent in desertion until he surrendered himself at or near Warken, Luxembourg, on or about 18 January 1945.

Specification 4: In that * * * did, in the vicinity of Warken, Luxembourg, on or about 19 January 1945, 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 to-wit: participation in operations against an enemy of the United States and did remain absent in desertion until he surrendered himself at or near Beaufort, Luxembourg, on or about 23 January 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of Specification 1 excepting the words "at or near Scieren, Luxembourg" and substituting therefor the words "48th Replacement Battalion, APO 873, U. S. Army", of the excepted words not guilty and of the substituted words guilty; guilty of Specification 2; guilty of Specification 3 excepting the words "at or near Warken, Luxembourg, on or about 18 January 1945" and substituting therefor the words "to military authorities Northwest of Arlons, Belgium, on or about 11 January 1945", of the excepted words not guilty and of the substituted words guilty; guilty of Specification 4 excepting the words "at or near Beaufort, Luxembourg, on or about 23 January 1945" and substituting therefor the 8300

words "to military authorities at 821st Military Police Battalion on or about 22 January 1945", of the excepted words not guilty and of the substituted words guilty; and guilty of the Charge. Evidence was introduced of one previous conviction by summary court for failing to obey a lawful order from a commissioned officer in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 40 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. Prosecution's evidence was as follows:

The sole witness, First Sergeant Adolph J. Slagus, of Company F, 318th Infantry, accused's company (R6), testified generally, with respect to the activities of his organization from 15 December 1944 to the end of January 1945. On the first mentioned date it was in a rest area at Freyming, France, whence it was subsequently ordered to move to the flank of the Third Army at Scieren (Luxembourg). Before it was committed, orders were received to proceed to Bastogne, Belgium, to help stop the German drive and open up the rear for the 101st Airborne Division. Thereafter the company moved to Niederfeulen, Warken, Bourscheid, Wiltz and Beaufort (all in Luxembourg) where it crossed the Sure (Sauer) River. It continued the attack until it reached Mettendorf (Germany). "All the time we were attacking the enemy" (R7).

With respect to the several specifications, he testified as follows:

Specification 1: On 16 December 1944, while in the rest area at Freyming about 30-40 miles from Schmittville, France, the company was alerted to move on three hours notice. On 17 December reveille was at 0430 hours instead of 0600 hours as usual. When the company fell out at this time, accused was reported absent without leave. A search of the buildings failed to reveal his presence. He remained absent until he returned to military control at the 48th Replacement Battalion, APO 873, U. S. Army, on 25 December (R7; Pros.Exs.A,B). On 31 December he was returned "by battalion" to his organization at Scieren, Luxembourg, and was brought to the company commander who asked him why he was absent without leave. At first accused did not answer and then stated he wished to obtain some insurance "he wasn't getting". The company commander placed him in arrest of quarters (R7).

Specification 2: On 1 January 1945 at Scieren accused was absent from the formation held at 0700 hours. A check showed he was not in the building or in the remainder of the company area. He was absent without leave from that date until 9 January on which date Slagus brought him "from the battalion" to the company command post where the company commander again placed accused in arrest of quarters. The organization was then at Niederfeulen, Luxembourg (R7; Pros.Exs.C,D).

Specification 3: Accused again absented himself without leave from his organization at Niederfeulen on 9 January and could not be found in the buildings. He remained absent until his return to military control northwest of Arlons, Belgium, on 11 January (R7; Pros.Exs.D,E). On 18 January he was returned to his company at Warken, Luxembourg, where the company commander again placed him in arrest of quarters (R8; Pros.Ex.E).

Specification 4: On 19 January accused was not with his platoon. He once again absented himself without leave from the company, at Warken, and remained absent until he returned to military control (the 821st Military Police Battalion) on 22 January. On 23 January he was once more placed in arrest of quarters (R8; Pros.Exs.F,G,H). Slagus was present for duty with the company throughout the period of accused's unauthorized absences. Subsequent to 18 January 1945, he did not see accused until the day of trial (R8).

4. a. For the defense, Lieutenant Colonel John O. Woods, Chaplain of the 80th Division (R11), testified he met and talked with accused on the day of the trial (R12). As a result he learned facts concerning his civilian background. He was a farm and mill worker. He entered the Army about the middle of 1942. He was with the 89th Division for about 18 months during which time he did nothing that would be considered a misdemeanor and seemed to be a good soldier. While boxing he injured his left arm. He worked in a "wire section", studied radio and discharged his duties faithfully. He apparently was never reprimanded (R11). He joined the 80th Infantry Division in October 1944 (R12). He had $5,000 (National Service Life) insurance and while in England wanted an additional $5,000. He spoke about it twice to responsible people but was never assured that he would receive it. He did not wish to press them further. Concern over this insurance and his arm injury bothered him. He admitted that leaving his comrades was wrong. He told witness that if assured of the additional insurance he would be willing "to go back to do the soldiering that would be expected of him". He was quiet, unassuming, gregarious and remorseful because of leaving his comrades. Witness believed that if assured of additional insurance and given an examination of the left arm, accused would be willing to go back and work on a wire team "or something

that he knows he is trained in". The sole reason accused gave for his four absences was the lack of assurance concerning his requested additional insurance (R12).

b. After his rights were explained, accused elected to make the following unsworn statement through his counsel:

> "Since being in the Army I have received an arm injury at a boxing match fighting for my unit. I was in the hospital for six weeks. My arm bothers me considerably from time to time. However, since coming overseas, no one has paid much attention to the condition of my injury. I was examined by the medics in England and was told that nothing could be done about it, also that my arm would never be again as good as new. I have applied for an additional $5,000. National Service insurance while in England, which would give me a total of $10,000. However, the papers have never been completed to this date. My parents have written to me that they have never received word in regard to this insurance. As a result it has caused me considerable worry. If I could be relieved of the mental worry of this insurance and feel assured that the condition of my arm would be given some consideration, I am sure I would be able to and I would be willing to perform my military duties to the best of my ability" (R13).

5. Accused was charged with and convicted of desertion on four occasions, for periods of eight, eight, two and three days respectively,

> "by quitting and absenting himself without proper leave from his organization and place of duty with intent to avoid hazardous duty to-wit: participation in operations against an enemy of the United States".

The evidence shows that throughout the period of his unauthorized absences accused's company was continuously engaged in operations against the enemy and, with respect to Specification 1, that on the day before the first absence (17-25 December 1944) the company, located in a rest area where it had been for an undisclosed period, was alerted to move on three hours notice. There is not the slightest evidence, however, as to accused's situation or his connection with his company or that he knew of this alert. The evidence shows only that he was reported absent without leave at reveille at 0430 hours

8300

17 December and that his absence was later confirmed. It may have been that accused departed because of the alert, but this may not be inferred from proof of his absence alone. In order to support the findings of guilty of the offense charged, the record must contain substantial evidence of the notification to accused of imminent hazardous duty (CM ETO 455, Nigg; CM ETO 1921, King; CM ETO 5958, Perry and Allen; and authorities cited in those cases). Such proof is not supplied by evidence merely of absence without authority (CM ETO 6039, Clayton Brown, and authorities therein cited) or by evidence of accused's knowledge that he was absent without authority (CM ETO 564, Neville; CM ETO 1921, King; CM ETO 2432, Durie; CM ETO 5958, Perry and Allen; see also CM ETO 2481, Newton). As in CM ETO 5234, Stubinski, the record

> "is utterly devoid of evidence of * * * circumstances surrounding the absences and is legally insufficient to support the inference that accused had [the intent] requisite to constitute desertion".

This case is distinguishable from those in which the evidence showed that the accused was present with his organization and engaged in active operations against the enemy at the time he absented himself without authority. In such cases notice to the accused of existence and imminence of combat and its hazards is inherent in the situation (see cases cited in CM ETO 5437, Rosenberg, and CM ETO 5958, Perry and Allen). Accused's statement that the reason he absented himself without leave was that he wished to obtain further insurance is not in itself probative of an intent to avoid hazardous duty. The Board of Review is therefore of the opinion that the record is legally insufficient to support the finding of the intent alleged in Specification 1, but that the evidence clearly establishes accused's absence without leave for the period and at the place alleged.

With respect to Specifications 2,3 and 4, the testimony of the first sergeant of accused's company indicates that at the inception of each of the unauthorized absences, the company was engaged in direct and immediate operations against the enemy, in the vicinity of Scieren, Niederfeulen and Warken, Luxembourg. Accused was required to be present with his company. The inherent tactical situation was notice to him of the existence and imminence of battle hazards and perils. (See authorities above cited). In each instance when accused left without authority, he was in arrest of quarters by order of his company commander, inferentially pending court-martial trial for his prior absence or absences. The fact that accused was in a status of restraint pending trial did not render him immune from the hazardous duty of participation in operations against the enemy (CM ETO 7339, Conklin, and authorities therein cited). Before each absence he was present

with his company, which was continually moving forward and attacking the enemy, and he was available, although in temporary arrest of quarters, for any duty, hazardous or otherwise, which his commanding officer might see fit at any time to impose upon him. That he knew this and that such knowledge motivated his successive unauthorized departures is, under the circumstances disclosed by the record, an inescapable conclusion. Each of the three unauthorized absences was obviously "calculated to enable him to avoid such hazardous duty" (MCM, 1921, par.409,p.344), and it must therefore be concluded that each was accompanied by the intent alleged. The record fully sustains the findings of guilty (CM ETO 7339, Conklin).

6. The charge sheet shows that accused is 32 years three months of age and was inducted 11 July 1942 to serve for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted herein, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1 of the Charge as involves findings that accused did for the period and at the place alleged absent himself without leave from his organization and place of duty in violation of Article of War 61; and legally sufficient to support the findings of guilty by exceptions and substitutions of Specifications 2,3 and 4 of the Charge and of the Charge and legally sufficient to support the sentence.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

CM ETO 8358

28 JUN 1945

U N I T E D S T A T E S	80TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 80, U. S. Army, 2 March 1945.
Privates JAMES J. LAPE (42142937) and RICHARD E. CORDERMAN (37698206), both of Company C, 317th Infantry	Sentence as to each accused: Dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years (Suspended).

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

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

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

LAPE

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James J. Lape, Company "C" 317th Infantry, did,

8358

in the vicinity of Niederfeulen, Luxembourg, on or about 12 January 1945 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, to wit: participation in operations against an enemy of the United States, and did remain absent in desertion until he surrendered himself at or near Diekirch, Luxembourg, on or about 8 February 1945.

CORDERMAN

(Identical Charge and Specification as those against LAPE)

Each accused pleaded not guilty and, all of the members of the court present at the times the votes were taken concurring, each was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions was introduced against either accused. Three-fourths of the members of the court present at the times the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved each of the sentences but suspended the execution thereof. The proceedings were published in General Court-Martial Orders No. 64 as to Lape and No. 65 as to Corderman, Headquarters 80th Infantry Division, APO 80, 7 March 1945.

3. The testimony of the prosecution was in substance as follows:

On 12 January 1945 accuseds' company was in a defensive position outside of Niederfeulen, Luxembourg. The two accused were sent with their platoon into that city "to shave and get dry clothes and clean up". All in the platoon except accused returned to the defensive position. They were absent without permission from that time until 8 February 1945 (R9). While accused were gone,

about the middle of January, the company moved to the northeast of Wiltz, Luxembourg, where it was attacked twice by the enemy, and thereafter on about 1 February moved to Medernach and then to Gilsdorf, Luxembourg.

4. Each accused, after his rights as a witness were fully explained to him, elected to remain silent and no evidence was introduced in their behalf.

5. The legality of this conviction of desertion to avoid hazardous duty depends on whether or not the evidence that the company was in a "defensive position" is proof of hazardous duty then existing or imminent. Dictionary of United States Army Terms (TM 20-205) defines "defensive position" as follows:

> "Area occupied by troops organized in a system of mutually supporting defense areas or fortified tactical localities" (p.84).

It is apparent that the term includes the position of our troops at fortified localities or other areas far removed from the scene of battle and from any imminent danger. The phrase is meaningless as a showing of dangerous duty which the accused sought to avoid, unless the proximity of the enemy can be judicially noticed.

If judicial notice may be taken of the exact location of enemy troops and of the tactical situation, the proof will sustain the findings. The principles of judicial notice have often been stated. An essential element thereof is that the matter of which such notice is taken must be of common and general knowledge (20 Am. Jur., sec.16, pp.46,47; sec.17, p.48; sec.19, pp.50,51; MCM, 1928, par.125, pp.134-135). The Board of Review will take judicial notice that the date of 12 January 1945 was during the closing stages of the great German winter offensive and that there were near that time heavy battles in Luxembourg. Judicial notice will not be taken as to the exact location of enemy troops, their precise movement, nor of the amount, kind and proximity of enemy fire in the vicinity of Niederfeulen, on that date. Such matters are not of common or general knowledge to the world at large, nor to the military establishment, but must have then been learned by presence on the field of battle or from classified communications. They can now be determined only from secret reports. Such knowledge is not common and general, and judicial notice

thereof would be improper (CM ETO 6226, Ealy; as to military matters of which such notice may be taken, see CM ETO 7413, Gogol; CM ETO 6637, Pittala).

The scant evidence as to the subsequent activities of the company during the accused's absence is of little importance inasmuch as the intent to avoid hazardous duty under the 28th Article of War must exist at the time the accused absented themselves without leave (CM ETO 5958, Perry and Allen).

The Board of Review does not herein intend to express the opinion that the phrase "defensive position" denotes lack of hazardous duty, for it is obvious that if there were any evidence that the enemy were near, or endangering, or apt to endanger, the position, the record of trial would sustain the sentence.

There is, however, no substantial evidence in the record from which the court could reasonably have inferred the requisite intent of desertion to avoid hazardous duty, and the record of trial is legally sufficient to support only findings of guilty of absence without leave for the period alleged as to each accused.

6. The Board of Review views with misgivings the faulty preparation and conduct of this judicial proceeding. Two soldiers were on trial for their lives under most serious charges of cowardly desertion. The investigating officer, required by Act of Congress to make a "thorough and impartial investigation", reported that he had secured no statements of witnesses; the advice of the staff judge advocate consisted of a mimeographed form; a junior officer sat as the law member of the court; the testimony of the only witness was reported on two pages; the cross-examination consisted of four questions; the record does not reveal that either counsel addressed an argument to the court; and the review of the staff judge advocate is most cursory in the treatment of the vital issue in the case. In view of the magnitude of the offenses charged, and the Anglo-Saxon tradition of a fair and full trial, it is thought that the Board of Review can state with propriety that these proceedings are not conducive to the appropriate contribution of justice to discipline in the Army, or defensible under public scrutiny.

7. The charge sheets show the following with respect to accused:

Lape is 24 years 11 months of age, and was inducted 30 May 1944 at Elizabeth, New Jersey. Corderman is 19 years one month of age, and was inducted 9 June 1944 at Sac City, Iowa. Each was inducted to serve for the duration of the war plus six months. Neither had prior service.

8. The court was legally constituted and had jurisdiction of the persons and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of either accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification against each accused as involves findings that each accused did, at the time and place alleged, absent himself without proper authority from his organization and did remain absent for the period alleged, in violation of Article of War 61, and legally sufficient to support the sentences.

B. Gratie Ney Judge Advocate

Wm. F. Sumrow Judge Advocate

Edward L. Stone, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 28 JUN 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by Act 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by Act 1 August 1942 (56 Stat.732; 10 USC 1522), is the record of trial in the case of Privates JAMES J. LAPE (42142937) and RICHARD E. CORDERMAN (37698206), both of Company C, 317th Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of the Charge and Specification as to each accused, except so much thereof as involves findings of guilty of absence without leave in violation of Article of War 61, be vacated, and that all rights, privileges and property of which each has been deprived by virtue of that portion of the findings, viz; conviction of desertion in time of war, so vacated, be restored.

3. The legal insufficiency of the record to support the findings, except so much thereof as involves absence without leave, was apparently due to the inadequacy of the testimony adduced for the prosecution rather than the unavailability of sufficient evidence. As there is now no way to remedy the defect in the record, the action taken by the Board of Review and myself is necessary. The proven absence without leave is for 27 days; the appropriateness of the sentence is proper for consideration.

4. Inclosed are forms of action designed to carry into effect the recommendation hereinbefore made. Also inclosed are draft GCMO's for use in promulgating the proposed action. Please return the record of trial with required copies of GCMO's.

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

(As to accused Lape, findings vacated in part, in accordance with recommendation of The Assistant Judge Advocate General. GCMO 302, ETO, 28 July 1945).
(As to accused Corderman, findings vacated in part, in accordance with recommendation of The Assistant Judge Advocate General. GCMO 303, ETO, July 1945).

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

BOARD OF REVIEW NO. 1

28 JUN 1945

CM ETO 8397

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Luneville,
	)	France, 9 and 23 February 1945.
Private ROBERT L. STATUM	)	Sentence: Dishonorable discharge,
(39390208), 853rd	)	total forfeitures and confinement
Quartermaster Fumigation	)	at hard labor for 20 years. Eastern
and Bath Company	)	Branch, United States Disciplinary
	)	Barracks, Greenhaven, New York.

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

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the findings of guilty.

2. The only question which requires consideration is whether the approved sentence is legal.

The record of trial shows that the court convened at 1340 hours on 9 February 1945 and the trial was concluded in one session of the court. Accused was found guilty of both charges and specifications. After evidence of previous convictions was introduced and accused's service data was submitted the following proceedings appear in the record of trial:

> "The court was closed, and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, sentences the accused to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for twenty (20) years.

The court was opened and the president announced the findings and sentence.

The court then at 1430 hours, 9 February 1945, adjourned to meet at the call of the president" (R14).

The record of the day's proceedings was signed by the trial judge advocate only. The same was not signed by the president of the court or initialed or signed by defense counsel. Thereafter the record of trial discloses the following transaction:

" Luneville, France
23 February 1945

The court reconvened at 0930 hours, all the members of the court, and the personnel of the prosecution who were present at the close of the previous session in this case were present. The accused, defense counsel, assistant defense counsel, and the reporter were also present.

The president announced that the court was reconvening of its own motion to reconsider its sentence.

The court was closed, and upon secret written ballot, all of the members present at the time the vote was taken concurring, sentences the accused to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for twenty (20) years.

The court was opened and the president announced the sentence.

The court then at 0945 hours, 23 February 1945, proceeded to other business" (R15).

At the conclusion of these minutes (R15), the record was authenticated by the president and trial judge advocate. Defense counsel certified that he had examined the record of trial prior to the authentication.

No letter is attached to the record transmitting it to the reviewing authority. However, the chronology sheet of the Staff Judge Advocates indicates that he received it on 5 March 1945. The date of his review is 7 March 1945 and the date of the action of the reviewing authority is 8 March 1945.

3. The original sentence of the court which included 20 years confinement at hard labor obviously was illegal as to ten years of the confinement imposed, because only two-thirds of the members of the court present at the time the vote was taken concurred (AW 43). After the president announced the findings and sentence the court adjourned on 9 February to meet at his call. The record of the first day's trial was signed only by the trial judge advocate, conforming thereby to the requirement of the Manual for Courts-Martial that he will sign the record of each day's proceedings (MCM, 1928, par.41d, p.32). Fourteen days later on 23 February the court reconvened on its own motion. All members of the court and personnel of the prosecution, who were present at the previous session of the court whereat the instant accused was tried, were present. The accused, defense counsel, assistant defense counsel and reporter were also present. The court then proceeded to reconsider its sentence and upon a secret written ballot, all members of the court present at the time the vote was taken concurring, it imposed the identical sentence which it imposed at the first session of the court after its findings of guilty. The record was then duly authenticated as required by Article of War 33 and transmitted to the reviewing authority on 5 March 1945.

From the foregoing it is manifest that the record of trial was not at the time the court reconvened on 23 February

> "finally approved and adopted by the court as a body and authenticated by the signature of its president and trial judge advocate" (CM 152731 (1922),

It was therefore not a legal record of trial until the final act of authentication by the president and trial judge advocate.

> "Until the 'legal record' is thus brought into existence, the court has plenary power over it for the purpose of making it 'speak the truth' and for the further purpose of revising the sentence in accordance with truth and justice" (CM 152731 (1922) supra).

This conclusion is confirmed by the concurrence of the Judge Advocate General in the holding of the Board of Review in CM 166782 (1925), (Dig. Op.JAG 1912-1940, sec.395(37), p.228)

> "In so far as it holds that the action of the court was legal in revising its findings and sentence, on its own motion, prior to the completion of the record of trial and its transmission to the convening authority".

The conclusion therefore is that the action of the court in the instant case was not irregular nor did it violate any right of the accused (CM 251451, Monaghan, 33 BR 243,249, IV Bull JAG 5 and authorities therein cited). His actual presence in court upon the announcement of the second sentence eliminated a serious question with respect to its validity (Cf: Anderson v. Denver, 265 Fed.3).

The court's action herein must be distinguished from the action of the court in CM 233806, McCaslin, 20 B.R. 149, II Bull. JAG 184, where after the legal record of trial has been "brought into existence" authenticated and transmitted to the reviewing authority, the court reconvened pursuant to call of the president in alleged "revision proceedings" and attempted to revoke its prior sentence of confinement at hard labor for five years and impose a new sentence which included dishonorable discharge, total forfeitures and confinement at hard labor for five years. In that case the subsequent action of the court was void because (1) it attempted to act on a legal record of trial which had been completed and left the "bosom of the court" and (2) it possessed no greater authority than the reviewing authority who by Article of War 40 is prohibited from returning a record of trial for revision with the view to increasing the severity of the sentence. In the instant case the legal record of trial had not come into existence. It remained under the control and authority of the court and it had not been transmitted to the reviewing authority. Furthermore the new sentence was identical with the first sentence. The fact that the first sentence was valid only for ten years confinement (CM ETO 2602, Picoulas) because imposed by a two-thirds vote of the members present at the time the vote was taken and the confinement for 20 years included in the original sentence was rendered valid by the subsequent unanimous vote of the court did not in the opinion of the Board of Review impose a more severe sentence within the prohibition of Article of War 40. However, that may be there is nothing contained in the acts of congress nor the Manual for Courts-Martial which prohibits such action by the court during the period it maintains plenary control over the record of its proceedings in a given case.

The Board of Review concludes that the sentence imposed by the court upon its reconvening is legal. The reasoning of the Board of Review herein is supported by CM ETO 11981, Hill which in some respects complements this case.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

8397

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

BOARD OF REVIEW NO. 1

28 JUN 1945

CM ETO 8414

U N I T E D S T A T E S	45TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 45, U. S. Army, 15 February 1945.
Private ROBERT E. MORRIS (32944041), Company F, 180th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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 Robert E. Morris, Company F, 180th Infantry, did, without proper leave, absent himself from his organization at or near Qualiano, Italy, from on or about 12 July 1944, to on or about 30 July 1944.

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

Specification 1: (Findings of guilty disapproved by reviewing authority).

Specification 2: In that * * * did, at or near Pertius, France, on or about 23 August 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat operations against elements of the German Army, and did remain absent in desertion until he surrendered himself at or near Uhrwiller, France, on or about 7 December 1944.

Specification 3: In that * * * did, at or near Uhrwiller, France, on or about 7 December 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat operations against elements of the German Army, and did remain absent in desertion until he was apprehended at or near Lyon, France, on or about 25 December 1944.

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

Specification: In that * * * having received a lawful command from 1st Lt. Jack L. Treadwell, Company F, 180th Infantry, his superior officer, to return to his platoon and take up position against the enemy, did at or near Wildenguth, France, on or about 9 January 1945, wilfully disobey the same.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification, Charge I, except the word "Qualiano" substituting therefor the word "Paestum", guilty of Charge I, guilty of Specification 1, Charge II, except the words "17 August 1944", substituting therefor respectively the words "16 August 1944 on or about 1300 hours", and guilty of the remaining specifications and charges. No evidence of previous convictions was introduced. Three-fourths of the members of the court present

at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority disapproved the findings of guilty of Specification 1, Charge II, 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. a. Charge I and Specification: Accused was absent without leave from his organization, then located at Paestum, Italy from 12 July 1944 to 30 July 1944. His guilt was fully proved.

b. Charge II, Specification 2: Accused was absent without leave from his organization from 0530 hours 23 August 1944 to 7 December 1944 (R5; Pros.Ex.A). He landed with his company on the shores of southern France at St. Maxine on 15 August 1944 in the invasion of France by the American forces from Italy (R6,7). The company fought its way northward and on 22 August it was in an assembly area four kilometers from Vittebonn, France. It was alerted and was under orders to move forward and attack a position where a reconnaissance patrol was ambushed. Accused was present with the company in the assembly area (R8). The company left the assembly area at 2350 hours on 22 August, reached its line of departure and set up a defensive position near Peyrolles. In the early morning of 23 August there was heavy friendly artillery preparation and then the company attacked. It met no resistance, gained its objective - a railroad embankment - and advanced about 200 or 300 yards beyond, where it was halted, and at 0530 hours the platoons were checked (R8,9). The first sergeant of the company testified that accused was not present at this platoon check nor was he with the company from 23 August to 2 December when the first sergeant was hospitalized (R10). In a voluntary extrajudicial statement (R17; Pros.Ex.C) accused declared:

> "On the 16th of August, I fell and injured my wrist, I went to some Aid Station of the 157th Infantry and had it taped up. I returned to my organization the following day. At that time, we were trying to make contact with the enemy. I stayed about a week and went AWOL. We were in reserve. I knew we were going up in a day or so and got scared. I turned in on 27 November 1944 at Montailieu to a Lieutenant who took me to the MP's. While absent I stayed at a hotel in Montailieu. I got back to my organization about the 6th of December".

From the foregoing evidence the court was authorized to find that accused was present with his company on the night of 22 August when it was alerted to make an immediate attack having for its purpose the rescue of the ambushed reconnaissance patrol. His statement shows that he had knowledge of the proposed advance movement against the enemy and that he left in order to avoid this hazard. His guilt was clearly established. The case is of the pattern of CM ETO 7189, Hendershot; CM ETO 7500, Metcalf and Wloczewski; CM ETO 8083, Cubley; CM ETO 8185, Stachura; CM ETO 9796, Emerson.

c. Charge II, Specification 3: On 6 December the company was in the town of Uberach, France, about three kilometers from Pfaffenhoffen. It had a defensive line in and around the town and the company command post was in the town. The town was under heavy enemy shell fire (R12). The entire kitchen and supply personnel were in the cellar of a house seeking protection from the shell fire. Accused returned from the absence involved in Specification 2, at 2000 hours on that date and went to the cellar where he reported to the company supply sergeant. He informed the supply sergeant that he had been apprehended by military police who brought him to the battalion headquarters. There he was directed to report to the kitchen. The supply sergeant,

> "told him that a truck would be going up to the company in the morning and that he would be ready to leave with it. * * * /accused was told/ not to get any foolish ideas about taking off or anything as it wouldn't be worthwhile * * * He slept in the cellar * * * at that time" (R12).

During the course of the evening while accused was present there was a general conversation between the men in the cellar relative to the heavy shelling then being experienced (R12). The supply sergeant specifically informed accused that the truck which would take him to the company on the morning of 7 December would leave the kitchen at 7 am. At that hour accused had disappeared and was not seen in the company until 9 January 1945, when he was placed under guard (R13). The accused in his extrajudicial statement (R7; Pros.Ex.C) admitted:

> "I got back to my organization about the 6th of December and left again the next morning. I never got back tothe front. I took off from the kitchen. I was afraid they would send me back to the lines and I just can't take that stuff anymore. I went back to the same town /Montailieu/ and was picked up by the F.F.I., who turned me over to the MP's in Lyons. I got back to my organization the first part of January 1945, but I have not been back up to the front".

A recital of the facts is all that is necessary to demonstrate that accused willfully, knowingly and deliberately absented himself without authority to avoid return to his company on the morning of 7 December which he knew was in the line facing the enemy. He thereby escaped the battle hazards to which his companions in arms were exposed. He was guilty of desertion under circumstances that brand him a weakling and a coward (CM ETO 5304, Lawson and Weitkamp; CM ETO 5396, Nursement; CM ETO 7032, Barker).

d. Charge III and Specification:

The evidence is clear that on 9 January 1945 at the company command post near Wildenguth, accused received a direct oral order from First Lieutenant Jack L. Treadwell, his superior officer, to go to the second platoon. He refused to obey the order. There is no doubt as to his guilt (CM ETO 2469, Tibi; CM ETO 5642, Ostberg and Kain; CM ETO 6457, Zacoi; CM ETO 7549, Ondi).

(194)

5. The charge sheet shows that accused is 19 years of age and was inducted 4 September 1943 to serve for the duration of the war plus six months. No prior service is shown.

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

7. The penalty for desertion and also for disobedience of the command of a superior officer in time of war is death or such other punishment as a court-martial may direct (AW 58,64). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

8414

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

BOARD OF REVIEW NO. 1 26 MAR 1945

CM ETO 8438

U N I T E D S T A T E S	)	IX TROOP CARRIER COMMAND
	)	
v.	)	Trial by GCM, convened at USAAF
	)	Station 538, APO 133, U. S. Army,
Second Lieutenant PETER W.	)	27 December 1944, 3 January 1945.
BARRETT (O-814004), 62nd	)	Sentence: Dismissal, total for-
Troop Carrier Squadron,	)	feitures and confinement at hard
314th Troop Carrier Group	)	labor for four years. Federal
	)	Reformatory, Chillicothe, Ohio.

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

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1. The record of trial in the case of the 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 93rd Article of War.

Specification: In that 2d Lieutenant Peter W. Barrett, 62d Troop Carrier Squadron, 314th Troop Carrier Group, did, at USAAF Station 538, on or about 2 December 1944, feloniously take, steal and carry away English currency, value about $62.00, the property of 2d Lieutenant Richard C. Gesell, 32d Troop Carrier Squadron; English currency, value about $64.00, the property of Flight Officer Adelbert W. Metzger, 61st Troop Carrier Squadron; English currency, value about $24.00, the property of Flight Offi-

8438

cer David Merkel, Jr., 61st Troop Carrier Squadron; English currency, value about $22.00, the property of 2d Lieutenant William T. Moore, 61st Troop Carrier Squadron; English currency, value about $20.00, the property of Flight Officer Thomas O. McCay, 61st Troop Carrier Squadron; English currency, value about $96.00, the property of 2d Lieutenant Raymond A. Henderson, 61st Troop Carrier Squadron; English currency, value about $172.00, the property of 2d Lieutenant J.R. Holt, 61st Troop Carrier Squadron; English currency, value about $60.00, the property of 1st Lieutenant Harry Drypolcher, 61st Troop Carrier Squadron; English currency, value about $180.00, the property of 2d Lieutenant Robert I. Spencer, 61st Troop Carrier Squadron; English currency, value about $56.00, the property of 2d Lieutenant Wesley M. Kolbe, 61st Troop Carrier Squadron; English currency, value about $42.00, the property of 2d Lieutenant Lewis E. Johnston, 61st Troop Carrier Squadron; English currency, value about $44.00, the property of Flight Officer Robert R. McDonald, 61st Troop Carrier Squadron; English currency, value about $30.00, the property of Flight Officer Robert E. Mann, 61st Troop Carrier Squadron.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for four years. The reviewing authority, the Commanding General, IX Troop Carrier 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 Federal Reformatory, Chillicothe, Ohio, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The facts proved by the prosecution, in support of accused's plea of guilty, are as follows:

At about 0545 hours 2 December 1945, at an officers' barracks in the 61st Squadron Area, Second Lieutenant John A. Forsyth was awakened by a prowler near his bed. The man moved from one bed to another, screening his flashlight with his hand and "rustling

8438

around" (R5; Pros.Ex.1). After the process was repeated two or three times, Lieutenant Forsyth spread the alarm and the man fled the barracks (R6). Second Lieutenant Charles R. Galloway having awakened, saw the fugitive, followed closely, and keeping always within sight, caught him within a hundred yards (R9-10). The man, positively identified by Lieutenant Galloway and others as the accused, was returned to the barracks, where he placed more than 200 pounds on a bed, saying "You got me. Here it is". It was the sum averred as stolen from the officers concerned (R12,13).

A day or so later, after a full warning of his rights in the presence of his special defense counsel, accused signed a full confession. He assigned as the reason for his theft the demand of a pregnant woman upon him for two hundred pounts, which demand he said he received by long distance telephone early the previous evening. He said she threatened to notify his family. The money was taken from officers in three separate barracks (R24,27; Pros.Ex.1).

4. a. The defense presented character witnesses, showing accused's military record as very satisfactory and his reputation for honesty and integrity extremely high (R28,29).

b. Accused, though duly advised of his rights, first elected to remain silent. After findings of guilty were made, the court upon his request, permitted an unsworn statement. Accused stated in greater detail the facts in his confession concerning the reasons for his taking the money. Both his parents and those of his wife are prominent. The girl here involved is of good family, and desired to leave home in order not to bring disgrace upon her people. Accused robbed his fellow officers in desperation, after a sleepless night (R31-32).

5. The pleas of guilty to the Charge and Specification are supported by clear evidence of the alleged offense. Such proof is unnecessary in law in view of the guilty plea, but is customary and desirable (CM ETO 2776, Kuest).

6. The charge sheet shows that accused is 28 years of age, had enlisted service from 9 February 1943 to 8 October 1943, and was commissioned a second lieutenant, Air Corps, 9 October 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 and confinement at hard labor are authorized punishments for a violation of Article of War 93. Confinement in a penitentiary is authorized for the offense of larceny of property of a value of $50.00 or more by Article of War 42 and section 287, Federal Criminal Code (18 USCA 466). Since accused is over 25 years of age the designation of a Federal correctional institution or reformatory as the place of confinement is not authorized. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, would be proper (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1),1b(4),3a,b, 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. 27 MAR 1945. TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant PETER W. BARRETT (O-814004), 62nd Troop Carrier Squadron, 314th 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. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Circular 25, War Department, 22 January 1945, directs that a Federal correctional institution or reformatory shall be designated as the place of confinement only for prisoners 25 years of age or younger. Accused is beyond that age. Hence, the United States Penitentiary, Lewisburg, Pennsylvania, or the Eastern Branch, United States Disciplinary Barracks, should be designated as the place of confinement. This may be done in the published court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 8438. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 8438).

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

(Sentence ordered executed. GCMO 106, ETO, 7 April 1945.)

8438

(201)

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

BOARD OF REVIEW NO. 1

22 JUN 1945

CM ETO 8448

U N I T E D S T A T E S	)	9TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Eupen,
	)	Belgium, 18 January 1945. Sentence:
Private CLIFTON V. TRACY	)	Dishonorable discharge, total for-
(32944364), Company E,	)	feitures and confinement at hard
39th Infantry	)	labor for life. United States Dis-
	)	ciplinary Barracks, Greenhaven,
	)	New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Clifton V. Tracy, Company "E", 39th Infantry, did, near Elsenborn, Belgium, on or about 22 December 1944, desert the service of the United States with intent to avoid hazardous duty and to shirk important service, and did remain absent in desertion until he surrendered himself at Verviers, Belgium, on or about 24 December 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the

Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 9th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States 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. On 22 December 1944, accused's platoon held a hill position between Elsenborn, Belgium, and Kalterherberg, Germany. The time was at the height of the great German winter offensive, and the place was the critical wedge the American Army held along the shoulder of the enemy's northern flank. The platoon repulsed an attack at 1300 hours, but was forced to withdraw some distance and reorganize by the superior force of an attack launched about 1730 hours. Accused was sent back in a small party to the company command post under orders to secure ammunition and return to the platoon. An artillery barrage fell near the command post and when it lifted, accused could not be found. He took refuge in a nearby foxhole where he remained about an hour. He was seen at about 2200 hours by his company commander some 400 yards to the rear, and ordered forward. He did not return, however, and remained absent until he surrendered at Verviers, Belgium, on 24 December 1944, 18 miles in the rear. His absence was unauthorized. Accused's statement, to which he did not swear, was that he had an earache and that he spent the night of 22 December 1944 in an aid station. He admitted his fright and did not attempt to account for his absence after 1000 hours 23 December. Evidence in the case was that he had no defective hearing, but had absented himself during other actions under complaint of ear trouble.

4. The case is typical of those of the battle line. Even if accused's statement were sworn, and evidence, it would not excuse him. Military experience is that cowards will use any excuse, however slight, to evade duty, even though the lives of their comrades and the country itself are in peril. There is substantial evidence to sustain the findings of the court (CM ETO 4382, Long; CM ETO 6842, Clifton; CM ETO 7086, Dell Amura; CM ETO 7378, Fisher and Wilhelm).

5. The charge sheet shows that the accused is 19 years five months of age and was inducted 9 September 1943 at Albany, New York, 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. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted.

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

B. Franklin Pritzker Judge Advocate

Wm. J. Durrow Judge Advocate

Edward L. Stevens Judge Advocate

8448

(204)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 22 JUN 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private CLIFTON V. TRACY (32944364), Company E, 39th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is 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 8448. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 8448).

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

(Sentence as Commutec ordered Executed. GCMO 255, ETO, 10 June1945.)

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

BOARD OF REVIEW NO. 1

29 JUN 1945

CM ETO 8449

U N I T E D S T A T E S	)	3RD INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Molsheim,
	)	France 24 December 1944. Sentence:
Private CARL A. KOLLMAN,	)	Dishonorable discharge, total for-
(38666875), Company F,	)	feitures and confinement at hard
30th Infantry	)	labor for life. Eastern Branch,
	)	United States Disciplinary Barracks,
	)	Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: (Finding of guilty disapproved by confirming authority).

Specification 2: In that Private CARL A. KOLLMAN, Company "F", 30th Infantry, did, at or near Faucogney, France, on or about 21 September 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he surrendered himself at or near Esmoulieres, France, on or about 24 September 1944.

(206)

Specification 3: In that * * * did, at or near Esmoulieres, France, on or about 24 September 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he surrendered himself at or near LaLongine, France, on or about 27 September 1944.

Specification 4: In that * * * did, at or near Remiremont, France, on or about 28 September 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain in desertion until he was apprehended at Epinal, France, on or about 20 November 1944.

He pleaded not guilty, and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and all specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 3rd 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, disapproved the finding of guilty of Specification 1, confirmed the sentence, but due to unusual circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the 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. Prosecution's evidence established the following factual situation with respect to accused's organization, Company F, 30th Infantry, on the dates indicated and accused's conduct at said times:

a. Specification 2: On 21 September 1944, the Company was at Faucogney, France, on "Potatoe Masher" hill. It succeeded in reaching the top of the hill but thereafter the enemy forced it to retreat.

> "we got up to this hill and we got chased off . of it and Private Kollman went to the rear and he returned to us as we pulled off that hill on the 24th" (R11).

Accused went to the rear without permission or authority (R11).

b. Specification 3: On 24 September 1944 the company

> "pulled out of Potatoe Masher Hill and we went up to relieve 'K' Company of the 3rd Battalion" (R12).

Accused's squad leader informed his squad as to the mission of the company and accused was present at this orientation. He accompanied the squad to the new position, but immediately after its arrival he left it without authority and went to the rear (R13). His squad leader went back and brought him forward to the company position, but

> "Shells came up and he went to the rear again" (R14).

Accused returned to the company on 27th September.

c. Specification 4: On 27 September 1944,

> "The 15th Infantry come up and relieved us from our position. We pulled out from there and went again to help 'K' Company of the 3rd Battalion and go into the attack" (R13). (Underscoring supplied).

At that time accused had been transferred to the third platoon which was at Remiremont, France, reorganizing for an attack. He was present with the platoon when it was informed that it was "assembling for an attack" (R16). Immediately thereafter the platoon membership was "checked" and accused was absent.

Accused's voluntary extra-judicial statement (R19,20: Pros.Ex.B) stated in pertinent part:

> "The reason why I have taken off so often was because of the shelling. A shell would come in close and I would lose my head and want to get out of the area, and I would go back out of the range of it.
>
> The last time I took Off from the Company was on or about 28 September 1944, when the Company left the silk factory. I was too frightened to move out with them. I couldn't go on and face the shells, so I remained behind. I stayed with a 3rd Division rear echelon outfit, when they moved up I moved with them. Some time later, I went to Epinal, France, and there on the 20 November 1944, I was picked up by the MP's".

4. The accused, after his rights were explained to him, elected to remain silent (R20-22).

5. From the foregoing competent, substantial evidence, the court was authorized to find that:

a. Accused's company was engaged in actual combat operations with the enemy on 21 and 24 September; that accused was present on these occasions; and that on each date he went to the rear without permission or authority in order to avoid the perils and hazards of battle.

b. On 27 September accused had been transferred to the third platoon of the company and upon being informed that it was reorganizing preparatory to an immediate attack on the enemy, he left it without authority and remained absent until 20 November when he was apprehended at Epinal, France by the military police.

The incidents on 21 and 24 September prove typical "battle line" desertion cases. In the midst of combat during which accused was present with his organization, he deliberately left it and sought safety in the rear. He thereby avoided the dangers and perils of battle to which his fellow soldiers were exposed. His guilt of these desertions is clear beyond all reasonable doubt. (CM ETO 6637, Pittala; CM ETO 7500, Metcalf and Wloczewski; CM ETO 8610, Blake; CM ETO, 8690 Barbin and Ponsiek; CM ETO 9257, Schewe).

As to accused's absence on 27 September, it was proved that after he received notice that the 3rd platoon of which he was then a member was about to attack the enemy he left it without authority. His pre-trial statement indicates definitely that he

> "was too frightened to move out with them. I couldn't go on and face the shells, so I remained behind".

His guilt of absence without leave to avoid hazardous duty is obvious (CM ETO 7189, Hendershot and authorities therein cited; CM ETO 8083, Cubley; CM ETO 8185, Stachura; CM ETO 8769 Wojtkowicz). The variance between date of offense as alleged, viz. "on or about", 28 September and date of offense as proved, viz. 27 September, is immaterial (CM ETO 1036, Harris).

6. The charge sheet shows that accused is 22 years of age and was inducted 10 March 1943 to serve for the duration of the war plus six months. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(210)

1st Ind.

War Department, Branch Office of the Judge Advocate General with the European Theater of Operations. 29 JUN 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private CARL A. KOLLMAN (33666875), Company F, 30th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 8449. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 8449).

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

✓ Sentence as commuted ordered executed. GCMO 256, ETO, 10 July 1945).

8449

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

BOARD OF REVIEW NO. 1

2 JUL 1945

CM ETO 8450

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Technician Fifth Grade ADOLPHUS G. GARRIES (33640871) and Private ADAM JACKSON, Jr. (34062387), both of Company A, 1310th Engineer General Service Regiment	Trial by GCM, convened at Cherbourg, France, 27 December 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life, United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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 and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE I: Violation of the 92nd Article of War

Specifications: In that Technician Fifth Grade Adolphus G. Garries, Company A, - - 1310th Engineer General Service Regiment, and Private Adam Jackson, Jr. Company A, 1310th Engineer General Service Regiment, acting jointly and in pursuance of a common intent, did, at Digosville, Manche, France, on or about 4 October 1944, forcibly and feloniously against her will, have carnal knowledge of Mme. Alphonsine Burnouf.

CHARGE II: Violation of the 93rd Article of War

Specification: In that * * * acting jointly and in pursuance of a common intent, did, at Digosville, Manche, France, on or about 4 October 1944, in the night time feloniously and burglariously break and enter the dwelling house of M. Edmond La Ranche, with intent to commit a felony, viz: rape, therein.

(Underscored names inserted by amendments during arraignment).

Each accused pleaded not guilty and, all of the members of the court present at the times the votes were taken concurring, each was found guilty of both charges and specifications. No evidence of previous convictions was introduced against either accused. All of the members of the court present at the time the votes were taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, approved 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, as to each accused, confirmed the sentence, but, owing to special circumstances in the case, commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. a. The credible testimony of Madame Burnouf established that in the night time on the date and at the place alleged, two colored American soldiers broke into the home of her aged father and herself where each of the soldiers in turn engaged in sexual intercourse with her several times against her protests while the other stood guard over her father and two young children. During the episode one or both of the soldiers bruised her and bit her neck. She was frightened but did not cry out because of the apparent futility of doing so and for fear of frightening her children. In response to the father's request for aid, two officers of accuseds' regiment, located nearby, came to the scene, where they found both accused. The alleged victim's testimony was corroborated by unmistakable evidence of a forcible entry into the house, by the father's testimony that the soldiers took turns guarding him, and by testimony of a medical officer that an examination of the victim, made a few hours after the attacks upon her, revealed tenderness at the entrance to the vagina and a small laceration on the side of the vaginal wall, characterized by the witness as evidence of penetration.

Each accused (Garries in sworn testimony and Jackson in an unsworn statement) denied that their entry into the house was effected by breaking and also denied having intercourse with the alleged victim, and

stated that their only purpose in going there was to secure calvados.

b. The question whether accused engaged in intercourse with the woman (CM ETO 11376, Longie; CM ETO 11608, Hutchinson) and the question whether she fully consented to the first act of intercourse by each accused (see CM ETO 11608, Hutchinson, and authorities therein cited) without intimidation, or whether it was committed by each by violence, terrorization, and against her will (CM ETO 8837, Wilson; CM ETO 12662, McDonald) were issues of fact within the exclusive province of the court. The circumstances of the violent manner of the colored soldiers' entry into the home, the presence of the victim's father and children there, the soldiers' intimidation of them, and the violence visited upon the woman, account for her submission to accused but belie consent to their acts of intercourse, and constitute substantial evidence that she was overcome by fear of bodily harm and did not submit to them freely or voluntarily. In the face of such circumstances her testimony carries a high degree of probability. "Inherently it possesses the tokens of truth" (CM ETO 8837, Wilson), even though it varies in relatively immaterial particulars with that of the officers at the trial. All of the elements of the detestable crime of rape are clearly proved to be present (CM ETO 3740, Sanders, et al; CM ETO 3933, Ferguson and Rorie).

The evidence is clear that both accused were guilty of burglary by breaking and entering the home in the nighttime with intent to commit rape therein as alleged (CM ETO 3859, Watson and Wimberly).

4. The charge sheet shows that accused Garries is 29 years ten months of age and was inducted 15 June 1943, and that accused Jackson is 38 years seven months of age and was inducted 25 June 1941. Each was inducted to serve for the duration of the war plus six months. Neither had prior service.

5. 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 as commuted.

6. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567), and upon conviction of burglary by Article of War 42 and section 22-1801 (6:55) District of Columbia Code. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B. Franklin Yates Judge Advocate

Wm. J. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(214)

1st Ind.

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

1. In the case of Technician Fifth Grade ADOLPHUS G. GARRIES, (33640871) and Private ADAM JACKSON, Jr. (34062387), both of Company A, 1310th Engineer General Service 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 as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 8450. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 8450).

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

(Sentence as commuted ordered executed. GCMO 290, ETO, 26 July 1945.)

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

BOARD OF REVIEW NO. 1

12 APR 1945

CM ETO 8451

U N I T E D S T A T E S	OISE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	Trial by GCM, convened at Reims, France, 19,23 January 1945.
Private First Class GEORGE J. SKIPPER (34250315), 57th Ordnance Ammunition Company, 100th Ordnance Battalion	Sentence: To be hanged by the neck until dead.

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

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

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

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

Specification: In that Private First Class George J. Skipper, Fifty-Seventh Ordnance Ammunition Company, One Hundredth Ordnance Battalion, did, in or near Mazancourt-Frenes, Somme, France, on or about 3 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Rouvroy (Marie Antoinette Boitel).

CHARGE II: Violation of the 93rd Article of War. (Disapproved by Reviewing Authority)

Specification: (Disapproved by Reviewing Authority)

(216)

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of Charge I and the Specification thereof, guilty of the Specification of Charge II except the words "with intent to do her bodily harm", substituting therefor "with intent to commit a felony, viz, commit an assault with intent to commit rape," and guilty of Charge II. No evidence of previous convictions was introduced. All members of the court present at the time the vote was taken concurring, he was sentenced, for the Specification of Charge I and Charge I, to be hanged by the neck until dead, and, for the Specification of Charge II and Charge II, "as amended", 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 20 years.

The reviewing authority, the Commanding General, Oise Section, Communications Zone, European Theater of Operations, disapproved the finding of guilty of the Specification of Charge II and Charge II, approved only so much of the sentence "as provides for to be hanged by the neck until dead", 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 modified and approved and withheld the order directing the execution thereof pursuant to Article of War 50½.

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

On 3 September 1944 accused's organization, 57th Ordnance Ammunition Company, 100th Ordnance Battalion, was located at Villers - Carbonnel, Somme, France (R7,8,35). On the evening of that day accused and two other colored soldiers, who were in a truck, met Madame Marie Antoinette Boitel Rouvroy, 24 years of age, her mother Madame Aline Boitel, her sister, Mademoiselle Genevieve Boitel, and a member of the French Forces of the Interior named Langlade, on the highway near the village Fresnes-Mazancourt, about two and one-half kilometers from Villers-Carbonnel (R7-8,9,18-19,30). The Frenchman, who spoke English, conversed with the soldiers and thereafter he and the three women went to the home of the latter in the village where he also lived (R9,19). When they arrived there about 10 P.M., the three soldiers, including accused, drove up to the house and the Frenchman invited them inside for a drink (R9,10,15,16,19,31). The three soldiers and the Frenchman, then drank one bottle of beer. In the house were also the three women and Madame Rouvroy's father (R10,13,15,24-25,31). After about 20-30 minutes, during which time the lightest colored of the three soldiers left the house and the other two, including accused, remained and talked with the French soldier, the conversation became animated. The latter informed Madame Boitel in accused's presence that the three soldiers wished to take the three women away (R10-11,13,31). The Frenchman and Madame Boitel said "No", whereupon accused loaded his carbine. The three women became frightened and started to leave the house (R11,13,20,31,32). Accused tried to grasp

Madame Rouvroy and follow her into her room, but was prevented by the French soldier (R20,31). The other two women fled to the home of neighbors 20-25 meters away (R11,15,17,32), and Madame Rouvroy, who was frightened, went through the rear door to a small building in the yard of her house (R17-18,20,32). About this time a shot was fired (R13,29,32).

Madame Rouvroy testified that she attempted to reach her neighbor's house "but it was too late" (R25); accused and one of the other colored soldiers grasped her and dragged her to a point next to a small wood about 50 meters from her house (R20). She cried out, resisted and struggled, but they placed their hands on her mouth and forced her to walk (R25,29). Both soldiers had guns and accused had a knife (R28). Fearing that the soldier with the knife would strike her with it in the course of the struggle, she raised her hand and her left thumb was cut (R20,25,26). The soldiers continued to drag the woman, who weighed 63 kilograms (about 139 pounds) until they reached the end of the woods, where they laid her on the ground, held her down by the shoulders, and successively engaged in sexual intercourse with her without her consent (R21-24,26-28,29). Her efforts to thwart accused, her first assailant, in the execution of his purpose were unavailing because he was stronger (R27-29). During accused's act of intercourse, which was completed by an emission (R23-24,26-27), he held a knife in his hand and Madame Rouvroy cried "Oh" and "Ah", but she was so frightened that her voice was weak (R28). After the attacks, which occurred about 2300 hours in the light of the full moon (R26), she fled (R21)..

The victim's testimony was corroborated by testimony of her mother (R11,18) and sister (R32) that they heard her screaming when they were at the neighbors' house and that when neighbors brought her back to her house about a half-hour later they supported her (R11,14,16,32). She was crying, her hair was disheveled, her clothes were in disarray and dirty and her thumb was bleeding (R12,32). Madame Boitel summoned Doctor M. Billard (R12,13,26), who examined the victim about 0100 hours 4 September, and sutured the deep thumb wound with six stitches. Examination of her sexual parts disclosed evidence of violence and bruises on the internal parts of the thighs and legs (R35; Pros.Ex.A).

Accused was positively identified both by Madame Boitel (R9-10), and by Mademoiselle Boitel (R31-34) as having visited the house. Mademoiselle Boitel testified definitely that he was the soldier who loaded his gun, thereby frightening the women out of the house, attempted to grasp Madame Rouvroy, and thereafter fired a shot (R31-33). She also testified he had a scar on his left cheek (R34). Madame Rouvroy unimpeachably identified accused as the smaller of the two colored soldiers who dragged her to the woods and assaulted her (R20-24,26-29).

4. Testimony for the defense, so far as material to the issues, was substantially as follows:

Private First Class Oscar Williams, of accused's company, testified that he (the lightest in color of the three soldiers), accused (the shortest, and the one who had a scar on the left side of his face) and a Private Muldrow (of the same company), on the evening of 3 September 1944,

drank beer and cognac in a house with two girls, their parents and another French civilian, about a mile from their camp (R39,40,43-44,48,53-54). After about a half-hour witness left the house and entered the vehicle in the front (R40,44). Shortly thereafter two women ran out of the house, followed by accused and Muldrow, both armed with carbines, one of whom fired a shot. The women ran down the street (R40-41,44,46,48,54,55). With the French civilian who joined him, witness then drove the vehicle down the street to a courtyard about 50 yards distant in an unsuccessful search for the women. He heard no one cry out at any time (R41-42,45-47,49,52). About 15 minutes after the shot was fired, accused and later Muldrow joined them at the vehicle (R42,45-47,51). Within accused's hearing witness apologized to the Frenchman for the disturbance (R45,47-48). On the way back to camp accused and Muldrow said nothing had happened. Accused stated he ran out of the house because he was frightened (R42,48). Accused, to witness' knowledge, was never in trouble (R39) and was a good soldier (R43).

Captain Jack Carstarphen, Commanding Officer of accused's company, testified he knew accused since 18 December 1943. He was a driver in the motor pool and his vehicle was one of the best maintained in the company. He was the kind of soldier witness would wish to have in his company (R73). There were a number of spies around the ammunition, but accused never reported spy activity to him (R74).

After an explanation of his rights, accused elected to take the stand in his own behalf (R56). He testified he had lived in Brooklyn, New York, and Conway, South Carolina, worked as a hospital orderly and grocery boy, and never had any trouble in civilian life. He joined his company about a year before the trial and his only trouble occurred when he received seven days punishment for taking a warmer into a building in England while on sentinel duty (R57). He came with the company to France on D plus six and thereafter was engaged in some fighting with the Germans. His organization arrived at its location near Mazancourt, France, on the day of the incident in question (3 September 1944) (R57-58).

On that evening about 8 P.M., after having a drink in a cafe, he, Muldrow and Williams were stopped in their vehicle by a Frenchman and two women (R58,72). The Frenchman, who spoke English, stated he desired a ride to Paris, so "to put him off", accused said he would take him. He asked accused some questions about his company and the three drove away. Suspicious that the Frenchman was a spy, they returned later and saw the Frenchman and the two women coming out of a house on a road about a half mile from the highway (R59). The man invited them inside for a drink and they consumed beer and cognac for about half an hour (R59-60,70). When the Frenchman asked about their company, they discovered he had no identification papers and one soldier suggested that they take him to their captain. The soldier said nothing, however, about women. He then pointed his rifle at the Frenchman and the women became excited and ran out of the house (R60). Witness directed Muldrow to follow the women and bring them back "because we didn't want to frighten them away". Shortly after Muldrow left the house he fired some shots. Then accused went out of the house, followed by

Williams (R60,63), and proceeded through a gate at the front of the house into the garden and to another house about 20-30 yards distant (R61,67). Nothing unusual occurred in this house (R65) andhe neither saw nor heard anyone so he returned to the gate where he met the Frenchman. Several minutes later Williams, and then Muldrow, arrived (R61). The latter had been gone about 15-20 minutes (R65). Accused was with the Frenchman and Williams at all times (R62,63). The four then proceeded to search for the women for about 10-15 minutes and accused entered a cave about 10 yards beyond the second house. He saw no trees there or for a distance of 50-60 yards back and did not know the place where Madame Rouvroy was raped (R61-62,68,70-72). They then returned to the vehicle and Williams apologized to the Frenchman for the disturbance (R62).

Accused heard no screams of any kind during the evening (R65) and at no time was he closer than 10 feet to any of the women (R68-69). He did not assault Madame Rouvroy with a knife or rape her and had no dealings with her after he left the house (R62). He had a carbine that evening (R67). He also had a knife but had no occasion to use it (R65). He was the smallest of the three soldiers (R62) and had a scar on his left cheek (R63).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration of her genitals is sufficient carnal knowledge and the force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM, 1928, par.148b, p.165). Madame Rouvroy's clear testimony leaves no doubt that accused, armed with a carbine and knife, and with the aid of his armed companion, dragged her to a wood, held her on the ground and engaged in sexual intercourse with her without her consent. She was completely terrorized and her resistance was overpowered. Her testimony was corroborated as above set forth. The only issue arose from accused's denial that he assaulted or raped Madame Rouvroy. It is significant that no testimony offered by the defense clearly supports this denial. In any event, the issue of identity was determined against accused by the court and, in view of the clear evidence in support of such determination, the same will not be disturbed by the Board of Review upon appellate review (CM ETO 3200, Price; CM ETO 3837, Bernard W. Smith; CM ETO 8166, Williams). Accused's guilt of the crime of rape was convincingly established by the evidence (CM ETO 5584, Yancy; CM ETO 7252, Pearson and Jones; CM ETO 8166, Williams).

6. a. Attached to the record of trial is an undated letter signed by accused which declared that he did not have a fair trial. A third indorsement, dated 8 February 1945, from the reviewing authority forwarding the basic letter to the confirming authority, states that accused reported in an interview with the Assistant Staff Judge Advocate of the reviewing authority: (1) that he had but one conference with his defense counsel and that a second conference which was planned did not take place because the date of trial was advanced, (2) that the only time he was identified by the victim was in open court where he was the only colored man present, and (3) that two witnesses in his behalf, a soldier and a French civilian, did not testify because his defense counsel told him they were not available and that the court stated it was not necessary to call these witnesses.

(220)

Careful scrutiny of the record of trial discloses that accused's claim that he was denied a fair trial and the grounds stated in support of the claim are without merit (Cf: CM ETO 4564, Woods, Jr. and authorities there cited):

1. Charges were served upon accused eight days before the day of trial. He thus had ample time to confer with his counsel and to prepare his defense. Under the circumstances, his failure to object to trial or to move for a continuance at the commencement of the trial or for a further continuance at its termination effectively waived any right he may have had to a further period for preparation (Ibid).

2. There is no requirement in the law that in order to sustain a conviction of an accused he be identified as the culprit either as one of a group or in any other particular way. All that is required is that there be substantial evidence of his identity (Cf: CM ETO 3832, Bernard W. Smith). Not only was the victim's identification of accused as the assailant positive, but the other testimony, including accused's own, shows beyond doubt that he was at the scene of the crime at the time of its commission.

3. Defense counsel requested and was granted a continuance for the purpose of interviewing and securing as witnesses the member of the French Forces of the Interior (Langlade) and the two soldiers (Williams and Muldrow) who were with accused on the evening in question (R35-36). On the reconvening of the court four days later (R37) he argued that he should be accorded an opportunity to interview one soldier who was still not present (Muldrow) and the Frenchman and, if need be, call them as witnesses (R38). The defense introduced the testimony of one of the soldiers, Williams, and after the testimony of its other witnesses rested its case without further argument (R74). It appeared that the other soldier (Muldrow) was absent without leave (apparently a fugitive from justice) (R38) but that the Frenchman was available. The president announced that it would not be necessary to call further witnesses (R74). In view of the testimony of witness Williams and of accused showing that there was a period of time following the shots when accused was in the company of neither the Frenchman nor Muldrow, the action of the president, although it should have been taken by the law member subject to objection by any member of the court (AW 31; MCM, 1928, par.51d, p.40) was free from prejudicial error. Under the circumstances the failure of the defense to move for a further continuance was a waiver of its right thereto and it is clear that accused's substantial rights were not prejudiced (Cf: CM ETO 6684, Murtaugh).

b. Lieutenant Colonel F. W. Brown, Adjutant General of Oise Section, Communications Zone, European Theater of Operations, by command of the Commanding General, referred the case to the trial judge advocate for trial. Colonel Brown was appointed and sat as a member and president of the court (R2). His act in referring the case for trial was purely administrative and in the absence of challenge (R3) and of indication of injury to any of accused's substantial rights, this irregularity may be

regarded as harmless (CM ETO 4095, Delre; CM ETO 3948, Paulercio).

c. The statement made by a member of the court, who was a medical officer, describing for the record the scar on the victim's thumb (R26) was merely in the nature of assistance to the reporter. The member was not sworn as a witness and did not purport to testify. He was therefore not disqualified from sitting further on the court under Article of War 8, as a "witness for the prosecution" (Cf Dig. Op. JAG, 1912-1940, sec.365(8), pp.173-174).

d. It was stipulated by the prosecution, defense and accused personally (R35; Pros.Ex.A) that if Dr. M. Billard were in court and sworn as a witness he would testify as to the physical condition of the victim on the night of 3-4 September 1944 as set forth in the stipulation. Accused by his affirmative action in agreeing to the stipulation waived his constitutional right to be confronted by this witness (Diaz v. United States, 223 U.S. 442, 451, 56 L.Ed. 500, 503; Sullivan v. United States, (C.C.A. 8th 1925), 7 F(2nd) 355, certiorari denied 270 U.S. 648, 70 L.Ed. 779; 16 C.J. sec 2115, p.838; 14 Am.Jur., sec. 188, p.897).

7. The charge sheet shows that accused is 24 years three months of age and was inducted 14 February 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 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 rape is death or life imprisonment as the court-martial may direct (AW 92).

B. FRANKLIN RITER Judge Advocate

WM. F. BURROW Judge Advocate

EDWARD L. STEVENS, JR. Judge Advocate

(222)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 12 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private First Class GEORGE J. SKIPPER (34250315), 57th Ordnance Ammunition Company, 100th Ordnance Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 8451. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 8451).

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

/s/ E. C. McNeil

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

1 Incl:
Record of Trial.

(Sentence confirmed, but after reconsideration, commuted to dishonorable discharge, total forfeitures and confinement for life. Sentence as commuted ordered executed. GCMO 217, ETO, 15 June 1945).

8451

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

BOARD OF REVIEW NO. 2 28 MAY 1945

CM ETO 8452

U N I T E D S T A T E S	8TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 8, U. S. Army, 11,12 January 1945.
Private First Class GEORGE R. KAUFMAN (33426822), Company C, 13th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private First Class George R. Kaufman, Company C, Thirteenth Infantry, did, in the vicinity of Hurtgen, Germany, on or about 0900, 27 November 1944, desert the service of the United States by absenting himself without proper leave from his organization with the intent to avoid hazardous duty to wit:

combat duty against an armed enemy of the United States, and did remain absent in desertion until he surrendered himself to the Military Police at Eupen, Belgium, on or about 1700, 27 November 1944.

Specification 2: (Finding of guilty disapproved by action of confirming authority)

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

He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and specifications thereunder, with exceptions and substitutions being made concerning Specifications 2 and 3 which are not now material. No evidence of previous convictions was introduced. All of the members of the court present when the vote was taken concurring he was sentenced to be shot to death by musketry. The reviewing authority, the Commanding General, 8th Infantry Division, approved the sentence, recommended that the sentence be commuted to confinement at hard labor for the term of his natural life and that the dishonorable discharge be suspended until the soldier's release from confinement and forwarded the record of trial for action pursuant to Article of War 50½. The confirming authority, the Commanding General, European Theater of Operations, disapproved the findings of guilty of Specifications 2 and 3 of the Charge, confirmed the sentence, but, owing to special circumstances in the case and the recommendation of the reviewing authority, commuted the sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the 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 evidence for the prosecution establishes that on 26 and 27 November 1944, accused was a member of Company C, 13th Infantry, which was located in an assembly area in the Hurtgen Forest near Lendensdorf, Germany (R16,17,19,25). Late in the afternoon of 26 November, the squad leader of accused's platoon called his men together and explained to them that an order had been issued to attack the enemy. A and B were ordered to lead the assault while Company C was

scheduled to remain in reserve until called up. All of the men were notified that they were to be ready to move out on a moment's notice. Accused was present at the time his squad leader gave this order (R25). During the night Company C, including accused, moved forward and occupied an area in the woods to the left of the town of Hurtgen. They were told to await orders to join in the attack to take Hurtgen. About1030 hours the next morning accused was seen walking into the woods with his rifle. He did not return or rejoin his organization (R26). His absence was reported to the first sergeant who made a thorough search throughout the area for accused but was unable to find him (R26). Later in the day the order came to advance on Hurtgen and the company moved out without the accused (R26). The town was partially occupied by enemy forces and the men assigned the task of taking the city were subjected to heavy enemy fire (R24,29). Accused, being absent, did not participate in this attack (R26). He had no permission or authority to be absent (R20). He reported as a straggler to the military police at the regimental command post on 29 November 1944 at which time he stated that he went "over the hill" and visited Eupen, Belgium (R9). When asked if he knew he would be court-martialed for being absent without authority accused replied that he "didn't know and didn't care" (R9). An extract copy of the morning report of Company C, 13th Infantry was received in evidence, defense counsel stating there was no objection, showing accused's return to military control as of 1700 hours, 27 November 1944 (Pros.Ex.3; R.39).

4. Accused, after his rights as a witness were fully explained to him, elected to remain silent and no evidence was introduced in his behalf (R40).

5. Competent, uncontradicted evidence established that accused absented himself without proper leave from his organization on or about 1030 hours, 27 November 1944, and remained in unauthorized absence until he surrendered himself to the military police at Eupen, Belgium, at about 1700 hours, 27 November 1944. At the time he absented himself Company C was momentarily expecting orders to attack and when they did they were subjected to heavy enemy shellfire. He remained in unauthorized absence for about eight hours, avoiding the hazards incident to combat with the enemy. Upon reporting, as a straggler to the military police 20 miles behind the line of attack and fire, accused voluntarily

stated that he had gone "over the hill". He indicated that he "didn't care" if he was court-martialed. Although his absence was for a relatively short period of time, the inference is inescapable that he intended to and did avoid hazardous duty during such absence. Withrop states that in time of war an absence of slight duration such as "even a part of a day" may, under certain circumstances fully justify a finding by the court of an intention to desert the military service. (Winthrop's Military Law and Precedents, (Reprint, 1920), sec.987,p.638). Under the circumstances herein shown the court was fully warranted in finding that accused knew that an attack against the enemy was imminent and that he absented himself with the specific intent to avoid such hazardous duty, constituting the offense of desertion within the meaning of Articles of War 58 and 28 (CM ETO 4743, Gotschall; CM ETO 6093, Ingersoll; CM ETO 6177, Transeau; CM ETO 6955, Slonaker; CM ETO 7230, Magnanti; CM ETO 7500, Metcalf).

6. The charge sheet shows that accused is 21 years and four months of age and was inducted 17 February 1943. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record is legally sufficient to support the findings of guilty of Specification 1 and the Charge, and the sentence as commuted.

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

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 28 MAY 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private First Class GEORGE R. KAUFMAN (33426822), Company C, 13th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specification 1 and the Charge, and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence as commuted.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 8452. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 8452).

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

(Sentence as commuted ordered executed. GCMO 197, ETO, 7 June 1945.)

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

BOARD OF REVIEW NO. 2

30 MAR 1945

CM ETO 8453

UNITED STATES	8TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 8, U.S. Army, 22 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JOSPEH CAIAZZO (32726998), Company E, 13th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Joseph NMI Caiazzo, Company E, 13th Infantry, then Private First Class, did in the vicinity of Bergstein, Germany, on or about 15 December 1944, desert the service of the United States by absenting himself without proper leave from his place of duty with the intent to avoid hazardous duty, to wit: combat duty against an armed enemy of the United States, and did remain absent in desertion from his post until he reported to his First Sergeant on or about 19 December 1944.

8453

CONFIDENTIAL

He pleaded not guilty and all the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of three previous convictions, two by special courts-martial for absences without leave for eight and three days respectively, and one by summary court for absence without leave for one day, each in violation of Article of War 61. All the members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 8th Infantry Division, approved the sentence, recommended that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and to a term of confinement at hard labor, and forwarded the record for action "under Articles of War 48 and 50½". The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the findings of guilty of the Specification and the Charge as involves a finding that accused did, in the vicinity of Bergstein, Germany, on or about 15 December 1944, absent himself without proper leave from his place of duty and did remain absent without leave from his post until he reported to his first sergeant on or about 19 December 1944, in violation of Article of War 61, mitigated the sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence clearly supports the findings as approved by the confirming authority, that accused absented himself without authority from 15 December 1944 until he reported to his first sergeant on 19 December 1944, in violation of Article of War 61.

4. The charge sheet shows accused to be 23 years ten months of age. He was inducted 21 January 1943 and 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 other than those noted and and corrected by the confirming authority were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings

of guilty as modified, and the sentence as mitigated, by the confirming authority.

6. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec. VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

(232)

1st Ind.

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

1. In the case of Private JOSEPH CAIAZZO (32726998), Company E, 13th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as modified, and the sentence as mitigated, by the confirming authority, 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 8453. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 8453).

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

(Sentence as commuted ordered executed. GCMO 97, ETO, 4 April 1945.)

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

BOARD OF REVIEW NO. 3

27 APR 1945

CM ETO 8454

U N I T E D S T A T E S	45TH INFANTRY DIVISION
v.	Trial by GCM, convened at La Petite Pierre, France, 2 February 1945.
Private JOHN J. RODRIGUEZ (12156469), Company C, 191st Tank Battalion	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private John J. Rodriguez, Company C, One Hundred and Ninety-First Tank Battalion, did at Wimmenau, France on or about 13th January 1945 misbehave himself before the enemy by refusing to become a member of a tank crew and advance with his command which had then been ordered forward by Captain Cobb to engage with elements of the German Army, which forces, the said command was then opposing.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by

general court-martial for absence without leave for 16 days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 45th 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, but, owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 13 January 1945 the command post of Company C, 191st Tank Battalion, was established at Wimmenau, France, three miles from Reipertswiller, where the second platoon was maintaining a road block (R3-4,5). Early in the afternoon, Captain Cobb, commanding C Company, ordered the second platoon to proceed to Wildenguth to relieve one platoon of A Company, a mission involving contact with the enemy (R5,8,10). Accused was dispatched in a jeep to the second platoon as one of two replacements for tank number six to which he was assigned as a loader (R4,8). At the crossroads between Reipertswiller and Wimmenau - about a mile and a half from the front lines - accused told his platoon leader, Second Lieutenant Richard J. Zuccaro, "that he had cracked up once before. He said he would go up but he didn't know how he would make out". Zuccaro instructed him to lead the tank around the corner of the crossroads. Accused led the tank for about 25 or 30 yards and then "either fell back or fell to the right and let the tanks bypass him" (R4). After proceeding some distance ahead of the tanks, Lieutenant Zuccaro

> "stopped to see if the others were catching up and the accused came to me and said he couldn't go up".

Zuccaro called C Company headquarters by radio and requested First Lieutenant Roy R. Ricks, the company executive officer,

> "to send up another replacement and Lt Ricks said he would come up to see what the trouble was".

When Lieutenant Ricks arrived, Zuccaro overheard a part of his conversation with accused, including the following:

> "Lt Ricks said 'Why didn't you tell us this while we were back there and save us all this trouble'. I walked away to the side for a while and came back again in time to hear accused say 'I'll take the ten years'" (R5).

Lieutenant Ricks testified:

> "After Rodriguez and the other replacement went up, about 20 or 30 minutes later I got a radio call from Tank number 6. Lt Zuccaro said he needed another loader. I had already sent Rodriguez as a loader and Captain Cobb sent me up to see what the trouble was. I went to where the tank was /about one mile out of Wimmenau toward Wildenguth/ and asked Lt Zuccaro what his trouble was and he said that he needed another loader that Rodriguez wouldn't go up. I talked to Rodriguez and asked him why and he said he couldn't take it anymore. I told him there was a number of other boys who didn't want to go up but they were going and he said he still couldn't take it. I told him he knew what was going to happen. * * * I told him that he should go up and we had some general conversation of that kind and he still refused to go. I gave him a direct order to get in the tank and go and he said he couldn't. I then told him to get his stuff together and go to the rear and I turned him over to Captain Cobb",

at the company command post at Wimmenau (R9). The second platoon's assignment that afternoon involved a combat mission. "We were going to the front to take up positions" (R10).

4. After being informed by the law member that he could "be sworn as a witness, make a sworn or unsworn statement to the court, or remain silent", accused elected to remain silent (R10).

5. The Specification alleges misbehavior beforethe enemy "by refusing to become a member of a tank crew and advance with his command", in violation of Article of War 75. The evidence shows that, very shortly after joining the tank crew as a replacement, accused fell out and, when ordered, refused to proceed on the combat mission to which his tank was committed. Before falling out, he expressedhimself to his platoon commander as doubtful as to "how he would make out", asserting that he "had cracked up once before". The incident occurred about a mile and a half from the front, which was, at that time, the immediate destination of accused's tank.

"Whether a person is 'before the enemy' is not a question of definite distance but is one of tactical relation" (MCM, 1928, par.141a, p.156). Here the tactical relation was clearly established by the evidence. Accused's misbehavior involved shameful abandonment of the combat unit to which he was assigned and disobedience of a lawful order to participate in the combat mission to which it was committed - conduct in neither phase "conformable to the standard of behavior before the enemy set by the history of our arms". The variance between the allegation that accused refused "to become a member of a tank crew" and the showing that he refused to continue as one, after reporting as a replacement and, for a short

time at least, actually becoming a member, is immaterial. He was alleged and shown to have refused to advance with his command. The evidence sustains the findings of guilty of the Specification and the Charge.

6. Although the defense counsel had advised accused of his rights as a witness, he requested that the court inform accused of his rights. The type of explanation which the Manual provides should be made by the court if it has any doubt that the accused fully understands his rights, if, of necessity, one comprehensive enough to reasonably dispel such doubt. In the instant case, the explanation was so cursory as to manifest indifference. In view of the compelling character of the uncontradicted evidence establishing accused's guilt, it may be lawfully assumed that any resulting prejudice was effectively neutralized by the action of the confirming authority in commuting the death sentence adjudged by the court to one of life imprisonment (MCM, 1928, pars.87b and 88, pp.76,79).

7. The charge sheet shows that accused is 20 years and six months of age and that, with no prior service, he enlisted at New York City, 20 October 1942.

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

9. The penalty for misbehavior before the enemy is death or such other punishment as a court-martial may direct (AW75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

Benjamin R. S. Cooper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. L. Levy Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 27 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private JOHN J. RODRIGUEZ (12156469), Company C, 191st Tank Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the 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 8454. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 8454).

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

(Sentence ordered executed. GCMO 136, ETO, 7 May 1945.)

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

BOARD OF REVIEW NO. 2

24 APR 1945

CM ETO 8455

U N I T E D S T A T E S	)	8TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 8, U.S. Army, 19 January 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant ELLIOTT C. McCOY (O-1106349), Company C, 12th Engineer Combat Battalion	)	

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

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

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

CHARGE: Violation of the 64th Article of War.

Specification 1: In that Second Lieutenant ELLIOTT C. Mc COY, Company "C", Twelfth Engineer Combat Battalion, having received a lawful command from Lieutenant Colonel Edmund M. Fry, Jr., his superior officer, to report to the Command Post of the Third Battalion, one hundred and Twenty First Infantry Regiment did near Germeter, Germany, on or about 6 January 1945, willfully disobey the same.

Specification 2: In that * * * having received a lawful command from Lieutenant Colonel Edmund M. Fry, Jr., his superior officer, to "come to the telephone" so the said Lieutenant

8455

CONFIDENTIAL

Colonel Edmund M. Fry, Jr., could speak with him, did, near Germeter, Germany, on or about 6 January 1945, willfully disobey the same.

Specification 3: In that * * * having received a lawful command from First Lieutenant Samuel M. Futral, his superior officer, to "Get out of bed, and meet me at the C.P." did, near Germeter, Germany, on or about 6 January 1945, willfully disobey the same.

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

Specification 1: In that * * * was, near Germeter, Germany, on or about 6 January 1945, found drunk while on duty as Platoon Commander of the Third Platoon of Company "C", Twelfth Engineer Combat Battalion.

He pleaded not guilty of Charge I and its specifications and guilty of Charge II and the Specification. Three-fourths of the members of the court present at the time the vote was taken concurring, he was found guilty of each of the specifications of Charge I, except the words "willfully disobey", substituting therefor the words "fail to obey", of the excepted words not guilty, of the substituted words guilty and as to Charge I, not guilty of violation of the 64th Article of War but guilty of violation of the 96th Article of War, and guilty of the Specification of Charge II and Charge II. No evidence of previous convictions was introduced. Three-fourths of the members present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of 25 years. The reviewing authority, the Commanding General, 8th 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 but owing to special circumstances in this case 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 withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 6 January 1945, accused was a member of Company C, 12th Engineer Combat Battalion, located near Germeter, Germany (R5,11). Between 1400 and 1600 hours on that date he took three drinks from a bottle of cognac and at 1630 appeared to be drunk (R16). At 1500 First Lieutenant Samuel M. Futral, the commanding officer of Company C, told accused that he was to be at the command post of the 3rd Battalion, 121st Infantry, at 1900 hours. At 1830 Lieutenant Futral found him in bed in the officers' quarters and told him to get out of his bunk and meet him at the company command post. Lieutenant Futral left the quarters, waited a couple of minutes, returned to the quarters,

found the accused still in bed, and said, "Get up and let's get going". Accused said nothing and Lieutenant Futral left (R11,12). At 1920 hours Lieutenant Colonel EdmundM. Fry, Jr., commanding officer of the 12th Engineer Combat Battalion, called accused by telephone and told him to obtain transportation and be at the command post of the 3rd Battalion in 30 minutes (R6). At 2200 hours accused not having yet arrived there, Colonel Fry called again and told the charge of quarters to get accused to the telephone (R6,7). The charge of quarters found accused sleeping in the officers' quarters and advised him that Colonel Fry wanted to talk to him on the telephone. Accused asked the charge of quarters to have a Lieutenant Wigham answer the telephone as he was sick, and did not himself answer it (R9,10). Transportation was available to accused (R7,13), but he did not report to the command post that night (R6,11,12).

4. Witnesses for the defense testified that at 1630 hours on 6 January 1945 accused was staggering, his speech was blurred, and liquor was smelled on his breath (R21,22,24,25).

The accused after his rights as a witness were explained to him, elected to be sworn as a witness on his own behalf, and testified that on the afternoon of 6 January 1945, he had two or three drinks of cognac, went out to eat, and did not remember "too much from then on". The next thing he remembered was receiving a call from Colonel Fry, who told him to go to the command post of the 3rd Battalion. He made preparations to go but on his way to the officers' quarters he started vomiting and fell down (R33). Someone came in that night and told him that Colonel Fry wanted to speak to him on the telephone (R33,35). He did not report to the command post of the 3rd Battalion that night (R34).

5. The findings of the court are amply supported by the evidence. The court properly found with respect to Charge I and its specifications that each disobedience of accused, alleged therein, constituted a failure to obey in violation of Article of War 96 rather than willful disobedience in violation of Article of War 64 as alleged and charged. The findings as to the Specification of Charge II and Charge II, to which the accused filed a plea of guilty, are supported by the testimony of both the prosecution and the defense.

Although the findings by exceptions and substitutions with respect to the specifications under Charge I, do not state offenses strictly following the form in the Manual for alleging failure to obey an order (MCM, 1928, Form No.139, Appendix 4, p.255), the words "being in the execution of his office" being omitted, the findings were entirely proper, for the ordinary import of the phrase quoted is supplied by the allegation that the order given was a "lawful command" (CM ETO 7584, Emery).

The evidence under Specification 2 of Charge I shows that Colonel Fry communicated by telehone with the charge of quarters who advised the accused that Colonel Fry wanted to speak to him on the telephone (R10). The method of transmitting an order is immaterial (MCM, 1928, par.134b, p.149).

6. The charge sheet shows that accused is 28 years and nine months of age and entered the service as an enlisted man on 23 April 1941. He was commissioned a second lieutenant in the Army of the United States 11 November 1942 at Fort Belvoir, Virginia.

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

8. The penalty for a violation of Article of War 85 by an officer in time of war is dismissal from the service and such other punishment as a court-martial may direct (AW 85), and violations of Article of War 96 by an officer are punishable at the discretion of such court (AW 96). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

(on leave) Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 26 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Second Lieutenant ELLIOTT C. McCOY (O-1106349), Company C, 12th Engineer Combat Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as modified, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 8455. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 8455).

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

(Sentence ordered executed. GCMO 134, ETO, 4 May 1945.)

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

BOARD OF REVIEW NO. 3

29 MAR 1945

CM ETO 8456

UNITED STATES	HEADQUARTERS COMMAND, SUPREME HEADQUARTERS ALLIED EXPEDITIONARY FORCE
v.	
First Lieutenant WARREN THORPE JR. (O-1645537), Company B, 3118th Signal Service Battalion	Tried by GCM, convened at Versailles, France, 23 January 1945. Sentence: Dismissal.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Warren Thorpe, Company 'B', 3118th Signal Service Battalion, Supreme Headquarters, Allied Expeditionary Force, APO 757, United States Army, did, at Versailles, France, on or about 1 January 1945, wrongfully strike Technician Fifth Grade Chester J. Jasikowski, in the face with his fist.

Specification 2: In that * * * was at Versailles, France, on or about 1 January 1945, drunk and disorderly in uniform in a public place, to wit Avenue St. Cloud.

8456

He pleaded not guilty to and was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding Officer, Headquarters Command, Supreme Headquarters Allied Expeditionary Force, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing the execution thereof pursuant to Article of War 50½.

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

At about 0130 hours on 1 January 1945, Major Ralph I. Straus went to the Headquarters Command motor pool, in Versailles, France, in order to secure transportation to his billet. Arrangements were made whereby he would be driven there by Technician Fifth Grade Chester J. Jasikowski, a driver on duty at the motor pool (R6,9). As they were leaving, accused approached and asked either to be taken to St. Cloud or, according to Jasikowski, merely for "a lift" (R7,10,17). In whatever form made, the request was granted, accused got in the front seat, and the three thereupon proceeded first to Major Straus' billet. Jasikowski testified that accused appeared to be under the influence of liquor at this time (R16). Major Straus noted nothing unusual about accused's behavior except that at one time it appeared that he "was going to be sick, and so I suggested that if he was going to be sick that he be sick outside the jeep" (R7,11). However, the three reached their first destination without mishap, Major Straus alighted and Jasikowski then started back in the direction of the motor pool.

Accused asked to be taken to St. Cloud but Jasikowski refused on the ground that it "wasn't SOP". Instead, he continued on his way toward Versailles (R11). As they neared the motor pool, accused told him to stop the vehicle and, when he did so, unexpectedly struck him on the right side of his face with sufficient force that his teeth were loosened and his lip cut (R11,12,13). Words were then exchanged between the two men after which they dismounted from the vehicle and engaged in a struggle which lasted until the arrival of the military police. Several French soldiers were present at this time (R13). This struggle took place on a public street and accused was in uniform at the time (R14,22,23). The military policeman who took accused into custody testified that prior to taking him to military police headquarters he noted that his voice was thick, that he was somewhat unsteady on his feet and that he appeared to be under the influence of liquor (R20,22). Similar testimony was given by the duty officer at military police headquarters who stated that when accused was brought before him at about 0145 hours his breath smelled of liquor, he was "excessively

8456

garrulous" and he "seemed to have been drinking heavily". During questioning, after having been advised of his rights under Article of War 24, accused stated "I should not have struck him, but he was so provoking" (R24,25).

A similar version of the events above described is found in a statement later voluntarily made by accused to an agent of the Criminal Investigation Division and introduced into evidence by the prosecution. In this statement accused recited that, after becoming somewhat "tight" as the result of drinks consumed at an officer's club on New Year's Eve, he went to the motor pool in Versailles in search of transportation to his billet. He assumed that Jasikowski was going in the direction of St. Cloud and asked to be taken there prior to the time he got in the vehicle. When Jasikowski later stated that he had no authority to go to St. Cloud, accused asked to be let out in order that he might attempt to secure another ride. However, Jasikowski failed to stop with the result that accused repeated his request as they neared the motor pool. It was at this time that "I regret to say that I hit him in the face with my fist". Thereafter an altercation ensued as the result of which both men were taken to military police headquarters (R29-31; Pros.Ex.2).

4. The evidence for the defense was limited to the testimony of three character witnesses who testified generally that in the past accused had never been known to order the enlisted men who served under him "to do anything that was not in the regular line of duty", that his treatment of and attitude toward enlisted men had always been excellent and that he was an able and efficient officer (R34,35,36). Accused, after his rights as a witness were fully explained to him, elected to remain silent.

5. It is clear that the conduct alleged in the specifications of the Charge is violative of Article of War 96 (Winthrop's Military Law and Precedents, Reprint, 1920, pp.715-718). That accused was guilty of the conduct alleged was convincingly shown by uncontradicted testimony as well as by his voluntary confession. The evidence is amply sufficient to support the findings of guilty.

6. The charge sheet shows that accused is 32 years of age and was appointed a second lieutenant 22 March 1943 at Fort Monmouth, New Jersey. Prior service is shown as follows: "Inducted 23 June 1940 at New York, New York. Discharged 21 March 1943 801 Sig. Serv. Regt. (OCS)".

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.

(248)

8. A sentence of dismissal is authorized upon conviction of an offense in violation of Article of War 96.

Benjamin R. Sleeper Judge Advocate

SICK IN HOSPITAL Judge Advocate

B. H. Lewy Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of First Lieutenant WARREN THORPE JR. (O-1645537) Company B, 3118th Signal Service Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 8456. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 8456).

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

(Sentence ordered executed, GCMO 99, ETO, 4 April 1945.)

8456

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

BOARD OF REVIEW NO. 1 31 MAR 1945

CM ETO 8457

U N I T E D S T A T E S	83RD INFANTRY DIVISION
v.	Trial by GCM, convened at Luxembourg, Luxembourg, 28 November 1944. Sentence: Dismissal.
Captain JOHN B. PORTER (O-491308), 908th Field Artillery Battalion	

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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 83rd Article of War.

Specification: In that Captain John B. Porter, 908th Field Artillery Battalion, did, on the highway toward NANTES, FRANCE between NOZAY and NANTES, on or about 2145, 5 September 1944 through neglect suffer a GPW 1/4 ton 4x4, of the value of about one thousand dollars ($1,000.00), military property belonging to the United States of America, to be damaged by wrecking.

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

Specification: In that * ** did, without proper leave, absent himself from his

8457

command at BLAIN, FRANCE from about 2030 hours, 5 September, 1944, to about 2300 hours, 5 September 1944.

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

Specification 1: In that * * * did, at VIGNEUX, FRANCE, on or about 6 September, 1944 with intent to deceive an investigating officer, Major George P. Fosque, officially state to the said Major Fosque, concerning the evening of 5 September, 1944, that, "We went to the Mayor's house (meaning in BLAIN, FRANCE). We went there in anticipation of the firing we were going to be doing and we wanted to check with him so that there would be no civilians in the area where our fire would fall. The mayor was not at home so we went to his office but found that the office was locked up. Then we went to look for his secretary's place but we could not find it. *****I remember asking Captain Oliver to go with me but I did not go to NOZAY.*****The whole trip was strictly business except for the few minutes that we spent in the Hotel south of NOZAY", which statement was known by the said Captain Porter to be untrue in that he, Captain Porter, did not undertake to visit the Mayor in Blain and did drive directly to NOZAY for his own pleasure.

Specification 2: (Finding of not guilty)

He pleaded not guilty, and was found not guilty of Specification 2 of Charge III, and guilty of the remaining 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, 83rd Infantry Division, disapproved so much of the findings of guilty of Specificationl Charge III, as involved a finding of guilty of the word "directly", approved the sentence, but remitted the forfeitures and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, disapproved so much of the findings of guilty of Specification 1 of Charge III as involved a finding of guilty of the words "did not undertake to visit the Mayor in Blain, and", confirmed the sentence as approved and modified, though deemed inadequate punishment for an officer guilty of such serious offenses, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution summarizes as follows:

On 5 September 1944, the mission of the American forces in the vicinity of St. Nazaire, France, was to contain the German garrison manning the perimeter defenses of that city (R27). The artillery was widely dispersed, but in position, firing on enemy troops and prepared to mass fire on any German offensive moves (R7,27). Accused was a battalion assistant S-3 in charge of a subordinate fire direction center in Blain, France (R7). Because of the emergency character of the assignment and of the inexperience of his newly commissioned assistant , he was under affirmative orders not to leave his place of duty without permission from a superior (R7-9,24,25,29,31). At least one battery of the battalion artillery, the division cannon company and two platoons of attached tank destroyers were under his control (R7,24). He had no duties other than at the center (R8) and none to contact civilians (R68).

During the evening of this day Captain Joel L. Oliver, a battery officer, came to the fire direction center, and at sometime between the hours of 1900 and 2045, accused invited him to go to Nozay. He refused (R11,19). Soon thereafter accused told his assistant to notify any callers that he would be in the Mayor's office in Blain, took a message center jeep with its driver and another enlisted man and left (R11,21). The departure was without permission (R25,31). They drove in and about Blain, and then proceeded about nine miles northeast to Nozay, where they rode around and stopped at a hotel for a meal (R34,45-47; Pros.Ex.4).

Thereafter they proceeded in a southerly direction on the Rennes-Nantes highway. It was a clear night, but dark and driving was under blackout (R23,48). The speed limit was 20 to 25 miles an hour (R35,48). Accused cautioned the driver at one time concerning his speed, but at a point several miles south of Nozay while they were traveling at about 35 or 40 miles an hour, an accident occurred. A French automobile suddenly appeared in the middle of the road going north at fast speed (R48,52; Pros.Exs.2,4). The jeep swerved to its right off the road, across it to the left, then turned over, and rolled back to the right (R49; Pros.Ex.1). Accused and his driver were injured and the accompanying enlisted man killed (R49). Damage to the truck was extensive (R39). The skid marks though not continuous were 90 yards in length (R35). The driver thought the accident would have happened regardless of his speed (R50). Accused returned to the fire direction center about 2300 hours (R12). A fire mission had been called for in his absence (R8,67). The next morning, in the course of an official investigation, accused made a sworn statement, later reduced to writing and signed, that he did not go to Nozay (R32; Pros.Ex.2).

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

He was commanding officer of the fire direction center, had on other occasions left the area on official duties, and felt that he was within his authority in leaving at this time (R58). It was advisable to see the Mayor of Blain concerning the presence of friendly civilians in the target area, and also to determine what knowledge that official had concerning the presence of enemy patrols reported by the Free French forces to be in the woods to the north (R60). He searched Blain unsuccessfully for the Mayor, and sought also to find his secretary who lived near the Nozay road. Having reached the outskirts of Blain and not having found the secretary's house, he decided to proceed to the 3rd Battalion, 331st Infantry, Command Post whose troops his artillery supported. He considered that this organization might have information concerning the reported enemy patrols. After proceeding seven or eight kilometers, he was aware that he was on the wrong road, but intended to turn to the right and south on another road. When he reached this intersection about two miles south of Nozay, his driver was hungry and they turned left and went to the edge of that town and ate. Going to Nozay and back, from the intersection, was his only unauthorized travel (R59,60).

In returning by the eastern route (Rennes-Nantes highway) he warned his driver about speeding. His estimate of the speed of the vehicle at the time of the accident was about 25 miles an hour. He felt the accident would have occurred regardless of the speed, because his driver was blinded (R58,62).

His admissions were: that he did not secure permission to leave; that he did not have specific authority to take up any matter with the Mayor; that he did say to Captain Oliver, "Let's go someplace, Joe"; and that he did go to Nozay (R63,64).

Stipulations were introduced as to the testimony of character witnesses to the effect that accused in action had been cooperative, efficient and courageous in the finest traditions of the Army, outstanding, hard working and conscientious. An instance of his heroism in reconnaissance under fire was recited (R66,67).

5. a. Specification, Charge I: Whether the excessive speed was negligence and whether it was the proximate cause of the injury were questions of fact for the court, which were found against the accused on competent evidence. As senior officer in the vehicle, he was responsible for its proper operations, and the negligence of the driver may be imputed to him (CM ETO 2788, Coats and Garcia; III Bull. JAG 473). The case under Charge I is within the 83rd Article of War (See CM 241729, III Bull. JAG 383).

b. Specification, Charge II: Likewise, there is clear evidence that accused left his organization without leave. His version is much weakened by reference to Pros.Ex.2 which reveals that he could have gone directly from Blain to the infantry command

post by proceeding two miles east. Instead his route involved travel of 21 miles.

c. Specification 1, Charge III: The official statement was signed and sworn to, and in effect confessed as false in court. This is an offense under Article of War 95 (MCM, 1928, par.151, p.186; CM ETO 5389, Pomerantz).

6. The charge sheet shows that accused is 22 years of age, was commissioned a second lieutentant 20 September 1942 (to serve for the duration of the war plus six months), promoted to first lieutenant 30 April 1943 and to captain 1 January 1944.

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. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95 and authorized upon conviction of a violation of Articles of War 61 and 83.

B. Franklin Riter Judge Advocate

Wm. F. Lawrence Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

8457

(256)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 31 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Captain JOHN B. PORTER (O-491308), 906th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 8457. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 8457).

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

(Sentence ordered executed. GCMO 98, ETO, 4 April 1945.)

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

BOARD OF REVIEW NO. 1

27 APR 1945

CM ETO 8458

U N I T E D S T A T E S	)	3RD AIR DIVISION
	)	
v.	)	Trial by GCM, convened at AAF Station 142, APO 559 (England), 24 January 1945. Sentence: Dismissal and total forfeitures.
	)	
Second Lieutenant EARL L. PENICK (O-755039), 731st Bombardment Squadron, 452nd Bombardment Group (H)	)	

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

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

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

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

Specification 1: In that Second Lieutenant Earl L. Penick, 731st Bombardment Squadron, 452nd Bombardment Group (H), was, at Hingham, Norfolk, England, on or about 16 November 1944, disorderly in uniform in a public place, to wit: Fish and Chips Shop operated by George Farrants.

Specification 2: In that * * * did, at Hingham, Norfolk, England, on or about 16 November 1944, commit an assault and battery upon Grace Elizabeth Farrants by wrongfully grasping her on the body with his hands and throwing her to the floor.

8458

Specification 3: In that * * * did, at Hingham, Norfolk, England, on or about 16 November 1944, wrongfully and willfully fraternize and associate socially with Staff Sergeant Donald J. Wolfe and Sergeant Grady F. Miller, enlisted men in the military service of the United States.

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

Specification: In that * * * did, without proper leave, absent himself from his command at AAF Station 142, APO 559, U.S. Army, from about 21 December 1944 to about 25 December 1944.

He pleaded not guilty to, and was found guilty of both charges and the 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 one year. The reviewing authority, the Commanding General, 3rd Air Division, approved only so much of the sentence as provided for dismissal from the service and forfeiture of all pay and allowances due or to become due, 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 modified, though deeming it, as so modified, wholly inadequate punishment for an officer convicted of such gross and serious misconduct, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution summarizes as follows:

At about 1900 hours on 16 November 1944 accused and Staff Sergeant Donald J. Wolfe cycled together from their post to the town of Hingham, Norfolk, England, where they went first to the "Unicorn" public house and later to the "Cock" public house. There they spent much of the evening, talking, drinking and playing darts. Accused drank beer with Wolfe and with Staff Sergeant Grady F. Miller from time to time (R7-10; Pros.Ex.1). At about 2220 hours he and Miller proceeded to a small restaurant operated by Mr. George Farrants and his wife, Grace Elizabeth Farrants, and consumed food (R30,47; Pros.Ex.1).

Mrs. Farrants requested all in the restaurant to leave at about 2300 hours, as it was closing time. Everyone complied except accused and Miller (R30). When they persisted in staying she called her husband, who meeting with continued refusal, loud talk and a threatening gesture or an attempted blow from accused's fist, forcibly ejected him from the shop and bolted the door (R15,16,31,32,51-53). Although accused had first offered violence, Farrants thereafter lifted up a fire extinguisher against him and struck him with his fist (R22,40,41,50,55).

Miller entered the fray when accused was evicted from the restaurant, and held Farrants on the floor (R17,32,53). Accused then forced the door open by breaking the bolt assembly, sought to reach Farrants, and pushed Mrs. Farrants first aside and then to the floor when she interfered (R17,32,53). The struggle ended with the coming of help in response to her cries (R33,53).

Accused's version of the facts, as set forth in his sworn statement of 27 November 1944, introduced by the prosecution at the trial, varies from the above to the extent of his claim that the quarrel was due to Farrant's remarks about "Yanks", and that he was guilty of no violence whatsoever (R79; Pros.Ex.1).

At about 0300 hours on 20 December, upon call for an operational mission, accused could not be found (R61-64). He should have been in his barracks, but his bed had not been slept in, and he was nowhere in the area (R64). Search of the base was made, and his quarters were frequently checked, but he was not present for duty until 25 December 1944 (R71-75). He had no permission to be absent (R71,78,79).

4. Accused, after his rights were explained to him, elected to be sworn and to testify only as to Specification 2 of Charge I. After answering only a few introductory questions, he withdrew from the stand (R81-82). It was stipulated that accused had flown 27 operational missions (R80). By stipulation the written statement made by Miller (who was at the time of the trial missing in action) to the investigating officer was admitted in evidence. Miller's statement coincides with the prosecution's testimony concerning the events prior to 2300. At that time, he stated he heard Farrants and accused cursing and saw Farrants advance towards accused with an object in his hand saying, "I'll kill you". He persuaded Farrants first to desist, and was almost out the door with accused, whom Farrants then struck. He restrained Farrants, while the woman got accused outside, and then he left. In departing he was struck a hard blow in the back (R81; Def.Ex.A).

5. a. Specification 1, Charge I:

There was no specific testimony that accused was in uniform. The witnesses in the shop, however, recognized him as a lieutenant, although one at least had not seen him before and even though he was not so addressed there (R16,20,30,50). Wearing the uniform is mandatory by military personnel during war. It has been repeatedly held that under such circumstances it may be inferred that he was in uniform (Dig.Op. JAG, 1912-40, sec.453 (11), pp.342-343; CM ETO 339, Gage). There is competent evidence of a disorder caused by accused.

b. Specification 2, Charge I:

Since there is evidence that accused provoked the fray, and was thus the aggressor, his violence against Mrs. Farrants, who sought to quell the disturbance, is none the less a battery against her even though she first placed hands upon him. She had the definite right to go to the

aid of her husband and accused none to retaliate (5 C.J. sec. 238, p. 751 and note 88b; 4 Am. Jur., sec.54, p. 155; Restatement of the Law of Torts, sec.76(b)).

c. Specification 3, Charge I:

It is alleged that accused did "wrongfully and willfully fraternize and associate socially" with Staff Sergeant Wolfe and Sergeant Miller, enlisted men in the military service of the United States. The evidence shows that accused spent much time talking, drinking and playing darts with the enlisted men in a public place. In the opinion of the Board of Review, the record supports the conviction (Patterson, W.D. GCMO No. 615, 10 Nov. 1944; CM 226512, Lubow (1943), 15 B.R. 105, II Bull. JAG 17; CM ETO 6235, Leonard, and authorities therein cited).

d. Specification, Charge II:

There is clear evidence that accused left his organization without leave as alleged during a period of continued operations against the enemy.

6. The charge sheet shows that accused is 20 years eleven months of age, had enlisted service from 4 August 1942 to 11 September 1943; and attached papers show that he was commissioned a second lieutenant, Air Corps, 11 September 1943.

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

8. A sentence of dismissal is authorized upon conviction of an offense in violation of Article of War 61 or 96.

B. Frankel Kite Judge Advocate

(Dissenting in part) Judge Advocate

Edward L. Stevens Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

27 APR 1945

CM ETO 8458

U N I T E D S T A T E S	) 3RD AIR DIVISION
v.	) Trial by GCM, convened at AAF Station 142, APO 559 (England), 24 January 1945. Sentence: Dismissal and total forfeitures.
Second Lieutenant EARL L. PENICK (0-755039), 731st Bombardment Squadron, 452nd Bombardment Group (H)	)

CONCURRING and DISSENTING OPINION by
BURROW, Judge Advocate

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1. I concur in the holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and Specification 1 and 2 thereof and of Charge II and its Specification, and legally sufficient to support the sentence. I cannot agree that Specification 3 of Charge I alleges any offense, and am therefore of the opinion that the record is legally insufficient to support a finding of guilty thereof.

2. a. The specification in my opinion states no offense. "Fraternize" is defined by Webster, "to associate or hold fellowship upon comradely terms", and "socially" as "Marked by companionship with others." The effect of the allegation is to accuse the officer of wrongfully being a comrade in arms, a relationship which is not blameworthy, but on the contrary, precisely his duty (Par. 3, AR 600-10, 8 July 1944). Officers enjoined to "keep in as close touch as possible with the men" and to build "relations of confidence and sympathy" (AR 600-10, supra) should not be convicted on a specification alleging on its face only compliance in private with that duty.

b. Furthermore, if the accused did not have notice of the offense charged, the specification is fatally defective. The majority assumes that drinking is a bad kind of fraternization and therefore the defendant had notice. Drinking with enlisted men, whoring or gambling with them, are

8458

distinct well recognized offenses which impair discipline and reduce respect of officers. It will be observed that one of these three offenses could be proved under the majority's theory, and perhaps also the other two, or sodomy, or any possible act of the officer's relations with the men not intended as unfriendly, which the court might by chance consider improper. If a specification is to constitute anything more than a blanket accusation of general guilt, it should specify the offense charged.

c. Besides differing as to the substance of the specification, and on the existence of notice, I am wholly out of accord with the philosophy underlying this finding. It is to be remembered that this is an Army of a democracy engaged in a war for the rights of men. We have too often in history defeated armies with officer caste systems to regard their practices as desirable, yet this holding is in that philosophy. The contrary American doctrine, set forth in the pertinent regulation, emphasizes leadership with discipline, as opposed to caste. This command theory is successful with the American soldier. No greater surrender of the freedom and dignity of men than is necessary should ever be made, and tendencies in that direction should be resisted in the Army as elsewhere. The people would not approve, nor should the Army sanction, an indign status injurious to the self-respect of the ordinary soldier. Furthermore, it seems anathema to see an officer of a democracy sentenced for the offense of wrongfully fraternizing with his fellow citizens of the United States.

d. The holding by the majority is not controlled by the decisions cited.

3. For the foregoing reasons, dissent is expressed to the holding of the Board of Review under Specification 3 of Charge I.

Wm. F. Sumner Judge Advocate

8458

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 27 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant EARL L. PENICK (O-755039), 731st Bombardment Squadron, 452nd Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 8458. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 8458).

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

(Sentence ordered executed. GCMO 135, ETO, 4 May 1945.)

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

BOARD OF REVIEW NO. 1

19 MAY 1945

CM ETO 8474

U N I T E D S T A T E S	78TH INFANTRY DIVISION
v.	Trial by GCM, convened at Rotgen, Germany, 23 February 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 20 years. Loire Disciplinary Training Center, Le Mans, France.
Private First Class EARL W. ANDOSCIA (31455324), Company L, 310th Infantry	

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

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

2. The accused was tried upon the following Charge and specifications:

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Private First Class Earl W. Andoscia, Company L, 310th Infantry, did, near Konzen, Germany, on or about 30 January 1945, misbehave himself before the enemy, by failing to advance with his command, which had then been ordered forward by its commanding officer to engage with the enemy forces, which forces, the said command was then opposing.

CM 292933

Specification 2: In that * * * did, at Konzen, Germany, on or about 30 January 1945, run away from his Company, which was then engaged with the enemy, and did not return thereto until he was returned thereto by the Provost Marshal, 78th Infantry Division.

He pleaded guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and both specifications thereunder. Evidence was introduced of one previous conviction by summary court for absence without leave for one day and breach of restriction in violation of Articles of War 61 and 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence and ordered it executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The proceedings were published in General Court-Martial Orders Number 7, Headquarters 78th Infantry Division, APO 78, U. S. Army, 3 March 1945.

3. The following facts proved by the prosecution in support of accused's pleas of guilty are undisputed:

It was the mission of Company L, 310th Infantry, to attack the town of Konzen, Germany, early on the morning of 30 January 1945. For this purpose, accused's platoon marched three miles before daybreak to the line of departure, where a halt was made to await the battalion orders as to the exact time of the assault. The men began to "dig in" (R6,7).

Accused was an ammunition bearer of a bazooka team consisting of himself and Private First Class John E. Bunn. He had knowledge of the impending attack and of his duties therein (R7). He and Bunn arrived at the line of departure without having secured their bazooka and ammunition at the supply point, some 500 or 600 yards to the rear, as directed (R7-9). The platoon leader estimated that there remained at least a half hour before the assault, and personally gave accused and Bunn an order to return to the supply point,

secure the above articles, and to report back to him either at the line of departure or in the town (R7,9,10). The two soldiers proceeded as ordered, secured the above materiel, and started back to the front. Bunn last saw accused walking about 20 yards behind him along a clearly defined and deep path in the snow. It was still dark (R7,12,13). Later on his journey, he noticed accused's absence, searched vainly for him where last seen, and moved forward again, reporting back to the platoon leader. His trip required only thirty minutes (R8,10,13). He was sent back to find accused, but failed, although he did discover six rounds of bazooka ammunition along the path, the usual load for one man. He and another divided the burden of the ammunition and proceeded into the attack at about 0800 hours without accused, who did not participate (R6,8,10-12). There were only two bazooka teams in the platoon (R7), and only one in accused's squad (R12). Bunn did not think accused seemed nervous or showed any nervous reaction (R12).

Accused surrendered to a military policeman at Rotgen, Germany, the same day at 1000 hours. He said he wanted to turn in and that he had come back from the front, where he "just couldn't take it" (R13,14). He seemed to be under a nervous strain and frightened, but he was not frantic or hysterical (R15).

4. The defense introduced, without objection from the prosecution, a psychiatric report signed by the division psychiatrist dated 17 February 1945 (R15; Ex.A). It consisted of a mimeographed sheet with blanks filled by typing, and purported to show his opinion, based on an examination of accused on 14 February 1945, that: accused's diagnosis was "Anxiety Neurosis, Fear and Panic Reaction"; that he was sane enough to conduct his defense; that at the time of the alleged offense he had a defect of the mind which "probably" kept him from knowing the nature and consequences of his act; and that he was "probably" unable to refrain therefrom. The "evidence" as to accused's behavior was said to be "Fear and Panic Reaction". The mimeographed conclusion was to the effect that accused was not mentally responsible at the time of the acts alleged. The final recommendation was "Return to duty if possible, after treatment".

The accused, after his rights as a witness were explained to him, elected to remain silent, and no other evidence was introduced in his behalf (R16).

5. The pleading in the case deserves criticism. There is but one act proven in this case, and but one offense. The two specifications, therefore, present an erroneous multiplication of charges. The allegations are in legal effect the same (CM ETO 1663, Ison), and either would be sustained by the proof herein. Perhaps it may be argued with logical nicety that if accused ran away from his company as alleged in Specification 2, he could not have been present with the company and failed to advance, and by such artificiality Specification 1 should be disapproved. The form of pleading is a procedural matter, and it is patent that thereby accused had full notice of the offense charged, and suffered no injury to his substantial rights (CM ETO 1197, Carr; CM ETO 10362, Hindmarch). The error is therefore harmless, particularly in view of his plea of guilty, which may properly be regarded as a waiver of any objection to the form of pleading (MCM, 1928, par.64a, p.51).

6. There is no question but that accused committed the cowardly offense charged, and by his absence prejudiced the cause of his country. By leaving on his comrades the duty he owed, and thereby increasing the odds against them, he bears as well the guilt of increasing their casualties and lessening their chances of surviving the ordeal they bore bravely. The only ground whereby he may be excused from this despicable act is that of insanity, and the issue of the case is whether that defense is made.

In the record of trial, there is no evidence, as such, of mental irresponsibility, for the psychiatric report is not evidence but hearsay. The basis for the purported opinion is apparently fright. There is no mention in it of combat fatigue, nor is there elsewhere in the record of trial. Such a casual suggestion of insanity as this perfunctory insertion of hearsay, whereby a psychiatrist may have said that in his opinion this accused was not responsible because he was afraid, will not be a defense to so harsh a charge. It will not be held to upset the presumption of sanity, for it is too slight in so great a case. Against the hearsay, there stands the direct testimony of his comrade in the line, that accused was not nervous, and of another at the scene of surrender, that though under nervous strain and frightened, he was neither frantic nor hysterical. The court was warranted in disregarding the hearsay opinion, especially in view of the direct evidence, the plea of guilty, and the court's own

peculiar knowledge of human motives and actions in battle (CM ETO 1404, Stack; CM ETO 1663, Ison; CM ETO 4570, Hawkins; CM NATO 2047, III Bull. JAG 395(36), p.229).

> "Where there was no substantial evidence of insanity the presumption of sanity contemplated in paragraph 63 and 112, M.C.M., was operative * * *" (C.M. 193543(1930), Dig. Op. JAG, 1912440, sec.395(36), p.227).

It must be concluded that the defense did not have a legitimate plea of insanity and that defense counsel was cognizant of this fact and therefore allowed his client to plead guilty. By way of extenuation and in order to secure lenient treatment of accused, he presented the psychiatric report. There was no other proper function of the report under the circumstances. To interpret the procedure otherwise is to impute to defense counsel either gross ignorance of trial procedure or sharp practice. Neither imputation is justified.

7. The charge sheet shows that accused is 20 years of age and was inducted 14 March 1944 at Fort Devens, Massachusetts, to serve for the duration of the war plus six months. He had no prior service.

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

9. The penalty for misbehavior before the enemy is death or such other punishment as a court-martial may direct (AW 75). The designation of the Loire Disciplinary Training Center, Le Mans, France, was proper (Ltr. Hq. European Theater of Operations, AG 252, Op. TPM, 19 Dec 1944, par.3).

B. Franklin Riter Judge Advocate

Wm. F. Sumrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1 28 MAR 1945

CM ETO 8485

U N I T E D S T A T E S	)	80TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 80, U. S. Army, 19 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 50 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private HENRY C. BEARD (35503078), Company B, 318th Infantry	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Henry C. Beard, Company B, 318th Infantry, did, in the vicinity of Landremont, France, on or about 8 October 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 to-wit: participation in operations against an enemy of the United States and did remain absent in desertion until he was apprehended at Lerouville, France on or about 19 November 1944.

8485

CONFIDENTIAL

(272)

Specification 2: In that * * * did, in the vicinity of Grentzingen, Luxembourg, on or about 22 December 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 to-wit: participation in operations against an enemy of the United States and did remain absent in desertion until he surrendered himself at Colmar, Luxembourg on or about 29 December 1944.

Specification 3: In that * * * did, in the vicinity of Colmar, Luxembourg, on or about 30 December 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 to-wit: participation in operations against an enemy of the United States and did remain absent in desertion until he surrendered himself at Ettelbruck, Luxembourg on or about 4 January 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of Specification 1, except the words "was apprehended" substituting therefor the words "surrendered himself", of the excepted words not guilty and of the substituted words guilty, and guilty of Specifications 2 and 3 and of the Charge. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 80th Infantry Division, approved "only so much of the findings of Guilty of Specification 1 of the Charge as finds the accused Guilty of desertion with intent to avoid hazardous duty from 8 October 1944 until he surrendered himself to military control on 19 November 1944", approved the findings as thus modified, approved the sentence and forwarded the record of trial "pursuant to Article of War 50½".

The confirming authority, the Commanding General, European Theater of Operations, disapproved the finding of guilty of Specification 1 of the Charge, approved only so much of the findings of guilty of the Charge and Specifications 2 and 3, thereunder, as involved findings that the accused did at the times and places alleged absent himself without leave until he surrendered at the times and places alleged, in violation of Article of War 61, mitigated the sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 50 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and with-

8485

held the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence clearly supports the findings as approved by the confirming authority that accused absented himself without leave from 22 December 1944 until he surrendered himself on 29 December 1944 and from 30 December 1944 until he surrendered himself on 4 January 1945.

4. The charge sheet shows that accused is 22 years and 11 months of age and was inducted 7 July 1942 to serve for the duration of the war plus six months. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused other than those noted and corrected by the confirming authority were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as modified by the confirming authority and the sentence as mitigated by the confirming authority.

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

B. Franklin Riter — Judge Advocate

Wm. F. Sprow — 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 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private HENRY C. BEARD (35503078), Company B, 318th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as modified and the sentence as mitigated, 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 8485. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 8485).

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

(Sentence as mitigated ordered executed. GCMO 101, ETO, 5 April 1945.)

8485

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

BOARD OF REVIEW NO. 2

25 MAY 1945

CM ETO 8492

U N I T E D S T A T E S	)	XV CORPS
	)	
v.	)	Trial by GCM, convened at Sarrebourg, France, 20 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
	)	
Private HIRAM L. WINTERS, Jr. (34581125), Troop A, 121st Cavalry Reconnaissance Squadron Mechanized	)	

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

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

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

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

Specification: In that Private Hiram L. Winters Jr., Troop A, 121st Cav Rcn Sq (Mecz), having received a lawful order from 2d Lt Carroll R. McGraw, an officer, who was then in the execution of his office, to stand guard, did at or near Neunhoffen, France, on or about 20 December 1944, willfully disobey the same.

8492

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

Specification: In that * * * being present with his platoon while it was engaged with the enemy, did at or near Neunhoffen, France, on or about 20 December 1944 shamefully abandon the said position and seek safety in the rear.

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 charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 17 days in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

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

Accused was a rifleman in Troop A, 121st Cavalry (R7,11). On 20 December 1944, his platoon was in Neunhoffen, France. About 2000 or 2100 hours the platoon pulled out of Neunhoffen, due to an enemy counter-attack, and withdrew to a new position about a half-mile away. The platoon reached its new position about midnight (R7). There accused approached his platoon leader, stating he was not going to stay with the platoon that night and asked to be taken back to the rear echelon. Lieutenant McGraw (his platoon leader) told accused that he would not give him permission to leave the area, that he was to stay there that night and stand guard and showed him where his position was to be (R8,12,15). After being ordered to stand guard, accused remained there for a second or two and then walked away (R14). Although the platoon remained in this location until 0800 hours the next morning

and Lieutenant McGraw's position was only ten yards from the one he designated for accused, he only saw accused once, about 15 minutes after the above order was given, when accused was talking to one of the sergeants. He remained there a while and then walked away and was not seen again while the platoon was in this position (R8,13,16,18). During the course of the day, the platoon received an enemy barrage and were forced to remain in their shelters until the situation cleared up (R8).

At approximately 0800 hours on 21 December 1944, accused was seen by his troop commander in a "chow line" at the troop rear echelon about a mile from the position his platoon was occupying (R19,20,21).

4. The defense called a soldier in accused's troop who testified that he had been under fire with the accused and the latter was very scared and nervous. He added that while most of the men joked about it after a shelling was over, accused was more scared at that time, than when the shelling was going on (R22).

Accused, after his rights as a witness were fully explained to him (R23), was sworn and testified in substance as follows: He had been with his present organization since 27 November and had taken part in several combat situations and patrols under shell fire. At one time he was sent back from a patrol because of his nervousness (R24). On the night in question he asked Lieutenant McGraw to send him back, but he was ordered to stay out there that night. He got on an armored car which came by and reported to Headquarters platoon at about 2200 hours and the next morning he was placed under arrest. He reported his nervous condition to the troop commander on several occasions and was always told to report back to his platoon. The troop commander repeatedly told him he would let him know in a couple of days if he could be sent to the rear (R25). On cross-examination, accused testified he understood Lieutenant McGraw had ordered him to stay out there with the platoon and that approximately ten minutes later he left in the armored car and reported to headquarters platoon (R25). The Germans were then about 500 yards away from the position his platoon occupied and he did not return to his platoon either that night or the next day (R25,26). None of the other men in the platoon left their position (R26). When questioned by members of the court, accused stated his platoon had been fired on all afternoon and that after Lieutenant McGraw gave him orders to do so he did not take his position (R26,27).

5. Competent, uncontradicted evidence established that on 20 December 1944, accused was given a direct order by Lieutenant McGraw, his platoon leader, to stand guard and that he willfully disobeyed this command. The evidence of the prosecution is corroborated by the admissions of the accused in his sworn testimony. His conduct evidenced an intentional defiance of authority. The order given by Lieutenant McGraw related to a military duty, was one he was authorized to issue, and immediate compliance was obviously contemplated. The findings of guilty of a violation of Article of War 64 are fully supported by the evidence (MCM, 1928, par.134b, pp.148-149; CM ETO 7230 Magnanti; CM ETO 7870, Bell).

As to Charge II, the evidence shows that during the day 20 December 1944, accused's platoon received heavy artillery barrages and withdrew one-half mile from the town of Neunhoffen to a defensive position. Accused testified the Germans were about 500 yards from his platoon's position which had been fired on all afternoon. His organization was in contact with the enemy. "The words 'before the enemy' mean * * * in contact with the enemy, either in the frong line in actual conflict or in reserve immediately to be engaged" (Dig.Op.JAG, 1912-1940, sec.433(2), p.303). Under these circumstances he left his platoon and went to the troop rear echelon. By such conduct, he shamefully abandoned his platoon while it was engaged with the enemy within the meaning of Article of War 75 (Winthrop's Military Law and Precedents, Reprint 1920, p.623). There is substantial evidence to sustain the findings of guilty of Charge II and its Specification (CM ETO 6406, Way; CM ETO 4820, Skovan).

6. The charge sheet shows that accused is 22 years, five months of age, and was inducted 20 November 1942. He had no prior service.

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

8. The penalty for either willful disobedience of the lawful command of a superior officer in time of war,

or for misbehavior before the enemy, is death or such other punishment as the court-martial may direct (AW 64; AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is proper (AW 42; Cir.210, WD, 14 Sept.1943, sec. VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

28 JUN 1945

CM ETO 8511

UNITED STATES	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Luneville, France, 15 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private HENRY SMITH (34512427), Company B, 1553rd Engineer Heavy Ponton Battalion	)	

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

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

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

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

Specification: In that Private Henry (NMI) Smith, Company B, 1553d Engineer Heavy Ponton Battalion, did at Aneumenil, France, on or about 30 November 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Yvonne Georges.

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

Specification 1: In that * * * did, at Aneumenil, France, on or about 30 November 1944, commit the crime of sodomy by feloniously and against

the order of nature having carnal connection per os with a human being, to wit, Madame Yvonne Georges.

Specification 2: In that * * * did, at Pouxeaux, France, on or about 27 November 1944, with intent to commit a felony, viz, rape, commit an assault upon Madame Genevieve Demange, by willfully and feloniously threatening the said Madame Genevieve Demange, with a deadly weapon, to wit, a knife.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of Charge I and its Specification, and at least two-thirds of the members present at the time the vote was taken concurring, was found guilty of Charge II and its specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated 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. Rape of Madame Yvonne Georges (Charge I and Specification):

a. The evidence proved more than one act of intercourse between accused and Madame Georges. There was no motion by defense to require the prosecution to elect upon which act it would rely. On appellate review, it will be assumed that the prosecution elected to stand on the offense first shown by the evidence (CM ETO 492, Lewis; CM ETO 7078, Jones; CM ETO 8837, Wilson).

b. The act of intercourse was proved by convincing evidence and was admitted by accused in his sworn testimony. The vital question is whether Madame Georges submitted to same as a result of fear for her life or great bodily harm directly induced by accused or whether she was a voluntary party to the coition. Prosecution's evidence and accused's testimony are in direct conflict. A question of fact for the court was thereby created. The court elected to believe the evidence for the prosecution which is substantial and convincing that accused entered the home of the victim and her husband soon after midnight armed with a hand grenade. With it he threatened both the victim and her husband. The inference is legitimate and fair that

he caused the victim through fear for her life and physical safety to submit to his carnal desires.

> "There is a difference between consent and submission; every consent involves submission, but it by no means follows that a mere submission involves consent * * *" (52 CJ, sec.26, p.1017).
>
> "Consent, however reluctant, negatives rape; but where the woman is insensible through fright, or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity) the consummated act is rape" (1 Wharton's Crimiral Law (12th Ed., 1932), sec. 701, p.942).

The evidence forms a familiar pattern to the Board of Review and the conclusion here stated is supported by many precedents (CM ETO 7078, Jones; CM ETO 7373, Johnson; CM ETO 7977, Inmon; CM ETO 10871, Stevenson and Stuart; CM ETO 11376, Longie). Under the circumstances the findings of the court will not be disturbed on appellate review (CM ETO 8837, Wilson; CM ETO 12662, McDonald).

4. Sodomy upon Madame Georges (Charge II, Specification 1):

The evidence is undisputed that accused committed forcible sodomy per os upon the person of Madame Georges (CM ETO 339, Gage; CM ETO 3778, Darcy; CM ETO 5879, Martinez; CM ETO 8837, Wilson).

5. Assault with intent to commit rape upon Madame Genevieve Demange (Charge II, Specification 2):

All of the elements of this offense were proved by prosecution's evidence. The testimony of the victim, corroborated by the testimony of the American soldiers, is inherently worthy of belief (CM ETO 78, Watts; CM ETO 3469, Green; CM ETO 3749, Ward; CM ETO 3750, Bell; CM ETO 7202, Hewitt and Nash; CM ETO 10097, Rosas; Hammond v. United States (App. D.C. 1942), 127 Fed.(2nd) 752,753).

6. The charge sheet shows that accused is 26 years one month of age and was inducted 5 November 1942 at Fort Jackson, South Carolina. He had no prior service.

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

support the findings of guilty and the sentence.

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454,567), upon conviction of assault with intent to commit rape by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455), and upon conviction of sodomy by Article of War 42 and section 22-107, District of Columbia Code (CM ETO 3717, Farrington, and authorities therein cited). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

CM ETO 8519

27 JUN 1945

U N I T E D S T A T E S	36TH INFANTRY DIVISION
v.	Trial by GCM, convened at Headquarters 143rd Infantry, APO 36, U. S. Army, 3 February 1945.
Private PAUL BRIGUGLIO (32629995), Company B, 143rd Infantry	Sentence: Dishonorable discharge (suspended), total forfeitures, and confinement at hard labor for life. Loire Disciplinary Training Center, Le Mans, France.

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

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

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

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

Specification 1: In that Private Paul (NMI) Briguglio, Company B, 143d Infantry, did, near Qualiano, Italy, on or about 3 August 1944, desert the service of the United States with intent to avoid hazardous duty, to wit: combat duty

with the enemy, and did remain absent in desertion until he returned to military control on or about 17 August 1944.

Specification 2: In that * * * did, in the vicinity of Montbronn, France, on or about 4 January 1945, desert the service of the United States with intent to avoid hazardous duty, to wit: combat duty with the enemy, and did remain absent in desertion until he returned to military control on or about 8 January 1945.

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

Specification: In that * * * being present with his company while it was engaged before the enemy, did, in the vicinity of Luxenville, France, on or about 18 September 1944, shamefully abandon his company and seek refuge in the rear and did not return to his company until 27 December 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 both charges and all specifications. Evidence was introduced of one previous conviction by special court-martial for failure to report conditions indicating contraction of a venereal disease. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the findings of guilty of the Specification, Charge II, and of Charge II as involved a finding of guilty of absence without leave from 18 September 1944 to 3 October 1944 in violation of Article of War 61, approved the sentence but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France as the place of confinement. The proceedings were published in General Court-Martial Orders No. 73, Headquarters 36th Infantry Division, 4 March 1945.

3. a. Specification 1, Charge I:

During the early part of August 1944, in the Salerno area near Naples, Italy, accused's company was engaged in training for an amphibious operation (R6,12). General preparations were made, and both pillbox and water training were pursued. The troops worked with regular army equipment and also with special invasion equipment, such as, invasion gas masks and life belts (R6,17). It was generally known that an amphibious landing would be made (R6). Accused accompanied the unit to Salerno, took the majority of the training, but failed to report for reveille on 3 August 1944 (R12,13; Pros.Ex.1). He was not present in the company when the unit embarked in landing crafts on 10 or 11 August for the invasion, but returned to duty 13 August (R10,14; Pros.Ex.1).

b. Specification 2, Charge II:

On 28 December 1944, accused was returned to his company for duty after a period of confinement (R17,18; Pros.Ex.1). The unit was then in a rest and training area, where it remained until 3 January 1945. On the latter date, a five-hour movement in trucks was made to a new area, where although no small arms or artillery fire was heard, it was assumed that the enemy was to the right front because friendly cannon were faced in that direction. There was of course no training in that area, and the men were all "dug in". Accused was told by his squad leader that he was to be on guard that night. Orders came down during the evening to the squad leaders that the company was to make an attack, but the evidence does not reveal whether they were transmitted to the men. The men knew, however, as a general matter they were likely to move at any time, and were in fact told not to pack all their equipment, but it is not in evidence whether accused was then present. He was absent without authority the next morning, and some of his equipment was found beside his partially dug foxhole. The attack was not made as scheduled, but the company moved instead to another training area on 5 January. Accused returned to military control 8 January (R19-23; Pros.Ex.2).

c. Specification, Charge II:

Competent morning reports established accused's absence without leave from 18 September 1944 to 3 October 1944 (R22; Pros.Ex.1).

4. No evidence was introduced in behalf of accused, but after his rights as witness were fully explained to him, he elected to make an unsworn statement through counsel as follows:

> "I was inducted into the Army 14 November 1942 and joined the 36th Division at Camp Edwards, Massachusetts, and came overseas with it as a rifleman. I was wounded on Hill 1205 in Italy and I contracted pneumonia and was hospitalized. Later when we were in a rest area I rejoined my company on Mt Cairo. I have tried twice to go back up with my outfit during the French campaign but my nerves will just not take any more shelling. I have no desire to desert the service. During shelling I lose control of myself and am unable to stay with my unit. With regards to Charge II I turned into the MPs on October 3rd in Paris and was in military control from that date on and was going through replacement depots and channels returning to my unit" (R24).

5. The Board of Review will take judicial notice of the widely publicized and generally known facts that the 36th Infantry Division participated in heavy fighting in Italy including the bloody landing on the Salerno beachhead, was withdrawn from combat in that country, and took part in the historic invasion of the Southern shores of France beginning 15 August 1944 (MCM, 1928, par.125, p.134; Neely v. Henkel, 180 U.S. 109, 45 L.Ed. 448; Oetjen v. Central Leather Co., 246 U.S. 297, 62 L.Ed.726; Ex Parte Zimmerman, CCA 9th, 132 Fed.(2nd) 442; The Austvard (DC, Maryland), 34 Fed.Supp.431; CM ETO 6637, Pittala). Considering these matters of common knowledge, together with the prosecution's evidence of the return to the Salerno beachhead with its awesome suggestions of past terrors, for amphibious training with invasion equipment, and accused's admission of past service with the division,

the Board of Review is of the opinion that the court could reasonably infer as to Specification 1 of Charge I that on 3 August 1944 accused knew an amphibious operation was imminent and absented himself to avoid it (CM ETO 7174, Piehuta; CM ETO 7148, Giombetti).

6. As to the second desertion specification, it will be observed that accused in his unsworn statement has in fact admitted the requisite intent to avoid hazardous duty. He said in effect that he twice tried to go into the French campaign but that his nerves would not allow him to do so and that during shelling he loses control of himself. The morning reports in evidence show that he was back and present for duty on only two occasions: for three days beginning 15 September 1944 and for six days before this offense. They must have been the two attempts to return of which he spoke. These reports and the evidence show also that by his absences and confinements he has avoided all action in France. Return to his unit in a rest area, a long road trip to the front where he was at least close enough to be near friendly artillery and to have to dig in, in connection with his statement as to his nervousness, and his past evasion of danger, are substantial facts from which the court could likewise infer that his absence beginning 3 January 1945 was with the intent to avoid hazardous duty (CM ETO 6637, Pittala; CM ETO 7312, Andrew; CM ETO 8769, Wojtkowicz; CM ETO 12044, May).

7. The charge sheet shows that accused is 23 years of age and was inducted 14 November 1942 at Camp Upton, New York. He had no prior service.

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

9. The penalty for desertion in time of war is death or such other punishment as a court-martial may

direct (AW 50). The designation of the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement is authorized.(Ltr. Hq. European Theatre of Operations, AG252, Op TPM, 19 Dec.1944, par.3).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

21 JUL 1945

CM ETO 8533

U N I T E D S T A T E S	)	THIRD UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Esch, Luxembourg, 19 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Corporal BOB BATISTE (38267793), 382nd Quartermaster Truck Company	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Bob Batiste, 382nd Quartermaster Truck Company, did, at or near Bouligny France, on or about 11 December 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Booker T. Headen, 382nd Quartermaster Truck Company, a human being by shooting him with a Carbine.

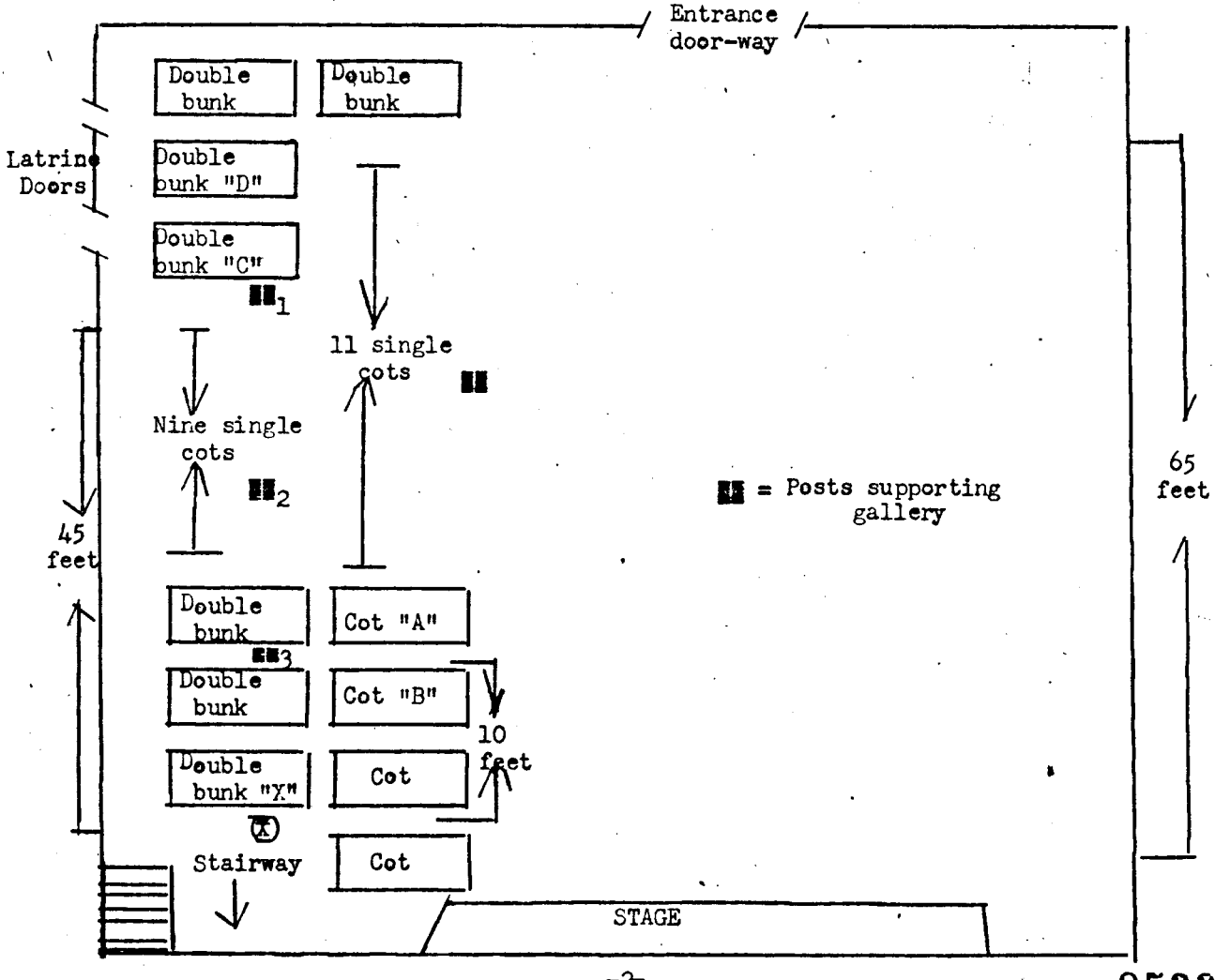
He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for disrespect towards a superior officer in violation of the 63rd Article 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

8533

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, although deeming it grossly inadequate, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Substantial competent evidence for the prosecution proved the following facts:

On 11 December 1944 the 382nd Quartermaster Truck Company was billeted in a theater building in Bouligny, France (R7). The following diagramatic representation (R9; Pros.Ex.1) of the part of the barrack room where the homicide occurred will permit a more cogent, understandable narrative of the facts and circumstances surrounding the same:



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8533

At about 2000 hours on that date a crap game was in progress at Cot "A", participated in by accused, deceased and at least three or four other members of the organization (R14,43,46,66). Upon a certain throw of the dice an argument arose (R15,44). At this point Private George Davies entered the barrack room and hearing the disturbance walked to the cot where the game was conducted. He placed a 500 franc note on the cot and

> "told them there was 500 francs, to stop the arguing, don't be arguing over no crap game" (R15,44).

Davies' intervention was of no avail and the altercation continued (R15). Deceased asserted that Burroughs, one of the players "had a right to catch the dice" (R26). Accused informed deceased that

> "he didn't have nothing to do with it and to keep his mouth out of it and if he didn't he would be lying on the floor" (R15,27).

Deceased replied that accused "would be lying on the floor too" (R15,32). The dispute continued (R15). Accused then walked over to his cot - about eight feet distant - picked up his carbine and returned to the game. He stood with his left foot on a cot next to cot "A" and held his carbine by the muzzle with its butt on the bed next to his foot (R44). Davies then said to accused

> "Batiste, why don't you put your rifle up? There aint no need of this" (R16,45).

Deceased exclaimed, "That is what I say" (R45). Thereupon accused replied,

> "I am going to bust a cap in somebody's ass tonight" (R45).

Deceased asked, "What do you think I'll be doing?" to which accused answered, "You will be kicking" (R45). Accused then raised his carbine "worked the bolt" and placed a cartridge in the chamber (R16,45). He pointed the muzzle of the carbine toward deceased who was about four feet distant from him (R33,45). Davies grabbed the barrel of the carbine with both hands and pointed it in the direction of the ceiling. He said to accused "Please don't do that" and warned him several times that he would kill somebody (R29,51). At that moment a shot was discharged from the carbine and the bullet entered the ceiling of the room (R18,19,46,50). Davies and accused stood between cot "A" and cot "B" (R18; Pros.Ex.1). Davies held to the carbine and accused attempted to break his hold by backing into the aisle between the two rows of cots and thence toward the entrance door way of the theater in the direction of double bunk "C" (R19,29,79). When at a point in the aisle approximately three-fourths of the distance between cot "A" and double bunk "C", at least two more shots were discharged. They struck the wall on the right of the stage over the stairway (R37,50,53).

(The terms "right" and "left" assume that an observer stood in the entrance door way of the theater and looked toward the stage). Davies released his hold on the carbine and sought to protect himself by standing against the wall of the auditorium at a point approximately midway between posts 1 and 2 (R20,30,35). Accused then proceeded to the space between double bunks "C" and "D". He faced the stage and pointed his carbine in the direction of the stairway on the right side of the stage. The carbine rested upon the upper bed of the double bunk (R21,22, 31,32,34,40,68,80).

Immediately after accused and Davies became involved in the altercation over the possession of the carbine the other soldiers who had been gathered about cot "A" "started scattering" (R67). Deceased reached the space between double bunk "X" and the stairway on the right of the stage (R48). It was at this time that accused projected his carbine over the upper bed of double bunk "C" and pointed it in the direction of the stage. When deceased arrived at the point above described accused aimed his weapon directly at him and fired three or four shots, the first of which struck deceased. He fell to the floor (R68-70,81) at the point marked (X) on the above diagram. His head was toward the aisle and his feet toward the wall of the building (R81,85). When accused ceased shooting he removed the clip from the carbine and either replaced it or inserted a new clip (R22). Some of these shots struck post 3 (R58,59). One of the soldiers, Staff Sergeant Wesley Grant, approached accused and called to him

> "Don't shoot. You have killed the boy already" (R61).

To which accused replied:

> "You don't know who you are messing with. I will kill everybody in here" (R61,62,81).

It was stipulated (R91) between the prosecution and defense that deceased was declared dead at 2230 hours on 11 December 1944 and that his death was caused by

> "A perforating gunshot wound of the chest, which resulted in the lacerations of the Vena Cava, ascendingAorta, Pulmonary Vein, left Bronchus, left Lung, which resulted in internal hemorrhage and shock" (Pros.Ex.2).

4. Accused after his rights were explained to him, elected to be sworn as a witness on his own behalf (R92). He described the quarrel which arose over the crap game and in which he was an actor and he admitted that he secured his carbine from his cot (R94). He asserted that when he returned to the game with his carbine deceased commenced to quarrel with him and he

became angry; that he informed deceased that he "didn't have nothing to do" with the activities of one of the players, ordered him to shut his mouth and then said,

> "I will bust a cap in somebody's ass" (R94).

Deceased replied, "What do you think I will be doing?" Accused answered, "You will be kicking" (R97). He then "shoved /the/ bolt up on the gun". Deceased, who was sitting down, arose and exclaimed

> "That son of a bitch wants to break up the game. Throw the dice away" (R95).

Accused told him not to talk to him like that and raised his rifle. He was angry because deceased "called me a 'son of a bitch'" (R102). One of the soldiers (Davies) grabbed the gun and while the gun was at an angle of 45 degrees, accused fired it. The bullet went into the ceiling (R95). At that time he saw deceased standing near cot "A" (R103). Accused backed into the aisle followed by Davies who retained his hold on the gun. At that time two or three shots were discharged from it (R97). After Davies released his hold on the carbine accused fired two or three shots and the bullets discharged entered a post (R103). Deceased was in a corner of the building and accused had no intention of shooting him (R95).

> "When I saw him /deceased/ running I saw Sergeant Grant rightaway and shot in the post to keep from hitting some one" (R103).

Deceased was unarmed (R96). Subsequent to firing the bullets which entered the post accused went back to double bunk "C", but fired no shots from that position. The shots were fired only when he was near post 2 (R98,99). Sergeant Grant came to him and disarmed him and said to him

> "Don't shoot any more, Bob, I think you have already hit him" (R100).

He answered Grant

> "They don't know who they are fooling with" (R100).

5. The evidence established beyond reasonable doubt that accused killed deceased at the time and place alleged by shooting him with a carbine. The sole question presented for consideration on appellate review is whether the homicide was murder or manslaughter. The determination of this question must be based upon the application of the following acknowledged legal principles:

"Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought" (1 Wharton's Criminal Law, (12th Ed., 1932) sec. 423, p.640).

"Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary" (MCM, sec.149a, p.165).

"If a sudden quarrel arises, the parties to which fight, upon fair terms either immediately or at a place to which they immediately resort for that purpose, and one of them is killed, the person killing the other, provided he took no unfair advantage, is guilty of man-slaughter and not murder, which ever of them may have struck the first blow" (9 Halsbury's Laws of England (2nd Ed.) sec.755, p.440; sec.748, p.436).

"At common law a killing ensuing from sudden transport of passion or heat of blood, if upon sudden combat, was also manslaughter, and the statutory definition of voluntary manslaughter has in some jurisdictions been made expressly to include a killing without malice in a sudden fray. However, a sudden combat is ordinarily considered upon the same footing as other provocations operating to create such passion as temporarily to unseat the judgment" (29 CJ, sec.115, p.1128).

"Manslaughter at common law was defined to be the unlawful and felonious killing of another without any malice, either express or implied. * * * Whether there be what is termed express malice or only implied malice, the proof to show either is of the same nature, viz., the circumstances leading up to and surrounding the killing. The definition of the crime given by U.S. Rev. Statutes, sec.5341 is substantially the same. The proof of homicide, as necessarily involving malice, must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice in connection with the crime

of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts and that inference is one of fact for the jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder or manslaughter" (Stevenson v. United States, 162 U.S. 313,320; 40 L.Ed.980,983). (Cf: Jerry Wallace v. United States, 162 U.S. 466, 40 L. Ed. 1039; John Brown v. United States, 159 U.S. 100, 40 L.Ed.90).

"At common law mere language, however, aggravating, abusive, opprobrious, or indecent, is not regarded as sufficient provocation to arouse ungovernable passion which will reduce a homicide from murder to manslaughter" (26 Am. Jur. sec.29, p.175; Cf: 40 CJS, sec.87, p.950; MCM, 1928, par.149a, p.166; CM ETO 2899, Reeves; CM ETO 6229, Creech).

Preceding the homicide accused, deceased and other colored soldiers were engaged in a dice game dispute, wherein accused and deceased applied obscene and profane epithets to each other. The dispute involved nothing of importance and prior to the time accused armed himself assumed no particularly violent tone. It was a typical "crap game" quarrel between negroes of which profanity, obscenity and threatening language are always the marked characteristics. However, from the moment accused secure his carbine the affair assumed a more serious meaning. Davies sensed this fact in his futile endeavor to disarm accused and in his warnings to accused that he "would kill somebody". Deceased and other participants in the game "started scattering" because obviously they knew the danger to life and safety involved in the combination of an angry negro armed with a lethal weapon. Deceased fled in the direction of the stairway on the right of the stage. When Davies failed in his efforts to secure accused's weapon, he immediately sought protective shelter. Accused went to double bunk "C", rested his carbine on the upper bed, aimed it in the direction of deceased who was then fleeing from the scene and discharged three or four bullets at him. The first one struck and killed him.

If it be assumed that deceased directed opprobrious and abusive language to accused, it was not a provocation recognized by law sufficiently grave to arouse an ungovernable passion in accused which dethroned his

reason and judgment. The evidence bespeaks the opposite conclusion. When accused fired the fatal shot deceased was unarmed and in the course of retreating from the scene of the disorder. He was at the opposite end of the room. He was unarmed and offered accused no resistance or physical violence. Accused, on the other hand, placed himself in a position where he could rest his weapon upon the upper bed of the double bunk and take deliberate aim at his victim. There was, therefore, present in the case substantial evidence of deliberative action on the part of accused. It bespeaks louder and more positively than words factual malice and discloses that in the heart and consciousness of accused there existed a cold-blooded, savage desire to take the life of deceased.

> "The instant case demonstrates clearly the presence of factual malice - the badge of the murderer - in a positive, decisive manner. This homicide was manifestly murder; not manslaughter" (CM ETO 9467, Roby).

The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings that accused was guilty of murder (CM ETO 6229, Creech, supra; CM ETO 11178, Ortiz; CM ETO 6682, Frazier; CM ETO 7315, Williams; CM ETO 9467, Roby, supra).

6. The charge sheet shows that accused is 22 years seven months of age and was inducted 1 February 1943 at Lafayette, Louisiana to serve for the duration of the war plus six months. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 3

8 MAY 1945

CM ETO 8541

U N I T E D S T A T E S	45TH INFANTRY DIVISION
v.	Trial by GCM convened at APO 45, US Army, 13 February 1945. Sentence: As to Pace and Karney, dishonorable discharge, total forfeitures and confinement at hard labor for 80 years; as to Johnson, dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ALFRED J. PACE (33591800), Private First Class FORD JOHNSON (35791896), and Private CLARENCE E. KARNEY (39718434), all of Company L, 157th Infantry	

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

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

2. Accused were arraigned separately and tried in common trial without objection on their part upon the following charges and specifications:

PACE

CHAGRE: Violation of the 58th Article of War.

Specification: In that Private Alfred J Pace, Company L, 157th Infantry, did, at or near Offwiller, France, on or about 17 January 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: Combat operations against elements of the German armed

(300)

forces, and did remain absent in desertion until he was apprehended at or near Luneville, France, on or about 28 January 1945.

JOHNSON

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Ford Johnson, Company L, 157th Infantry, did, at or near Offwiller, France, on or about 17 January 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat operations against elements of the German armed forces, and did remain absent in desertion until he was apprehended at or near Luneville, France, on or about 28 January 1945.

KARNEY

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Clarence E Karney, Company L, 157th Infantry, did, at or near Offwiller, France, on or about 17 January 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat operations against elements of the German armed forces, and did remain absent in desertion until he was apprehended at or near Luneville, France, on or about 28 January 1945.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification preferred against him. Evidence was introduced of one previous conviction by special court-martial against Johnson, for disobeying a lawful order of his commanding officer and being drunk and disorderly in uniform in violation of Articles of War 64 and 96 respectively. No evidence of previous conviction was introduced against Pace or Karney. Three-fourths of the members of the court present at the time the vote was taken concurring, Pace and Karney were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for a period of eighty (80) years. All members of the court present at the time the vote was taken concurring, Johnson was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority, as to each accused, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and for-

warded the record of trial for action pursuant to Article of War 50½.

3. The prosecution's evidence was substantially as follows:

Authenticated extract copies of the morning report of Company L, 157th Infantry, showing absence without leave by each of accused from 17 January 1945 to 28 January 1945 were received in evidence without objection by defense (R6; Exs.A,B,C).

On 17 January 1945, all three accused were in confinement at the regimental stockade at Zinswiller, France. Along with about 25 other men, they were assembled that day and advised by the regimental S-1 that they were to be returned to their respective outfits (R12). At the same time, they were told that absence without leave on their part would constitute desertion. Neither small arms nor artillery fire would be heard in Zinswiller at this particular time (R13).

Accused, pursuant to these instructions, were taken to the first sergeant of the company the same day at Offwiller, France, where the company's kitchen, motor pool and supply room were located. Accused were without equipment and hence the sergeant obtained rifles, helmets, hand grenades, and other equipment for them, telling them that they were to be sent later in the day to the front to join their company. Artillery fire could be heard in Offwiller at this time, although the sound of small arms fire was not audible. The company was on the front lines approximately three and a half miles to the north. There was a counter-attack and "there was very heavy artillery and it was a pretty rough situation". Accused were not specifically told "what was going on up there", nor were they assigned any particular duties. After issuing accused their equipment, the first sergeant left them to go to the office of the regimental S-4 to procure additional ammunition. When he returned, all three accused were gone, and their equipment was lying on the road. They had no authority to leave and were absent from their company until 28 January 1945 (R6-11).

The pre-trial investigating officer testified that on 29 January 1945, he interviewed each accused and after being duly warned of his rights, each made an oral statement. The statements were substantially alike, each accused admitting that he was released from the stockade on 17 January 1945 and ordered to report to his company. Each was advised at the time that a failure so to report and to stay would constitute desertion. All were then taken by the military police to Offwiller and while at the motor pool there, some shells started coming in and each took off. Pace said he "just couldn't stand any shelling" because of his nerves, and so he took off and stayed in several small towns. Johnson admitted that "he intended to stay away and he couldn't stand it up there any longer".

Karney told the investigating officer that "he couldn't take it up in the line anymore". He said he intended to stay away a couple of weeks and that the cold was too much and he couldn't take it. He could not stand the shelling. All admitted that they were picked up at Luneville, France, on 28 January 1945 (R15-20).

4. Accused, after their rights as witnesses were fully explained to them, elected to remain silent and no evidence was offered for the defense (R20-21).

5. The evidence clearly establishes that accused were under orders to join their company in combat duty of a hazardous character, that they were aware of such orders and of the element of danger involved, and that they absented themselves without authority for the purpose of avoiding it. All elements of the offense charged against each accused were therefore proved and the record of trial accordingly is legally sufficient to sustain the findings of guilty in each instance (CM ETO 1406, Pettapiece; CM ETO 1664, Wilson).

The statements of accused were in effect confessions and were admissible only under the limitations provided in the Manual for Courts-Martial (MCM, 1928, par.114a and c, pp.115-117). All such requirements were met in this case, the corpus delicti having been fully proved by other competent evidence and the voluntary character of the confessions in each instance being adequately established. Since each statement contained references only to the particular accused who made it, no objection can be raised on the ground that the other accused were prejudiced thereby.

6. The charge sheets show the following as to accused: Pace and Johnson are both 21 years of age and were inducted 11 March 1943 and 3 March 1943 at Philadelphia, Pennsylvania, and Cincinnati, Ohio, respectively; Karney is 25 years of age and was inducted 26 November 1943 at Los Angeles, California; none had prior service.

7. The court was legally constituted and had jurisdiction of each accused and of the offenses. No errors injuriously affecting the substantial rights of 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.

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

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

Benjamin R Sleeper Judge Advocate

Malcolm C. [illegible] Judge Advocate

R. L. [illegible] Judge Advocate

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

BOARD OF REVIEW NO. 1

20 JUL 1945

CM ETO 8542

U N I T E D S T A T E S	)	OISE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Sergeant OBBIE L. MYLES (39861351), 663rd Ordnance Ammunition Company	)	Trial by GCM, convened at Reims, France, 24 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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 Sergeant Obbie L. Myles, 663rd Ordnance Ammunition Company, did, at Brancourt-en-Laonnois, Aisne, France, on or about 6 January 1945, forcibly and feloniously, against her will, have carnal knowledge of Mademoiselle Arlette Maillet.

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

8542

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 under Article of War 50½.

3. Prosecution's evidence proved that about 1830 hours on 6 January 1945, Mademoiselle Arlette Maillet, a French girl of the age 16 years who lived in Brancourt-en-Laonnois, Department of Aisne, France, proceeded on foot on a public highway from Coucy to Pinon, France (R12). Accused in company with Corporal Shirley Gee and Private First Class Willie A. Boyd, Jr. (all colored), of 663rd Ordnance Ammunition Company, riding in a weapons carrier, overtook Mademoiselle Maillet and passed her. Immediately the vehicle was turned around, driven back to the girl and halted. Two of the soldiers dismounted from the vehicle and seized the young woman. One of the men held her by the shoulder and the other grasped her feet and in spite of her protests and struggles forced her into the back seat of the weapons carrier (R13). Accused sat in the front seat and drove the vehicle. Gee and Boyd sat in the rear seat and held the girl (R18,25; Pros.Ex.E). She struggled, cried and resisted their advances (R18,29,30). After the vehicle was driven a distance on the highway in the direction of Coucy, it was turned into a farm road and was finally stopped in a field about 600 meters from Brancourt. There were no houses in the immediate vicinity (R13). In spite of the resistance of Mademoisello Maillet she was held on the rear seat of the truck by the negroes who forcibly undressed her (R13,19). Each of the negroes in turn engaged in sexual intercourse with her. There was penetration of the victim's genitals in each instance. During the successive acts of intercourse she was pinioned to the seat by two of the men while the third man violated her. One held her feet and the other her head and shoulders (R13,14,18,19,22). Upon completion of the third coition, an overcoat was thrown on the floor of the rear of the truck and the girl was placed on it by the negroes. Thereupon each of them in succession again engaged in intercourse with the girl (R16,17,19,22).

4. After an explanation of his rights, accused, as a witness in his own behalf, admitted his presence with Boyd and Gee at the time and place of the alleged rape but denied that he either touched the girl's body or engaged in sexual intercourse with her. Oppositely, he asserted that because of her youth he protested against the

violation of her person and pleaded for her release, but that Boyd prevented his succoring the girl by threatening him with a carbine (35-39).

5. a. The proof showed that accused engaged in two acts of intercourse with Mademoiselle Maillet.

> "As there was no motion by the defense to require the prosecution to elect upon which act of intercourse it would rely in its proof of rape, it will be assumed on appellate review that the prosecution elected to stand on the first offense shown by the evidence (CM ETO 492, Lewis; CM ETO 7078, Jones; CM ETO 12162, Gross)" (CM ETO 11608, Hutchinson).

The above rule is applicable in the instant case.

b. The evidence irrefragably showed that three negroes each in turn engaged in a sexual act with the young woman while she was held by the other two on the back of the weapons carrier. She was then placed on the floor of the carrier and again each negro in succession had carnal connection with her. However, the order in which the men indulged their lust was not proved. Such particularization of the evidence was unnecessary. If the first act of intercourse on the seat of the carrier was performed by either Gee or Boyd, accused clearly aided and abetted the individual who performed that act and he was properly charged and found guilty as a principal (CM ETO 3740, Sanders et al; CM ETO 4234, Lasker and Harrell; CM ETO 4589, Powell et al; CM ETO 5068, Rape and Holthus). If he was the guilty person he was a principal in his own status. Under either interpretation of the evidence, accused is legally responsible for the first act of intercourse.

c. No question is involved as to the identity of accused as one of the three negroes who kidnapped Mademoiselle Maillet and thereafter in a weapons carrier in a lonely field engaged in acts of sexual intercourse with her. Accused admitted in his voluntary extrajudicial statement and in his testimony at the trial that he was present at the time and place alleged and proved.

d. The testimony of Mademoiselle Maillet exhibits the bestial crime of rape in its most detestable and brutal form. Her testimony concerning penetration of her genitals by the male organ of each of the three negroes is corroborated by the testimony of her mother that she

suffered a hemorrhage from her vagina when she arrived at her home at about 1915 hours (R27) and by the testimony of the physician who examined the young woman at 1000 hours on 7 January 1945 (R7-9). His statement as to lack of penetration indicates he did not use the term "penetration" in the legal sense of the word. His factual testimony proved that the hymen was in truth badly lacerated and such proof fulfills the legal requirements (MCM 1928, par.148b, p.165; Cf: CM ETO 6554, Hill).

The victim's description of the outrage perpetrated upon her by the American negro soldiers is not only inherently probable and worthy of belief, but received substantial corroboration. The accused's testimony and extrajudicial statement clearly indicate that the girl was an unwilling captive and that to the extent of her physical powers she resisted the attacks upon her person. The torn, damaged and bloodstained condition of her clothing (R14-16,27; Pros.Exs.A,C,D), the dismemberment of the clasp from her trousers (R14,15; Pros.Ex.B), her immediate complaint to her mother and sister (R17,26), her dazed and disheveled appearance (being clad only in a slip) upon her return to her home (R26), and the hemorrhage from her vagina all corroborate in a most convincing manner her narrative of violence and force visited upon her in the ravishment and defilement of her person.

There is not only substantial evidence in proof of all of the elements of the crime of rape, but also this evidence is convincing beyond all doubt that accused was guilty as charged (CM ETO 3740, Sanders et al; CM ETO 3859, Watson and Wimberly; CM ETO 4444, Hudson et al; CM ETO 4608, Murray et al). The accused was one of three negroes who satisfied their lustful appetites upon the body of a young white girl. His own testimony was disbelieved by the court and, considering its inherent weakness and the fact that it is in part contradicted by the testimony of the accomplice, Boyd, it is manifest the court could not have done otherwise. Accused, a mature man of 34 years, merited the extreme penalty of death and it is difficult to understand the action of the court in imposing the lesser of the mandatory punishments.

6. The charge sheet shows that accused is 34 years one month of age and was inducted 28 July 1943 to serve for the duration of the war plus six months. No prior service is shown.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 3

25 OCT 1945

CM ETO 8555

U N I T E D S T A T E S	CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Technician Fourth Grade HARRY B. KENNEY (34362159) and Private LOUIS A. STAVAS (39393945), both of Headquarters Company, 759th Railway Operating Battalion	Trial by GCM, convened at Dijon, France, 2 and 6 February 1945. Sentence as to each accused: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for five years. Loire Disciplinary Training Center, Le Mans, France.

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

1. The record of trial in the case of the soldiers named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings and sentences. 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 were arraigned separately and tried together upon the following charges and specifications.

Kenney

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Technician Grade Four Harry B. Kenney, Headquarters Company, 759th Railway Operating Battalion, did, at Arezzo, Italy, on or about 22 August 1944, wrongfully and unlawfully convert to his own use about

one hundred twenty-four (124) cartons of cigarettes, value in excess of $50.00, the property of the British Government.

Specification 2: In that * * * did, in conjunction with Private Louis A. Stavas, Headquarters Company, 759th Railway Operating Battalion, then Staff Sergeant, Headquarters Company, 759th Railway Operating Battalion, and Private Ben A. Johnson, Headquarters Company, 759th Railway Operating Battalion, at Rome, Italy, on or about 25 August 1944, wrongfully and without proper authority sell to an unknown civilian one hundred twenty-three (123) cartons of cigarettes of the value in excess of $50.00, property of the British Government.

Stavas

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Louis A. Stavas, Headquarters Company, 759th Railway Operating Battalion, then Staff Sergeant, Headquarters Company, 759th Railway Operating Battalion, did, in conjunction with Technician Grade Four Harry B. Kenney, Headquarters Company, 759th Railway Operating Battalion, and Private Ben A. Johnson, Headquarters Company, 759th Railway Operating Battalion, at Rome, Italy, on or about 25 August 1944, wrongfully and without proper authority sell to an unknown civilian one hundred twenty-three (123) cartons of cigarettes of the value in excess of $50.00, the property of the British Government.

Each accused pleaded not guilty and was found guilty of each Charge and Specification preferred against him. No evidence of previous convictions against either was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved, as to Kenny, only so much of the findings of guilty of Specification 1 of the Charge as involves findings that accused did, at the place and time alleged, wrongfully and unlawfully convert to his own use about 80 cartons of cigarettes, of the value alleged, the

ownership of which is unknown, and only so much of the findings of guilty of Specification 2 of the Charge as involves findings that he did, in the manner alleged, and at the place and time alleged, wrongfully and without proper authority sell to an unknown civilian about 80 cartons of cigarettes, of the value alleged, the ownership of which is unknown; approved, as to Stavas, only so much of the findings of guilty of the Specification of the Charge as involves findings that he did, in the manner alleged, and at the place and time alleged, wrongfully and without proper authority sell to an unknown civilian 123 cartons of cigarettes, of the value alleged, the ownership of which is unknown, approved both sentences and ordered them executed, but suspended the execution of that portion of each thereof adjudging dishonorable discharge until the soldiers' release respectively from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France as their place of confinement. The proceedings were published by General Court-Martial Orders Number 25, as to Kenney, and 26, as to Stavas, Headquarters, Continental Advance Section, Communications Zone, European Theater of Operations, APO 667, 24 February 1945.

3. For the purpose of this opinion a summary of the evidence is unnecessary.

4. Under Specification 1 of the Charge against Kenney it is recited that he did, at the times and place alleged, "wrongfully and unlawfully convert to his own use one hundred twenty four (124) cartons of cigarettes, value in excess of $50.00, the property of the British Government". In view of the absence of any evidence of trespass, it was proper not to charge larceny under Article of War 93. In unlawful conversion it is immaterial whether the converter acquired possession of the property by trespass or otherwise, trespass not being an essential element of proof (CM 252620 (1944), III Bull. JAG 346). In CM 198657 (1932), (Dig. Ops. JAG 1912-1940, sec.454 (102), p.367), where the specification under Article of War 96 alleged wrongful conversion of an automobile the property of two persons named and the evidence established, and the court found, that accused converted an automobile belonging to three different persons, the Board of Review said:

> "it is too well settled to require discussion that wrongful conversion of the property of one person is a separate and distinct offense from wrongful conversion of the property of another person. Neither offense is included in the other and the court by exceptions and substitutions found accused not guilty of the offense charged".

(314)

Similarly, with respect to larceny and embezzlement The Judge Advocate General and the Board of Review, following court decisions too numerous to cite, have held many times that a variance between the allegation and proof as to ownership of the property stolen is fatal (CM 201485, Darr, 5 B.R. 137-144 and authorities therein cited; 2 Wharton's Criminal Law (12th Ed., 1932), sec.1175, pp.1494-1495; CM 110910, 129356 (1918), 154476 (1922), 193191 (1930), Dig. Op. JAG 1912-1940, sec.451 (45), pp. 328-329). Also, where property belonging to the United States and furnished and intended for the military service thereof is wrongfully and unlawfully converted, such ownership must be alleged and proved (MCM, 1928, par.150i, p.185). In CM 201485, Darr, above cited, the Board of Review stated that where

> "the name of the owner is stated in an indictment or charge it becomes a part of the description of the offense, serving not only to identify the offense, but especially to identify the property which is alleged to have been the subject of larceny" (pp.139-140).

In the instant case, the action of the reviewing authority, in accordance with the foregoing authorities, effected a fatal variance between the pleading and findings under Specification 1 of the Charge against Kenney, since such action changed the alleged ownership of the cartons of cigarettes from the "British Government" to "the ownership of which is unknown" and thus found accused guilty of an entirely separate and distinct offense from that charged. The Board of Review is therefore of the opinion that the record of trial is legally insufficient to support the findings of guilty, as modified, of Specification I of the Charge against Kenney.

5. Specification 2 of the Charge against Kenney and the Specification and Charge against Stavas each describe their joint wrongful and improper sale, at the time and place alleged, of cigarettes belonging to the British Government. Where such conduct is charged involving property belonging to the United States and furnished and intended for the military service thereof its ownership must be alleged and proved (MCM, 1928, par.150i, p.185; CM 109100, 120948, 120949 (1918), 123447 (1919), Dig. Op. JAG, 1912-1940, sec.452 (23), p.340). Similarly, in accordance with the law concerning the allegation and proof of an indictment the action of the reviewing authority effected a fatal variance between the pleadings and findings under Specification 2 of the Charge against Kenney and the Specification and Charge against Stavas in changing the ownership of the cartons of cigarettes as alleged in each Specification from the "British Government" to "the ownership of which is unknown" and thus found each accused guilty of an entirely separate and distinct

8555

offense from that alleged (CM 201485, Darr, 5 BR 137-144 and authorities therein cited). The reviewing authority's action also did not eliminate the possibility that the ownership of the cigarettes might have been in accused, which would have rendered their alleged conduct no offense. Had these alleged offenses occurred after 4 April 1945 in the European Theater of Operations the modified findings of guilty as to each accused could be upheld in that in each instance a lesser included offense would have been committed in violation of letter of the Commanding General, European Theater of Operations, dated 4 April 1945, AG 004 OpGA, Subject: Prohibition against "Engaging in Business" which reads in part:

> "1. It is the policy of the Theater Commander that personnel subject to military law in this theater shall not, so far as can be avoided, disturb the economy of the liberated countries nor use their presence here in order to obtain or to lay plans to obtain any commercial advantages for themselves or for others.
>
> 2. Pursuant to this policy, all personnel subject to military law are prohibited from 'engaging in business' in this theater.
>
> 3. The term 'engaging in business' is defined to include:
>
> a. Buying, selling or dealing in securities, except savings bonds regularly purchased from the issuing government; postage stamps; real estate; or any kind of property in this theater for present or future personal profit or investment".

However, there is no evidence in the record of trial of any similar prohibition in effect at Rome, Italy in the Mediterranean Theater of Operations where these offenses were allegedly committed (MCM, 1928, par.125, pp.134-135). The Board of Review is therefore of the opinion that the record of trial is legally insufficient to support the findings of guilty, as modified, of Specification 2 of the Charge against Kenney and the Specification and Charge against Stavas.

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

Kenney is 24 years five months of age and was inducted 28 July 1942 at Fort Oglethorpe, Georgia for the duration of war plus six months. He had no prior service.

Stavas is 25 years three months of age and was inducted 13 August 1942 at Sacramento, California for the duration of the war plus six months. He had prior service from 26 July 1937 to 27 November 1939 with Company G, 184th Infantry, National Guard.

7. The court was legally constituted and had jurisdiction of the persons and offenses. Errors affecting the substantial rights of accused were committed as above set forth. 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 sentences.

B R Skeeper Judge Advocate

Malcolm C. Sherman Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 JUN 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Technician Fourth Grade HARRY B. KENNEY (34362159) and Private LOUIS A. STAVAS (39393945), both of Headquarters Company, 759th Railway Operating Battalion.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty, as modified, and the sentences be vacated, and that all rights, privileges and property of which they have been deprived by virtue of said findings and sentences so vacated be restored.

3. Inclosed are forms of action designed to carry into effect the recommendation hereinbefore made. Also inclosed are draft GCMO's 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.

(As to accused Stavas, findings of guilty, as modified, and sentence vacated. GCMO 270, ETO, 6 July 1945.)
(As to accused Kenney, findings of guilty, as modified, and sentence vacated. GCMO 271, ETO, 6 July 1945.)

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

BOARD OF REVIEW NO. 1

26 JUN 1945

CM ETO 8556

U N I T E D S T A T E S	IX AIR FORCE SERVICE COMMAND
v.	Trial by GCM, convened at Villacoublay, France, 22 February 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JAMES R. GARRISON (36809751), Headquarters and Headquarters Squadron, 45th Air Depot Group	

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

The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support so much of the findings of guilty as finds that accused did at the time and place alleged wrongfully and unlawfully sell to Odette Marraccini, a civilian, 18 gallons of gasoline, property of the United States, furnished and intended for the military service thereof, of a value of $2.90, in violation of the 94th Article of War, and legally sufficient to support so much of the sentence as provides for dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. This case is of the same category as CM ETO 6226, Ealy;

8556

CM ETO 7506, Hardin; CM ETO 9288, Mills, and is governed by the principles announced in the holdings of said cases.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 3

2 MAY 1945

CM ETO 8565

U N I T E D S T A T E S	DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private WILLIAM H. FLANAGAN (6922708) 572nd Port Company, 484th Port Battalion	Trial by GCM, convened at Marseille, France, 9 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the sentence.

2. With reference to Charge II and Specifications 1 and 2 thereunder, the proof shows that accused committed a series of acts which, if not interrupted by circumstances independent of accused's will, would apparently have resulted in his misapplication of the government property involved. Some measure of possession or control is an essential prerequisite to the commission of the offense of misapplication. Accused is not shown to have succeeded in acquiring either. The record of trial is therefore legally sufficient to support only so much of the findings of guilty of Charge II and Specifications 1 and 2 thereunder as involves finding accused guilty of attempted misapplication of the government property described in said specifications at the time and place alleged in violation of Article of War 96.

3. Confinement in a penitentiary is authorized upon conviction of offering and giving a bribe to any person acting in any official function with intent to influence him to collude in, allow or make opportunity for the commission of any fraud, by Article of War 42 and section

22:701 (6:134), District of Columbia Code. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4),3b).

Benjamin R. Cooper Judge Advocate

Malcolm A. Hearn Judge Advocate

B. H. Levy Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

CM ETO 8581

UNITED STATES	)	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private JOSEPH GEORGE (34125659), 104th Chemical Processing Company	)	Trial by GCM, convened at Rennes, Brittany, France, 24,25 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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 Joseph George, 104th Chemical Processing Company, did, at Rennes, Ille-et-Vilane, France, on or about 31 October 1944, forcibly and feloniously, against her will, have carnal knowledge of Mme. Marguerite Tual.

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

All of the members of the court present at the time the vote was taken concurring, he was sentenced to be 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. a. The proof of the sexual act and the circumstances under which an American soldier and Madame Tual engaged in it is dependent almost entirely upon the testimony of the alleged victim and upon accused's confession. Her evidence is inherently truthful and probable in all of its details. The woman's assertion that she never consented to sexual intercourse and that the soldier obtained the same as a result of force and violence visited upon her person by him in spite of her resistance is corroborated by proof of her disheveled condition and body bruises as seen by her friend, Madame Dajean a few minutes after the attack, of the victim's immediate complaint to this friend of her mistreatment and of the existence of bruises on her right arm, abdomen and right leg as observed by a doctor upon physical examination on 3 November 1944, three days after the incident. Madame Tual was at the time of the attack 45 years of age and was a French military nurse. She suffered an impairment of one of her arms as a result of war injuries. Her testimony is definite and certain and is such as one would expect from an intelligent, experienced person. All of the elements of the crime of rape were proved (MCM, 1928, par.148b, p.165). The Board of Review is of the opinion that the finding of the court that Madame Tual was raped by an American soldier at the time and place alleged is supported by substantial evidence and under such circumstances it will not be disturbed on appellate review (CM ETO 8837, Wilson, and authorities therein cited).

b. The victim, Madam Tual, made a positive and unqualified identification of accused in open court as her assailant, although she admitted that five days after the rape at an identification parade she was unable to identify him (R10). At the time of the assault, she testified, he wore an overseas cap. When he was taken into custody by the military police about one hour after the rape he wore such type of headdress. In an unsworn statement at the trial, accused asserted that he was in such drunken condition that he had no recollection of events of the evening from his consumption of intoxicants to the time he was arrested. The military policeman who apprehended accused denied he exhibited signs of drunkenness

and testified that he could detect no odor of alcohol upon him (R54,55). Independent of accused's confession there is therefore substantial evidence of his identity. However, the confession definitely inculpates accused as the rapist (R32; Pros.Ex.1). It was properly admitted in evidence as there was substantial evidence of its voluntary nature. The court's finding on the issue of its voluntary nature will therefore be accepted on appellate review (CM ETO 3469, Conway Green, and authorities therein cited). The weight and evidential value of the confession and the weight and credibility of other testimony in the case were peculiarly matters for the court as a fact-finding body (CM ETO 895, Davis, et al).

The Board of Review is of the opinion that the evidence that accused was the rapist of Madame Tual is satisfactory and substantial within the principles heretofore approved by it (CM ETO 3200, Price; CM ETO 3837, Bernard Smith; CM ETO 4292, Hendricks; CM ETO 4589, Powell, et al).

c. The defense specifically raised the plea of insanity and of accused's mental irresponsibility for the crime and asked that he be discharged because he was insane at the time and place of the rape. The defense introduced testimony of Major Arthur S. Strauss, Medical Corps, 199th General Hospital, a neuropsychiatrist, who examined accused on two occasions for 20 or 25 minutes and for 30 minutes, respectively (R43). In his opinion accused's mental age was probably 7½ years. Ethically he did not at the time of the crime understand the difference between right and wrong but

> "As far as punishment is concerned and the consequences of an act, if the problem has beset his mind before and he knows he will be punished or not punished, he does know the difference" (R42).

He also had the mental capacity to adhere to the right (R43).

The question of accused's mental responsibility for his acts was essentially one of fact for the court. The defense evidence, construed in a light most favorably to accused, left the question within the factual domain. It was for the court as a fact-finding body to determine whether accused was insane within the legal definition of insanity (MCM, 1928, par.78, p.63). In the instant case the court was in the most favorable position to determine this fact. It would be a usurpation of authority for the Board of Review to enter this field and attempt to weigh the evidence and analyze the cryptic testimony of experts. It is sufficient that there is convincing and substantial evidence that accused was sane at the time he committed his brutal crime. Here the Board of Review

should leave the question (CM ETO 3717, Farrington; CM ETO 5747, Harrison; CM ETO 9424, George W. Smith, Jr.).

4. The charge sheet shows that accused is 25 years, eight months of age and was inducted 18 June 1942 to serve for the duration of the war plus six months. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and 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.

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

P. Franklin Potter Judge Advocate

Wm. F. Lawrence Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

5 MAY 1945

CM ETO 8599

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Sergeant PAUL W. HART (37537089), Technician Fourth Grade JAMES E. LEMEN (39397456), Technician Fifth Grade HOWARD A. RAUBOLT (36890536) and Private ROBERT H. COSGROVE (35296680), all of Company C, 716th Railway Operating Battalion	Trial by GCM, convened at Seine Section, Paris, France, 12 January 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor, HART for 17 years and LEMEN, RAUBOLT and COSGROVE each for 20 years. Place of confinement not designated.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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 jointly tried upon the following Charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Robert L. Cosgrove, Sergeant Paul W. Hart, Technician Fourth Grade James E. Lemen, and Technician Fifth Grade Howard A. Raubolt, all of Company C, 716th Railway Battalion, European Theater of Operations, United States Army, did, at or near Dreux, France, and at or near Paris, France, and at various and sundry places between said places, between 1 September 1944 and 30 November 1944, jointly and

in conjunction with each other, and other members of 716th Railway Operating Battalion, and other railway operating personnel, agree and conspire to defraud the United States through pillaging, division of spoils, and mutual inaction against pillaging by each other, through wrongful conversion to their own joint and several purposes and profit of military supplies and equipment, the property of the United States in the possession and custody of military agencies, furnished and intended for the military service thereof, while such supplies and equipment were en-route to military forces engaging the enemy and other military forces of the United States, during a critical combat period in the theater of active military operations; and pursuant thereto, did, at divers times and places as herein alleged wrongfully divert such supplies and equipment from the military purposes for which such supplies were intended, to their own purpose of personal profit. (As amended at trial.)

Specification 2: In that * * * did, between 1 September 1944 and 30 November 1944, at or near Versailles, France, at or near Dreux, France, and at or near Paris, France, enter into an agreement and conspiracy to take, carry away and unlawfully dispose of and to apply to their own use and benefit rations, cigarettes and supplies, property of the United States, furnished and intended for the military service thereof, and to divert the same from military use in the theater of operations.

Specification 3: In that Private Robert L. Cosgrove, Sergeant Paul W. Hart, and Technician Fifth Grade Howard A. Raubolt, all of Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at Villiers, France, on or about 12 November 1944, jointly and in the execution of a conspiracy previously entered into between themselves, wrongfully take and dispose of one thousand (1,000) packages of cigarettes and six hundred (600) cigars, property of the United States and intended for use in the military service thereof, thereby, contributing to a shortage of cigarettes in the

European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Specification 4: In that Private Robert L. Cosgrove, and Technician Fourth Grade James E. Lemen, both of Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Paris, France, between 1 September 1944 and 30 November 1944, jointly and in the execution of a conspiracy previously entered into between themselves, wrongfully dispose of three (3) cases of post exchange rations, property of the United States and intended for use in the military service thereof, thereby diverting vital supplies from use in the theater of operations and contributing to a shortage of vital supplies during a critical period of combat operations.

Specification 5: In that Private Robert L. Cosgrove, Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Paris, France, on or about 1 September 1944, wrongfully take one (1) case of post exchange rations, property of the United States and intended for use in the military service thereof, thereby diverting vital supplies from use in the theater of operations and contributing to a shortage of vital supplies during a critical period of combat operations.

Specification 6: In that Private Robert L. Cosgrove, Company C, 716th Railway Operating Battalion, European Theater of operations, United States Army, did, at or near Paris, France, on or about 10 November 1944, wrongfully dispose of two hundred thirty (230) packages of cigarettes and four (4) boxes of chewing gum, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes and supplies in the European Theater of Operations, which cigarettes and supplies were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Specification 7: In that Private Robert L. Cosgrove, Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Paris, France, between 1 September 1944 and 15 September 1944, wrongfully dispose of one (1) case of post exchange rations, property of the United States and intended for use in the military service thereof, thereby diverting vital supplies from use in the theater of operations and contributing to a shortage of vital supplies during a critical period of combat operations.

Specification 8: In that Sergeant Paul W. Hart, Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Versailles, France, between 1 September 1944 and 30 November 1944, wrongfully dispose of five hundred (500) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Specification 9: In that Technician Fourth Grade James E. Lemen, Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Paris, France, between 1 September 1944 and 30 September 1944, wrongfully dispose of one thousand (1,000) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Specification 10: In that Technician Fifth Grade Howard A. Raubolt, Company C, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Versailles, France, on or about 15 October 1944, wrongfully dispose of about two thousand two hundred fifty (2,250) packages of cigarettes, property of the

United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Each accused pleaded not guilty, each was found guilty of the Charge, and accused Hart was found guilty of Specification 1, 2, 3 and 8; accused Lemen was found guilty of Specifications 1, 2, 4 and 9; accused Raubolt was found guilty of Specifications 1, 2, 3 and 10; and accused Cosgrove was found guilty of Specifications 1 to 7 inclusive. No evidence of previous convictions was introduced as to any of the accused. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, Hart for 35 years; and Leman, Raubolt, and Cosgrove each for 40 years. The reviewing authority as to accused Lemen disapproved the findings of guilty of Specification 2, approved each of the sentences but reduced the periods of confinement of Hart to 17 years and of Lemen Raubolt, and Cosgrove each to 20 years, and forwarded the record of trial for action pursuant to Article of War 50½. No places of confinement were designated.

3. The instant case is a companion to CM ETO 8234, Young et al. (for convenience hereinafter cited as Young case) and CM ETO 8236, Fleming et al. (for convenience hereinafter cited as Fleming case).

Summary disposition may be made of the following procedural and evidential questions which arose during the course of the trial of the instant case:

On behalf of each accused the defense

a. challenged for cause three members of the court because each had heard evidence upon trial of the Young and Fleming cases of a nature similar to the evidence prosecution would offer in the instant case in proof of the corpus delicti of Specification 1. The respective challenges were denied (R3-6);

b. moved for severance and for separate trials of each accused. The motions were denied (R8,9);

c. moved to strike Specification 1 on the ground that Specification 1 and Specification 2 were duplications. The motions were denied (R9,10);

d. moved to strike Specification 2 on the ground that the offense alleged therein was included in the offense set forth in Specification 1. The motions were denied (R11);

e. objected to each specification because it was laid under Article of War 96 instead of Article of War 94. The objections were overruled (R11).

f. Hearsay testimony of the same type as was admitted in the Young and Fleming cases is present in this case (R27,29,41,45,47,48).

For the reasons set forth in the holding in the Young case the action of the court with respect to a, b and e was correct. Both the Young and Fleming cases support the court's rulings with respect to c and d. There were no errors. With respect to the admission of the hearsay evidence (f, supra), the Board of Review is of the opinion that it did not prejudice the substantial rights of accused. The competent evidence in support of the findings of guilty is of a most convincing and substantial nature. The conclusion is identical with those in the Young and Fleming cases where hearsay evidence of the same type was involved.

4. The evidence for the prosecution in the instant case with respect to the widespread thefts of cigarettes, Post Exchange merchandise and food supplies from military railroad trains between 1 September and 30 November 1944 during the course of their carriage and transportation between Dreux and Paris, France, and of general shortage of such merchandise and supplies at Depot Q-177 during said period is substantially the same as that contained in the Young and Fleming cases. Likewise the evidence in the three cases as to methods and means pursued by military railway operatives in looting of the trains is virtually identical. A careful and detailed analysis of the evidence was made in the holdings in the Young and Fleming cases. Further comment would be redundant and a repetition of said evidence herein is wholly unnecessary. For the reasons set forth and upon the authorities cited in the holdings in said cases, the Board of Review is convinced that the prosecution established in the present case the corpus delicti of each of the offenses alleged in the specifications herein and that the written statements of the respective accused were properly admitted in evidence as bearing upon the relevant specification. The material parts of the statements follow:

Hart

"At Versailles, our train was stopped for a movement I checked the list of property as was one of the duties, I noticed a freight car loaded with cigarettes one of these cases was lying on the steps of the car. T/4 Whatley, a fireman named 'Tex', Pvt. Kinley and I each took a case of cigarettes (50 cartons in a case). It is common practice for our train to be stopped along the road between Versailles and Valintone, by the Fench workers, these workers would

approach our train and offer Francs for cigarettes. On this particular trip the men named above and I sold our loot to these workers from between 300 and 500 francs per carton.

Early one morning about the first part of November our train was taking on water at Villiers, a pusher engine crew composed of Sgt. Jaimett and T/5 'Pop' Donahue and I took cigarettes from a freight car. I took 2 cases (50 cartons to a case) and 1 case of cigars (Quantity unknown) I saw Jaimett take a case of cigarettes from the car and hide it along side of a building. I took my loot to the engine and divided the contents among members of my crew, Pfc. Cosgrove, T/5 Robolt, a student whose name I cannot remember and a fireman whose name I cannot remember. I took two boxes of cigars and gave the rest to the crew. My share of this loot amounted to 20 cartons of cigarettes, I took these with me to Paris where I sold them to 'Nick' the cook at Co. 'C' in Battinolles Yard. I received 500 francs per carton"(R61; Pros.Ex.9).

Lemen

"During the period of the first three or four weeks that I worked in this yard I took five (5)cases of P.X. rations. There are twenty cartons of cigarettes in each case and I sold the cigarettes for 500 francs a carton which netted me $1000.00 for the hundred (100) cartons of cigarettes that I sold. The remainder of the P.X. supply in these cartons I gave away to members of my organization or left it in the Billet for them to use.

Pvt. Robert Cosgrove, who is a brakeman for 'C' Co. has brought several cases of P.X. rations to the Billet and placed them in my locker, and I in turn would help him sell them. I never received any actual cut from these sales, but Cosgrove would /give/me a thousand (1000) or two thousand (2000) francs whenever I would ask him for money.

I would take these rations to my girl friends house, Donnise Rhode, who lives about ten or twelve blocks from the Station and sell them from there" (R57; Pros.Ex.6).

Reubolt

"On or about 10 Nov. 1944, I was coming into Villers to take water. We stopped our train down by the bridge and cut off about eleven cars. The other men on my crew were conductor Hart, Cosgrove, Linestaff, a student brakeman Milligan, and student fireman who I now know to be agent Cozzati of the C.I.D. Cosgrove, Hart, and myself went back to the eleventh car and took out two 50 carton cases of cigarettes and a box of cigars. The three of us carried the two cases of cigarettes and box of cigars back to the engine and handed them to my student fireman agent Cozzati. They were placed in the coal tender. When I went back to the car Donneghue and Jaimet, operators at the station, had taken two cases of cigarettes. We then went to St. Cyr, and during the trip Cosgrove put the contents of one case of cigarettes (50 cartons) into his duffle bag and student fireman Cozzati wrapped twelve cartons of cigarettes and two boxes of cigars into a shelter-half and I put ten cartons of cigarettes and three boxes of cigars in my barracks bag. Hart put about six cartons of cigarettes andtwo boxes of cigars into a gray convas carrying bag. When we arrived at St. Cyr we dropped off about twenty eight cartons of cigarettes and about two or three boxes of cigars to Pvt Barnehouse, operator at St. Cyr station. We then proceeded to Matelot yards and handed our bags down at the yardmaster's office. Pvt. Russel carried my bag over to his bunk in a box car. I gave him four of the cartons for carrying my bag and I gave the other six cartons to a man I know as 'Nick' in Co. A Supply room, for a pair of combat boots. We then proceeded to Paris and I don't know where in Paris Cosgrove and Hart disposed of their cigar-

8599

ettes and cigars. I gave my cigars to conductor Blackburn. When we came back from Paris, we stopped at St. Cyr and Hart picked up about ten cartons of cigarettes from Barnehouse. Barnehouse kept the rest of the cigarettes and the cigars. When Hart boarded the engine with the cigarettes he got from Barnehouse he gave me 1000 francs and some money to Cosgrove. He didn't have all the ten cartons when he came back so he must have sold some to some Frenchmen" (R63; Pros. Ex.11).

"Around the 15th of October, 1944, I was involved with the rest of my crew, Edward Keohane, Virgil Clutts, and Paul Tiedt in cigarette split-ups. I believe there were split ups on two occasions, both at Matelot Yards. Both times the cases of cigarettes were brought up to the engine for the split up. Keohane and Tiedt brought them up once, and I think Clutts was with them the second time. After the split up we took the cases of cigarettes to Steve, the cook in the kitchen. I don't know his last name. Steve paid us 400 dollars for a case of 50 cartons. I received about 1000 dollars from Steve. Keohane and I also took the cases up for Tiedt and Clutts and we gave them their cut" (R63; Pros.Ex.10).

"That part of my original statement referring to my giving T/5 Nick in Company 'A' supply room 6 cartons of cigarettes for a pair of government issue (G.I.) shoes, is incorrect. The true facts are as follows: I had previously given S/Sgt John Tieleman 6 cartons of cigarettes as a personal gift as he was always helping the boys of my company even though he was supply sergeant of Company 'A' of our battalion. S/Sgt Tieleman nor T/5 Tamella (the 'Nick' referred to in my original statement) never, to the best of my knowledge, took cigarettes in return for issued items of clothing, etc" (R59; Pros.Ex.8).

(336)

Cosgrove

"In the first part of Sept on my first trip to Paris with Taylor, Cook, Bardy, Roberts and Lt Loop all of my organization, T/5 Williams, Steen and myself each took a PX box containing cigarettes, chewing gum, toilet articles etc from the train which we were supposed to take out of the yards. This happened at Dreux. One block from the school house where we are billeted in Paris we sold the boxes in a cafe for approximately $450.00. Williams, Steen and myself divided the money between Taylor, Cook, Bardy, Roberts, R.C. Williams, Steen and myself which gave us about $80.00 apiece. * * * On one occasion Sgt Paul Hart and myself took off the car 2 boxes of cigarettes and one box of cigars when at the Matelot yards. This happened not over a month ago. * * * In September Sgt Stephen Roberts divided with myself and 6 others 3 cases of PX boxes containing supplies; I mentioned this in the beginning of my statement. * * * At one time around the 10th November I gave T/4 Lemon 23 cartoons of cigarettes and 4 boxes of gum for $250.00. Around the 1st of September I saw T/4 Lemen take off a PX box from a train in the Bagnatalle yards. I also took one off at this time. * * * I was with Pvt McNulty when he took a PX box from the train in the Bagnatalle yards. I took one also. This happened around the first of September"(R50;Pros.Ex.2).

Unlike the situations which prevailed in the Young and Fleming cases, the prosecution in the present case was able by direct testimony of a participating eye witness to connect three of the accused with at least one of the offenses (Specification 3). Bruno Cozatti, agent for the 27th Criminal Investigation Section (who was also a witness for the prosecution in the Young and Fleming cases), in the capacity of an undercover agent, assumed the role of a student fireman and on 11 November 1944 became a member of a train crew composed of accused Hart, Cosgrove and Raubolt and two men not involved in this case (R21). At 8 pm on said date the crew boarded its train at Dreux and departed on its "run" in the direction of Paris. At about 3 am 12 November the train halted about one half mile east of Villier station, in order to obtain water and to service the locomotive. The regular procedure was to disconnect the locomotive and tender which would be taken into the station while the

train remained at the stopping point. On this occasion, however, the train was "cut" behind the eleventh car and the locomotive, tender and eleven freight cars proceeded to the station. The military police train guards were left in the rear of the train. On arriving at the station, Cozatti as fireman remained in the locomotive tending the fire. Raubolt (engineer), Cosgrove (regular fireman) and Hart (conductor) went to the station platform. About 15 or 20 minutes later Hart and Cosgrove returned to the engine and threw into the passageway between the engine and the tender two cases of cigarettes and one case of cigars. Cozatti placed the cases in the tender. He also observed Hart, Raubolt, Cosgrove and the soldier operators of the station remove cases of cigarettes from the eleventh freight car and throw them into the station. Cosgrove returned in a few minutes to the locomotive and opened a case of cigarettes and placed the entire contents in his duffle bag. The second case was opened and Cozatti was given 12 cartons of cigarettes from it. He wrapped them in a shelter half (R22). When travel was resumed, the case of cigars was opened and Cozatti received two boxes of them. Hart obtained two or three boxes of cigars. The remainder of the cigarettes and cigars were delivered by Raubolt at 10 o'clock that morning (12 November) to the operators of the St. Cyr station to be held until reclaimed by the train crew on its return trip from Paris. When the crew and its train arrived in Paris, Cosgrove had the duffle bag filled with cigarettes; Raubolt had a few boxes of cigars in his duffle bag; and Hart had boxes of cigars and a few cartons of cigarettes in a gray suit case. Cozatti held his cigars and cigarettes in a shelter half. (Cozatti's cigarettes and cigars were introduced in evidence as Pros.Ex.1; R24). In the division of the loot, Cosgrove received a full case of cigarettes and two or three boxes of cigars. Cosgrove informed Cozatti that he intended to sell the cigarettes in Paris (R24,25).

5. The accused Lemen elected to remain silent (R64). Accused Hart, Raubolt and Cosgrove each elected to be sworn and testify as a witness for the defense (R64,76,80).

Hart described conditions surrounding the operation of the military railways in France immediately following the arrival of his battalion at Utah beach on 26 August 1944. He asserted that the rations which had been provided for the men were quickly consumed and that no provisions had been made for supplying them with additional rations or for feeding them. He further declared that with this condition prevailing some of the officers detailed men to secure rations from supply trains. After the battalion was stationed at Dreux and the train crews commenced operation of the trains the men were left to their own devices to secure food (R66,67). Major Marlin - "our major" - informed the men:

> "You're hauling the equipment, the rations supplies and stuff. If you go without anything, it's your own fault" (R66).

(338)

Hart stated that as a result of this necessity the men first took rations to supply their own needs, but

> "You have these French people, they stick this money under your nose and you are enticed to do it. And, really when we take this stuff, our intentions were not to sell it. That was really not our intention. It was to use it. But, you accumulate this stuff and you are tempted by the French people, and you figure, 'Well, let's see. Here is a $1.10 a carton for cigarettes and you can get $10.00 for a carton! Well, you figure 'I'll get by with this carton and then I won't sell any more! But then it doesn't prove out that way. I found it so" (R67).

The first occasion when he took Government property for other than his own personal use was when he took the 500 packages of cigarettes at Versailles (Specification 8). These cigarettes were sold (R67). He expressed regret concerning his actions and was ready "to make a clean breast of the whole thing". He had already given information as to his identity and methods of operation of other wrongdoers (R67) and offered to continue such practice "along with the other fellows". He stated that his thefts had yielded him about $700 and he had paid this amount to the government agents (R68). His statement (Pros.Ex.9) was voluntarily given by him. He informed the investigator at that time:

> "I know this kind of thing doesn't pay. That's the reason I want to make a clean breast of it all" (R68).

Upon cross-examination, Hart admitted that eventually all operating battalions looted the trains (R69) and that "everybody helped themselves". Further pertinent cross-interrogatories and answers of accused were:

> "Q. There is no question but what there was a wholesale looting of trains, is there?
>
> A. Well, as far as I know, sir, yes.
>
> Q. Everybody could help themselves?
>
> A. Everybody helped themselves.
>
> Q. And nobody told on anybody else?

A. No, that's right sir.

* * *

Q. What I am talking about, these cigarettes and these candy bars that were taken for sales to civilians, everybody was doing that, weren't they?

A. Well, as far as I know they were.

Q. Everybody you saw was; is that right?

A. Was taking them; I suppose they were for sale.

Q. And you know the boys were flush with money?

A. Everybody had money" (R70).

With reference to Specification 3, Hart testified there were 1000 packages of cigarettes and 600 cigars taken from the railroad car (R74).

Raubolt stated that in civil life he had been employed by the New York Central as a brakeman. He admitted he had sold government rations and cigarettes and realized therefrom approximately $1100.00 (R81). Of this amount $600.00 was represented by postal money orders which he had previously delivered to the Criminal Investigation Department agents. He asserted he used part of the funds to buy a pistol which he had lost. As to the balance of the funds he avowed he did not know where it had gone (R82). He realized that he committed a wrong in selling government property, "but I realize it too late now" (R82). Accused asserted that on one occasion a military police guard stopped one of the soldiers who was taking cigarettes from a car. A captain from the 710th Railway Grand Division intervened and informed the guard that "it was all right for the boys to help themselves". He said,

> "Guard, these men are working thirty hours. They haven't got any smokes" (R82).

Raubolt then paraphrased the unidentified captain's order to the guard thus:

> "so he says -- well, he put it that they should have them, and as long as they were there they should take them" (R82).

Accused never observed French civilians take any property from railroad cars (R83). He made a special plea to the court as follows:

"Q. Is there anything else you would like to tell the court?

A. No, sir, there isn't. Sir, I don't know if this here will be taken against me or what, but I would like to ask the court if they will hear it or not, they can say yes or no. If our names can be withheld from the papers, sir, for our folks' rights, not us, back home?

Q. You hate for your mother to know you are in trouble?

A. That's it, sir. Not only the papers -- because why ruin our folks' reputation back home. Maybe some day in this army we'll be able to do something good for them; always time to come back and straighten up something which you have done wrongfully. Some day we might be able to straighten it up and do right whatever is to be done. This way, of course, we know our jobs will be lost and our folks. That's true. They won't want us anymore. You can't blame them, disgrace there. I would like for -- if the court will ask permission of the papers if they would withhold our names, sir.

Q. I am sure the court will do everything they can to help you and also the other officers of the army will. A. Because some day we might be able to come back and pay for all of that we have damaged, sir" (R82).

Upon cross-examination he admitted that it was generally understood among members of the 716th Battalion that they could take anything they desired from ration trains without any other of the soldiers arresting them or reporting their actions or causing them to be taken to the company commander (R84).

Cosgrove declared that he had heard Hart's testimony and stated:

> "Well, sir, as far as Sergeant Hart's testimony itself, as far as I can see it is the truth. If you never made out for yourself, you went hungry" (R76).

He testified that at first cigarettes were taken by the men only for their own personal use, but they accumulated a surplus of them. On the occasion of a trip to Paris about 10 or 12 September he first sold cigarettes to civilians. He received about $700.00 or $800.00 in total from sale of government property, but was uncertain as to the exact amount. He had sent $300.00 home and the investigating agent took from him all the money he owned. He did not retain any proceeds of sale of government property. He stated that

> "They seem to think that us fellows in the 716th were the only ones responsible for that. Well, sir, that isn't right * * * There's any amount of men that can be named and pointed out that's doing the same thing we are doing, maybe on a higher scale.* * * I could point out sixty-five men that isn't here or in jail, and there's any amount of men among the hundred and eighty-three up there that can point out just as many as I can" (R78).

In response to his counsel's question,

> "The other battalions were engaged in the thefts as well as the men from the 716th; is that correct?"

He answered: "Absolutely" (R78). He denied, however, that there was any wholesale planning or that there was any general scheme in the execution of the thefts. "Every man was on his own. There was never no scheme to it at all" (R80). Upon cross-examination he stated that it was generally understood that supplies could be taken from the trains for personal use or sale (R78). When asked the question: "In other words, the train crew would go in together and split up cigarettes and some PX rations and sell them?" he replied: "Yes, sir" (R79).

6. a. The general over-all conspiracy alleged in Specification 1 was proved by the prosecution by substantial evidence. Accused's voluntary extrajudicial statements directly connected each of them with it as active participants. In addition, the testimony in court of Hart, Raubolt and Cosgrove corroborated in a startling manner the inferences which the court was entitled to draw from the prosecution's evidence. Upon the authority of the Young and Fleming cases, the Board of Review is of the opinion that the guilt of each accused of the offense charged in Specification 1 was proved beyond reasonable doubt.

(342)

b. The situation presented by Specification 2 is identical with that considered by the Board of Review in the Fleming case. For the reasons therein stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all accused except Lemen of said specification.

c. The specific offenses of diversion of military supplies by the respective accused as alleged in Specifications 3 to 10 inclusive were proved by substantial evidence. Hart, Raubolt and Cosgrove, in their extrajudicial statements and also in their testimony in open court admitted their respective guilts. Lemen's extrajudicial statement definitely determines his guilty of Specifications 4 and 9. For the reasons stated in the Young and Fleming cases, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the diversion specifications under which each accused is charged with an offense.

7. On the basis of the conclusions and for the reasons set forth in detail in paragraph 8 of the holding in the Young case, the maximum punishment of each accused is dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the periods here shown:

Years for each Specification

Accused	1	2	3	4	5	6	7	8	9	10	Total Years
Hart	2	2	10					10			24
Lemen	2			10					10		22
Raubolt	2	2	10							10	24
Cosgrove	2	2	10	10	10	10	10				54

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

Accused	Age	Inducted	
Hart	28 yrs. 1 mo.	Fort Leavenworth, Kans. 30 July 1943	Each accused was inducted for the duration of the war plus six months. Service period of each accused governed by Service Extension Act 1941.
Lemen	31 yrs. 7 mos.	Sacramento, Cal. 18 Sept. 1942	
Raubolt	22 yrs. 1 mo.	Detroit, Mich. 17 Nov. 1943	
Cosgrove	21 yrs. 11 mos.	Columbus, Ohio 6 Dec. 1943	

No prior service of any accused shown.

9. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of any of the accused were committed at the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all accused of the Charge and of accused Hart as to Specifications 1, 2, 3 and 8; of accused Lemen as to Specifications 1, 4 and 9; of accused Raubolt as to Specifications 1, 2, 3 and 10; and of accused Cosgrove as to Specifications 1 to 7 inclusive, and legally sufficient to support the respective sentences as approved.

10. Confinement in a penitentiary is authorized upon conviction of the crime of conspiracy to commit an offense against the United States by Article of War 42 and sec.37, Federal Criminal Code (18 USCA 88). The entire confinement may be executed in a penitentiary (AW 42).

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European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1 25 MAY 1945

CM ETO 8610

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Durler, Belgium, 24 February 1945.
Private THOMAS F. BLAKE (42019126), Headquarters Company, 1st Battalion, 12th Infantry.	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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 Thomas F. Blake, Headquarters Company, 1st Battalion, 12th Infantry, did, at Holzeim, Belgium, on or about 7 October 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: engagement with the enemy, and did remain absent in desertion until he surrendered himself at 2nd Infantry Division Military Police Stockade on or about 11 December 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge.

8610

8610

and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Accused was a radio operator assigned to the headquarters company of an infantry battalion, whose immediate mission was to attack a crossroads near the Siegfreid line. He moved with the company on the night of 6 October 1944 to the battalion command post in the vicinity of Holzheim, Belgium (Co-ordinates L 9795). Shells fell that night within four or five hundred yards, and the enemy lines were about a mile and a half distant. The next morning at his foxhole, he was ordered to get his equipment ready, leave his overcoat and gas mask, report at the command post fifty yards away, and go forward with the forward command group. Accused did put on his rifle belt, but placed his radio near the command post, and left his organization without permission. The battalion made the attack that morning without accused. He returned to military control 11 December. All the elements of desertion to avoid hazardous duty are present. From his abandonment of his comrades as they went into battle, the court could reasonably infer that his intent was cowardly (CM ETO 6637, Pittala; CM ETO 8083, Cubley; CM ETO 8690, Barbin and Ponsiek; CM ETO 9257, Schewe).

4. The charge sheet shows that the accused is 24 years six months of age and was inducted 3 November 1943 at Orange, New Jersey, 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 desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec. VI, as amended).

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BOARD OF REVIEW NO. 1 4 APR 1945

CM ETO 8619

U N I T E D S T A T E S v. Private First Class VERNELL L. LIPPIE, (35562185), and Private JOHN H. HINCHEY (36593772), both of Company F, 329th Infantry, Private First Class JOSE RAMIREZ (18047538), Detachment 44, Ground Forces Replacement System and Private EUGENE T. HALIS (16150243), 468th Company, 82nd Battalion, 14th Replacement Depot.	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Le Mans, Sarthe, France, 30 January 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW 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. Careful consideration has been given to the question of entrapment as a possible defense to the offenses alleged against each accused in Specifications 1 and 2 of the Charge. "When the criminal design originates with the officials of the Government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute", such conduct on the part of the officials amounts to entrapment and may constitute a defense (Sorrells v. United States, 287 U.S.435, 77 L.Ed. 413). Where, however, the criminal intent originates in the mind of accused, the fact that officers or employees

8619

of the government merely afford opportunities or facilities for the commission of the offense, does not defeat the prosecution (Grimm v. United States, 156 U.S. 604, 39 L.Ed. 550). In the instant case the evidence clearly established that the criminal designs originated in the minds of accused, and that the offenses were not instigated by the agents of the Criminal Investigation Division who merely afforded opportunities and facilities for their commission in order to detect and apprehend persons engaged in a criminal enterprise. There was, therefore, no entrapment.

3. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences as approved by the reviewing authority.

4. Confinement in a penitentiary is authorized upon conviction of larceny of property of the United States furnished or to be used for the military service, and of the offense of unlawful sale of such property by Article of War 42 and section 36, Federal Criminal Code (18 USCA 87), and of the offense of conspiring to commit an offense against the United States by Article of War 42 and section 37, Federal Criminal Code (18 USCA 88). 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), 1b(4), 3a, 3b, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

8519

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

BOARD OF REVIEW NO. 2 19 MAY 1945

CM ETO 8630

U N I T E D S T A T E S	)	XIII CORPS
	)	
v.	)	Trial by GCM, convened at APO 463, United States Army, 27 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private James W. Williams (34941334), 648th Quartermaster Truck Company	)	

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

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private James W. Williams, 648th Quartermaster Truck Company, did, at Nieuwenhagen, Province of Limburg, Holland, on or about 11 February 1945, with malice aforethought, willfully, deliberately feloniously, unlawfully, and with premeditation kill one Johannes Wilhelmus Houterman, 85 Voorstraat, Nieuwenhagen, Province of Limburg, Holland, a human being, by shooting him with a carbine.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present

when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. The prosecution's evidence shows in substance as follows:

With the exception of the medical officer, all the soldiers mentioned herein are members of the 648th Quartermaster Truck Company. On 10 February 1945, Mrs. Anne Houterman of 85 Voorstraat, Nieuwenhagen, Holland, was cleaning some rooms occupied by these soldiers at the house No. 77, the same street. She sent her 14 year old stepson, Johannes Wilhelmus Houterman (Wimpy), for some water. She went downstairs on hearing him crying and found him fighting with a colored American soldier (Private First Class Henry Trogdon), known as Chocolate. Accused was in the hallway (R9-10). Wimpy, a name by which her stepson was also known (R8), gave Chocolate a push and in return received a blow on the nose causing it to bleed. Accused took the boy away (R11).

On 8 February accused was in his quarters at No. 77 Voorstraat with Wimpy and asked Wimpy to get some water which he did (R12-13). The boy was not gone too long but on his return accused asked him what took so long and remarked that, "if he was my son he would slap the hell out of him" (R13,16) and when Private Trogdon, who was present, objected to such talk, accused said the boy "was too damn smart" (R13). When the boy then asked for a cigarette, accused refused him using obscene language.

Trogdon testified that on 9 February, while in his quarters, he reached for a pail of water at which Wimpy said he wanted it for his mother and struck Trogdon who struck him in return. Wimpy then brought his father and (step) mother and an argument ensued. At this time accused was in the hallway (R14,17) armed with a carbine and again called the boy obscene names and threatened to slap him (R15,19). He told the boy's father at that time,

> "that you better keep that damn boy out of here, if you don't somebody will be carried out of here and it won't be me".

Accused was pointing his rifle at Wimpy at the time (R15).

On a Sunday, 11 February 1945, three little girls of this same village, two of whom were 12 and 13 years old respectively (R22, 27), together with Wimpy and three soldiers (accused and Privates

Titus Stewart and Willie Wilson) were upstairs in the soldiers' room, having been each promised a piece of chocolate to come there (R23,28). The boy stood at the door with his hand on the door handle (R23,29). Stewart was untangling the chain on a crucifix for one of the little girls, Wilson was lying on a bed and accused was sitting on his bed (R34). Accused asked one of the girls to kiss him and she refused (R23,29) and said she wanted to go home and she testified that accused said she could go. What followed is told by one of the little girls sworn as a witness as:

"Q. Then what happened?
A. Then he said to Wimpy he should take the rifle back of his chair.

Q. Then what happened?
A. Then Wimpy said do it yourself.

Q. Then what happened?
A. When the soldier took the rifle himself Wimpy stood at the door.

Q. Then what happened?
A. Then the soldier asked Wimpy to open the door. Wimpy gave the answer do it yourself. Then he said again to open the door for me and Wimpy answered do it yourself. Then he shot Wimpy. Wimpy cried out and hung around the neck of the soldier, then he fell to the floor.

Q. Is the soldier who shot Wimpy present in the court room?
A. Yes.

Q. Point him out to the court.
A. (Witness pointed to the accused)" (R23-24).

and by another little girl as:

"Q. Did any one say anything to the little boy at this time?
A. The man who shot asked Wimpy to open the door.

Q. What did Wimpy say?
A. Do it yourself.

Q. Then what happened?
A. Then he said twice open the door.

Q. Then what happened?
A. Wimpy said again do it yourself.

Q. Then what happened?
A. And after that he shot.

Q. Is the soldier who shot present here in the room now?
A. Yes.

Q. Point him out.
A. Sitting over there (witness pointing to the accused).

Q. Did you see that soldier shoot the little boy?
A. Yes" (R29).

Accused acted angry because the boy refused to open the door (R30). He picked up the rifle, pushed the safety and then worked the bolt, the clip was in the rifle (R30,43,45). When shot, Wimpy cried out and was holding his chest for a few seconds, then fell, his face hitting the foot of the bed where accused was sitting (R31,35,43). The children thought Wimpy was acting but when they saw the blood streaming from his neck, they ran out of the room (R31). When he shot, accused held the rifle with the butt against his hip and muzzle pointing forward (R34,44-45). Wilson had told accused not to play with the gun just before the explosion occurred (R35), and after it was fired he took the rifle from accused and removed the clip which was in it when fired (R52). Accused shot the boy from a distance of about two feet (R43).

Private William E. Douglass slept in the same room with accused and Wilson. Douglass had a .30 caliber carbine which he carried only when on guard, leaving it most of the time by his bed where it was on the morning of 11 February, with the clip in it but no bullet in the chamber (R53). He had been on guard duty for two hours that morning and had carried his carbine (R53).

Captain Nathaniel E. Landy, medical officer for various units stationed in Nieuwenhagen, including the 648th Quartermaster Truck Company, testified that about 1045 hours on 11 February 1945, Johannes Wilhelmus Houterman was brought to him for examination. He was dead upon arrival (R25). The examination disclosed that death was caused, probably within ten or fifteen minutes previously, by a gunshot wound through the heart, apparently by a .30 caliber bullet (R26).

4. Accused on being informed of his rights as a witness, elected to be sworn as the only defense witness, and testified that he had been in the Army about a year. He denied making any statement to Chocolate about the boy at the time the boy and Chocolate had their argument and the boy's father and mother intervened. On the morning of 11 February at about 1045 hours, he, Wilson and Stewart were upstairs when three little girls and the little boy, Wimpy, came into the room (R47).

8930

"I was sitting on the head of my bed, Wilson was lying on Douglass' bed and two girls were sitting aside and I don't know what the other little girl was doing, I didn't pay any attention. Anyway, Wimpy got up, stood up. I said Wimpy open the door. He said I am not going to do it. I said open the door and leave some air come in and I said to the girl, I don't know her name, hand me that rifle, and she said I am not going to get it and get it yourself. So I picked up the rifle and said to Wimpy I want to shoot you, and he said you don't do anything to me. I said I am going to shoot you. So I took the rifle up and was only playing with it, not meaning to shoot it. I put my hand on the trigger and pulled the trigger and shot it through him, and it came through his shoulder. It was a boy's rifle by the name of Douglass and the gun had no clip in it, so after all this shooting, all of us went downstairs. In a few minutes after that the jeep come. So me and Willie Wilson went back upstairs and picked the boy up and carried him out and that was all I know about it" (R48).

He denied he pulled the bolt or that there was a clip in the gun. He denied ever having any arguments with Wimpy or of sending him for water. He denied he had ever threatened to shoot him or do him bodily harm, or that he was angry or intended to kill the boy when he pulled the trigger. He was only playing with the boy and "didn't think the bullet was in the gun". He didn't know whether the gun would fire or not when he pulled the trigger and never thought of looking in the chamber. He did not check the gun to see if it was loaded and denied he had asked one of the little girls for a kiss (R48-49). He did admit telling Wimpy twice that he wanted to shoot him and of pulling the trigger after telling him the second time (R50).

5. Murder is the unlawful killing of a human being with malice aforethought (MCM, 1928, par.148a, pp.162-164). The evidence shows and accused admits that he shot and killed the boy, Wimpy, as alleged. The only question is, was there "malice aforethought".

"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 the 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" (Ibid.p.163).

The evidence shows that on more than one occasion accused had threatened the boy with harm using obscene language in doing so. On at least one occasion he had threatened his life and pointed his rifle at him. On the day in question, on the boy's refusal to obey him, accused picked up a rifle with a clip in it, deliberately removed the safety, pumped a shell into the chamber and fired at the boy from a distance of two feet. He did not need to bring the gun to his shoulder at that distance. As said in CM ETO 3585, Pygate, and CM ETO 3932, Kluxdal, the facts show such a vicious, brutal and intentional killing as to "carry within itself proof of malice aforethought and thereby irrefragably stamp the offense as murder". The findings of guilty were fully supported by substantial, competent evidence of the most convincing kind (CM ETO 3180, Porter; CM ETO 1161, Waters; CM ETO 7253, Hopper).

6. The charge sheet shows accused to be 25 years, 11 months of age. With no prior service, he was inducted 27 January 1944 at Fort Benning, Georgia.

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

8. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (AW 42; Cir. 229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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

26 APR 1945

BOARD OF REVIEW NO. 3

CM ETO 8631

U N I T E D S T A T E S	)	V CORPS
	)	
v.	)	Trial by GCM, convened near Eupen, Belgium, 10 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private WADE A. HAMILTON (14056465), Headquarters Company, 86th Chemical Mortar Battalion	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Wade A. Hamilton, Company "D", 86th Chemical Bn. (Mtz), did, at Delhain-Limbourg, Belgium, on or about 28 January 1945, desert the service of the United States and did remain in desertion until he was apprehended at or near Verviers, Belgium, on or about 22 February 1945.

He pleaded not guilty and was found guilty of the Charge and Specification. Evidence was introduced of three previous convictions, one by summary court for wrongfully appearing in a house of prostitution declared off limits by standing order in violation of Article of War 96, two by special court for absence without leave for three days in

violation of Article of War 61, and for breach of restriction described as being in violation of Articles of War 61 and 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

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

Accused's absence without authority from 28 January 1945 to 22 February 1945 was shown by authenticated extract copies of his company's morning report (R10,15; Pros.Exs.A and C). Such extracts were received in evidence, the defense stating "No objection" (R10,15). Testimony of the first sergeant of the company showed that it was the practice to forward the data and changes relative to the morning report from the platoons to the company headquarters and then to the battalion personnel section where the report was made up and signed by the personnel adjutant (R9). The extracts received in evidence were authenticated by the personnel adjutant (Pros. Exs. A and C).

On 27 January 1945, accused was sentenced by special court-martial to be confined at hard labor for six months and to forfeit a portion of his pay (R11). On 28 January 1945, the sergeant of the guard of accused's battalion was notified that one Private Hamilton and another man were to report to him every hour "between the time they completed their work and the time they went to bed". Both men were working in the kitchen and at about supper time they asked the sergeant for permission to go to a movie to be shown in battalion rear. Permission was obtained from an officer and they went with the understanding that they were to return and finish their work at the end of the picture. Hamilton did not return and the sergeant, after unsuccessfully attempting to find him, "reported back". The sergeant believed that accused and the man named Hamilton were the same person but was unable to say for sure (R6-7).

The first sergeant of accused's company testified that accused was not present for duty at any time during the period 28 January to 22 February 1945, and had no authority to be absent during such period (R10). Similar testimony was given by an officer stationed at the battalion headquarters (R12). On 22 February 1945, at about 0300 hours, accused was noticed by a military policeman in Verviers, Belgium. At this time he was without helmet or helmet liner and was wearing a standard army issue field jacket bearing second Lieutenants' bars. His appearance excited the

curiosity of the military policeman since the latter had seen him shortly before midnight in the Military Police Headquarters talking to a lieutenant, at which time he was wearing a sweater. Accused was therefore taken to headquarters for investigation (R12-14).

4. Accused, after being warned of his rights by the law member, elected to remain silent and no evidence was introduced for the defense (R15).

5. Absence without leave during the period specified is adequately proved. Although the mode of maintaining the morning report as described by the testimony of the first sergeant indicates that none of the entries was within the personal knowledge of the officer making them, the first sergeant orally testified as to the absence without leave and thus cured any possible objection on this score.

There remains the question whether the record of trial is legally sufficient to sustain the finding of guilty of desertion. In the opinion of the Board of Review, it is not. There is no evidence of an intent to shirk important service or to avoid hazardous duty, and hence to sustain the conviction, it is necessary to find that the absence without leave was accompanied by an intent not to return. In addition to the fact of an absence without leave of short duration, there must be some evidence tending to show a motive for desertion or from which a court might reasonably infer that the accused intended no to return to military service (CM 198750, Dig. Op. JAG, 1912-1940, sec.416(9), pp.269-270). In this case the absence was of 25 days' duration, a period which is not so "much prolonged" as to raise in and of itself an inference of the required intent (see CM ETO 1629, O'Donnell (1944); CM ETO 6497, Cary (1945)). The other circumstances apparently relied on by the court for this purpose consist of the fact that accused at the time of departure had just been sentenced to six months' confinement, that during his absence he was in the vicinity of various military establishments and did not turn himself in, that he was apprehended, and that at the time of apprehension he was wearing a field jacket with the shoulder insignia of a second lieutenant.

While all these factual elements are admissible as evidence on the issue of intent, an analysis of the circumstances in this case fails to support the conclusion that they are sufficient, individually or collectively, to justify an inference that accused intended not to return. In all fairness to accused, it is considered that the sentence to six months' confinement should be disregarded as far as its value as evidence of motive is concerned. It does not appear in the evidence received prior to the time the court closed to make its findings, what action the reviewing authority took on such sentence, but the certificate of previous convictions describes the "sentence as approved" as involving only

a forfeiture of $22.60 of accused's pay per month for six months. Such certificate likewise shows that the offense for which accused was convicted was absence without leave for three days and that the sentence was approved 27 January 1945 (Pros. Ex.D). Assuming that a six months' sentence of confinement based on a conviction for a three days' absence without leave could properly be said to supply motive for desertion, we know that the sentence as approved in this case involved no confinement and that accused at the time of his departure was not in confinement. Since the certificate of previous convictions shows that the reviewing authority's action was taken the day before accused's departure, it is reasonable to suppose that accused at the time of such departure had been notified accordingly. Hence the sentence as a motive for desertion disappears. As for the failure of accused to turn himself in and the fact that his absence was terminated by apprehension, it has been held that these factors are insufficient in the case of an absence of approximately this duration to justify the inference of intent to desert (CM ETO 1567, Spicocchi (1944)). In this connection, it is noted that the apprehension occurred at Verviers which appears on the map to be only a short distance from the place of accused's departure. Nor does the fact that accused at the time of apprehension was wearing lieutenants' bars justify the finding of guilty of desertion. While there have been several cases where impersonation by accused of a commissioned officer has been regarded as evidential on the issue of intent not to return, all such cases contained additional circumstances bearing far more substantially on such intent than any in the instant situation (See CM ETO 2723, Copprue (1944); CM ETO 2901, Childrey and Cuddy (1944)). Here, the evidence fails to show any effective attempt to impersonate an officer, and on the contrary, reveals that shortly before, accused, dressed in a sweater, was in the military police headquarters talking to a lieutenant. These circumstances scarcely warrant an inference that he was attempting to conceal his identity, and hence his wearing of officers' insignia has little bearing on the issue of intent to desert.

6. The evidence of the previous conviction under Article of War 96 for violation of standing orders committed on 29 January 1945 was improperly received inasmuch as the offense was committed after the date of the offense presently charged (CM 199969, Harris, 4 BR 205 (1933)); CM 230826, McGrath, 18 BR 53 (1943); CM ETO 6468, Pancake (1945)). It is immaterial that the offense was committed during the present absence without leave, since the latter was not a continuing offense and was committed on the day the absence commenced, in this case, 28 January 1945 (MCM, 1928, par.67, p.52). The error in admitting evidence of this prior conviction could not have influenced the findings of guilty, but only the sentence, reconsideration of which is necessary in any event in view of the inadequacy of the record to sustain the finding of guilty of desertion.

7. The charge sheet shows that accused is 24 years of age and enlisted 20 May 1941. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and the offense. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings that accused did, at the place and time alleged, absent himself without leave from his organization and did remain 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.

9. Penitentiary confinement is not authorized for absence without leave (AW 42; MCM, 1928, par. 90, pp.80-81).

BENJAMIN R. SLEEPER Judge Advocate

MALCOLM C. SHERMAN Judge Advocate

B. H. DEWEY, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 2

26 MAY 1945

CM ETO 8632

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private WILLIAM J. GOLDING (32592483), Fifth Company, First Regiment, First Special Service Force.	Trial by GCM, convened at Cherbourg, Manche, France, 16 February 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that Private William J. Golding, Fifth Company, First Regiment, First Special Service Force, did, at or near Nice, France, on or about 14 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Nice, France on or about 13 December 1944.

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

Specification: (Not guilty)

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

Specification 1: In that * * * having been duly placed in confinement in the First Airborne Task Force stockade on or about 19 October 1944, did, at Nice, France on or about 19 October 1944, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that * * * having been duly placed in confinement in the First Special Service Force stockade on or about 24 October 1944, did, at Nice, France on or about 5 November 1944, escape from said confinement before he was set at liberty by proper authority.

Specification 3: In that * * * having been duly placed in confinement in the First Special Service Force stockade on or about 5 November 1944, did, at Nice, France on or about 14 November 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that * * * did, without proper leave, absent himself from his organization near Villeneuve-Loubet, France from on or about 24 August 1944 to about 11 September 1944.

Specification 2: In that * * * did, without proper leave, absent himself from his organization near Menton, France, from on or about 25 September 1944 to about 19 October 1944.

Specification 3: In that * * * did, without proper leave, absent himself from his station near Nice, France, from on or about 19 October 1944 to about 24 October 1944.

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

3. The prosecution showed by competent evidence that accused, after having been duly placed in confinement, escaped from confinement on three occasions, on the dates, at the places, and, as alleged in Specifications 1, 2 and 3 respectively, of Charge III, in violation of Article of War 69 (R19,23,29,30,31,32,47). It further showed three absences without leave as alleged in Specifications 1, 2 and 3 of Charge IV, in violation of Article of War 61. The first, commencing 24 August 1944 was terminated by his voluntary return to his platoon 21 September 1944; the second starting a few days later on 25 September, lasted until he was confined in the First Special Service Force stockade on 14 or 15 October, 1944; while the third of such absences began with his escape from the stockade on 19 October and continued until he surrendered himself at the same stockade on 24 October 1945, five days later (R9,10,14,15,18,23,33). The prosecution's proof as to the initial absence on the second occasion was not too satisfactory, but accused in his sworn testimony, supplied any defects connected therewith and, in fact, admitted all of the acts alleged in the specifications so far mentioned (R62,63). With respect to the charge of desertion, Charge I and its Specification, in violation of Article of War 58, it was proved and accused admitted on the stand, that he absented himself from his station, by escape from confinement, on 14 November 1944, and remained absent without permission until he was apprehended and brought into Military Police Headquarters in Nice, France, on 13 December, at which time he was dressed in civilian clothes: suit, topcoat, had and even civilian shoes, and with his hair dyed from brown to a red (R32,33,37,47).

4. Advised fully of his rights as a witness, accused testified in his own behalf. He admitted the commission of all the offenses with which he was charged, except that he denied any intention to desert the service. His first absence, he claimed, was due to involuntary separation from his command while on outpost duty, and his second absence was due to hospitalization. During

his last absence, he said, he dyed his hair red as a joke to match the color of a red-haired girl with whom he was living. He contended that he had rented the civilian clothes he was wearing when arrested in order to get his uniform cleaned (R62,63). The defense showed, in addition, by competent evidence, that prior to the period in question, accused had been an "Exceptional combat man * * he never shirked any duty". After his last arrest, accused gave valuable information to the authorities concerning the activities of a counterfeiting ring (R39,60).

5. The only issue not admitted by the defense was that involving accused's intent to desert during his last absence. This absence was only of 29 days' duration. However, it began by escape from confinement and was terminated by arrest, at which time he was dressed in civilian clothing even to his shoes. Furthermore, this last absence climaxed a series of prior absences which started 24 August 1944. It is possible that the earlier incidents were not characterized by intent to remain away permanently. Indeed there is evidence that he surrendered himself on 21 September and 24 October. However, later absences were initiated by escapes from confinement, and during the period of his last absence, he knew that on his return to military control he would have a series of serious charges to face. On this evidence, the court was justified in finding an intent to desert in violation of Article of War 58 (CM ETO 2723, Copprue; CM ETO 7379, Keiser).

6. The charge sheet shows accused is 22 years five months of age and that he was inducted 20 November 1942 at Flemington, New Jersey. He had no prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

27 APR 1945

CM ETO 8640

U N I T E D S T A T E S	83RD INFANTRY DIVISION
v.	Trial by GCM, convened at Argenteau, Belgium, 21 February 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private HERMAN J. OWSLEY (34819711), Company I, 331st Infantry	

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private Herman J. Owsley, Company I, 331st Infantry, did, at or near Langlir, Belgium, on or about 14 January 1945, run away from his company, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded.

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

8640

CONFIDENTIAL

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

3. The prosecution's evidence was substantially as follows:

Accused was a member of Company I, 331st Infantry, to which he returned on 11 January 1945 from the hospital, where he had been under treatment for trench foot (R7,13,15). The company was then at Ottre, Belgium, and constituted the battalion reserve. The enemy lines were about one mile south of Ottre and the town was under artillery and mortar fire (R7).

Next day, accused's platoon took up positions at a crossroad south of Ottre. Accused and another soldier were in a foxhole which was under shell fire. Accused's companion seemed to "crack up or was sick or both together" which appeared to affect accused adversely. The two men returned to the company command post, where accused reported to the first sergeant that he had been instructed to remain for the night. This occurred shortly before 2200 hours, 12 January 1945, at which time the company was scheduled to attack the town of Petite-Langlir. Consequently, accused stayed at the command post while the company moved forward and launched its attack on the town. After the town had been taken, the personnel, including accused, who had stayed at Ottre were instructed to join the company at Petite-Langlir. They arrived at about 2100 hours, 13 January 1945, at which time the town was still being shelled. The company meanwhile had moved on to a point approximately 1500 yards southwest of the town of Langlir. The first sergeant and the personnel from Ottre left Petite-Langlir for Langlir at about 0100, 14 January 1945. They encountered shelling en route and upon arrival, were unable to locate the rest of the company and were instructed to remain in the town for the night. Langlir was a small town of 12 or 14 buildings and the group including accused stayed in one of the houses. The town was shelled, undergoing about a thirty minute barrage which was "pretty tough". On the afternoon of 14 January 1945, at about 1600 hours, the company was called in to Langlir and then sent to an assembly area southeast of the town for the purpose of attacking to clean out the woods at daybreak, 15 January 1945. The first sergeant directed that the personnel who had been staying with him in Langlir join the company for this mission. It was at this point that accused was discovered to be missing. He could not be found, despite a search through all the buildings in Langlir. He had last been seen "off and on" after daylight 15 January 1945, in the cellar where the men were staying (R8-12,16-17,19-20).

The company launched its attack on the woods the next morning at dawn and was engaged until 19 January 1945. During this period, the company command post was maintained in Langlir. Apparently the company suffered considerable casualties in the course of the engagement (R11-13,18,21,22).

8540

Accused was next seen when he came into the command post at Langlir at about 0800 hours, 19 January 1945. He said he had stayed in a house in Petite-Langlir and had not come up sooner because he did not know where the company was. On being questioned more fully, he changed his story, stating that he had stayed in a house in Langlir. He also replied to a fellow-soldier who stated that the battalion headquarters at Petite-Langlir could have advised him of the company's whereabouts, that "I was only there one night and then moved in with some ack ack boys". His absence from 14 January to 19 January was unauthorized (R12,17-18).

4. Accused, after being warned of his rights by the law member, elected to make an oral unsworn statement (R21). He said that after returning to his company in Ottre he was sent out to a hill outside the town. The position was being shelled and he took refuge in a hole with two other men. The shelling continued and one of the men started to "cry and holler". By the time the shelling stopped, accused broke down. They were sent to see their lieutenant who refused to send them to the rear. Accused "cooled off some" and they returned to the hole. The shelling recommenced and accused's companion broke down again. This time the lieutenant sent them back to the command post and then to the aid station. There, the other man was evacuated but accused quieted down and was given some pills. The doctor told him to return to the command post and rest awhile. He did so and slept until the next morning. At about 1600 hours, orders were received directing the personnel at the command post to go forward. They started in a jeep without knowing exactly where the new command post was. They were shelled while en route and took refuge in a house. They asked some men where their company was and were told to go to a house down the road. On reaching the house, accused tried to "cool" his nerves. The next day he saw some "ack-ack boys" who told him to take it easy and lie down for a while. He did so and remained with them for about three days. He inquired of them as to the whereabouts of his company, but they were unable to inform him, and so he decided that he would find it after he calmed down. After his nerves were quieted, he found the command post (R21-22).

5. The evidence is fully sufficient to support the finding that accused was absent without authority from his company for the period specified. Similarly it is clear that the company was "before the enemy" at the time accused absented himself, being under fire and engaged in a definite tactical mission throughout the period in question. While it does not appear that the particular group of which accused was a part was "engaged with the enemy" in any sense involving hand to hand combat, it is clear that it was constantly subjected to enemy shelling and was involved in the general tactical operations then in progress. This is sufficient to render it "before the enemy" within the meaning of Article of War 75 (CM ETO 1404, Stack

(1944)). That accused was aware of the hazardous situation of the company and of its mission is demonstrated by his own statement as well as the testimony of the other witnesses, and the evidence is ample to justify the court's finding that he absented himself with the intention of seeking personal safety pending conclusion of the danger (See CM ETO 1404, Stack (1944); CM ETO 4095, Delre (1944)).

Inasmuch as accused was not with the main body of the company at the time of his departure and had not been for about two days previously, the question is raised whether the allegation that he "did * * * run away from his company" has been proved. The evidence is clear, however, that although the majority of the company had moved ahead of the particular group which included accused, this group was nevertheless an integral and organized part of the company and was subject at all times to the orders of the first sergeant. It may, therefore, properly be said that accused, in absenting himself from the group, ran away from his company. The case is distinguished in this respect from CM ETO 4740, Courtney (1945); there, the evidence showed that at the time of absence accused was merely enroute as an individual to join his company and had not yet physically joined it.

6. The charge sheet shows that accused is 19 years and four months of age and was inducted 29 November 1943 at Fort McClellan, Alabama. No prior service is shown.

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

8. The penalty for violation of Article of War 75 is death or such other punishment as a court-martial may direct. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is proper (AW 42; Cir.210, WD, 14 September 1943, sec.VI as amended).

Benjamin R. Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. U. Davis Judge Advocate

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

BOARD OF REVIEW NO. 1

14 JUL 1945

CM ETO 8649

U N I T E D S T A T E S	)	80TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 80, U. S. Army, 3 March 1945.
Private FRED E. SIGLASKY (36785057), Company A, 317th Infantry	)	Sentence (Suspended): Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Fred E. Siglasky, Company "A", 317th Infantry, did, in the vicinity of Erscherange, Luxembourg, on or about 24 January 1945 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, to-wit: participation in operations against an enemy of the United States, and did remain absent in desertion until he surrendered himself at or near Diekirch, Luxembourg, on or about 5 February 1945.

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

All of the members of the court present at the time the vote was taken concurring, he was sentenced to be 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 but suspended its execution.

The proceedings were published by General Court-Martial Orders Number 69, Headquarters 80th Infantry Division, U. S. Army, 9 March 1945.

3. The only witness for the prosecution, the first sergeant of Headquarters Company, 1st Battalion, 317th Infantry, testified that accused was a member of Company A, 317th Infantry (R6). Between about 15 January and 15 February 1945, the battalion was "attacking and holding offensive positions against the Germans". In January they were northeast of Feulen, Luxembourg, and in the latter part of that month they were in Wiltz, Luxembourg. During the first two weeks of February they were "back in Wedernach for a rest - I believe it was for one week - and Diekirch for one week" (R7). On 24 January, accused, who was on duty as a "PW chaser" for witness' company, was reported missing. The battalion was then located near Wiltz. Witness and others checked the area but were unable to find him, so witness

> "called Company A for the man on special duty with Headquarters Company - they picked him up on the morning report there" (R7).

Witness did not see accused again until the time of the trial (R7).

Morning reports of Company A were admitted in evidence, without objection by the defense, showing accused absent without leave from his organization at Erscherange, Luxembourg, from 24 January 1945 (Pros. Exs.A,B) until his return to duty at Diekirch, Luxembourg, 5 February 1945 (Pros.Ex.C), where the battalion was then located (R7-8).

4. After an explanation of his rights, accused elected to make an unsworn statement through counsel (R8), as follows:

> "I was sent to the 101st Evacuation Hospital on 17 December 1945. While there I was X-rayed and spots were found on my lung. However, the medical officer told me that they would disappear providing I had a rest. My mother has been troubled with tuberculosis for many years. As I was given no rest and because of the condition of my mother and the results of the X-ray, it has caused me considerable worry" (R9).

5. The testimony of the first sergeant and the morning reports referred to above establish accused's absence without leave from 24 January to 5 February 1945. With respect to the intent entertained by him at the inception of his unauthorized absence, the record shows merely that between 15 January and 15 February his battalion was engaged with the enemy in Luxembourg, that for two weeks during the first half of February it enjoyed a rest period at Medernach and Diekirch and that prior to the time accused left (24 January 1945) he was on duty as a "PW chaser". Such evidence is legally insufficient to establish that accused absented himself with the intent to avoid hazardous duty. The Board of Review has repeatedly held that where, as here, there is no evidence that accused's unit was in combat at the time the absence commenced, or that combat was then reasonably imminent and accused aware of its imminence, and no evidence of the activity or tactical situation of his unit at that specific time, there is no proof of an intent to avoid hazardous duty (CM ETO 8147, Pierce, and authorities therein cited).

The Staff Judge Advocate in his comment on the evidence states:

> "As a matter of fact the company entered combat before accused joined it 25 August 1944 and continued in contact with the enemy until the present date. There is nothing in the record to disclose that the company would not continue in contact with the enemy until the close of present hostilities. From the evidence introduced, establishing an unexplained, unauthorized absence of 12 days during a period when the unit to which the accused belonged was in active combat with the enemy, the court could and very properly did infer as matter of fact, an intention on the part of the accused to avoid hazardous duty.
>
> The accused's duties, on the particular day he left, were those of Prisoner of War chaser with a battalion headquarters company. This is in itself a hazardous occupation. Operating at less than 500 yards from the actual rifle-firing infantrymen, he must advance and relieve the company PW chasers of their burden and guard the PWs to a collecting point from which they are evacuated to the rear. A reasonable man would certainly believe that this was a hazardous occupation, since it is carried on within easy range of automatic weapons-rifle fire and hostile mortars, to say nothing of rockets and light artillery".

Had the prosecution properly introduced evidence of the additional facts set forth by the Staff Judge Advocate, and of accused's participation in such hazards of battle at the time of departure, the record would have been legally sufficient to sustain the findings of guilty as charged. But the court could not, nor may the Board of Review on appellate review, take judicial notice of these matters for they are not matters of common and general knowledge to the military establishment (CM ETO 8358, Lape and Corderman, and authorities therein cited). The Board of Review in the last cited case thus analyzed the scope of its judicial notice in a similar case:

> "The Board of Review will take judicial notice that the date of 12 January 1945 was during the closing stages of the great German winter offensive and that there were near that time heavy battles in Luxembourg. Judicial notice will not be taken as to the exact location of enemy troops, their precise movement, nor of the amount, kind and proximity of enemy fire in the vicinity of Niederfeulen, on that date. Such matters are not of common or general knowledge to the world at large, nor to the military establishment, but must have then been learned by presence on the field of battle or from classified communications. They can now be determined only from secret reports. Such knowledge is not common and general, and judicial notice thereof would be improper (CM ETO 6226, Ealy; as to military matters of which such notice may be taken, see CM ETO 7413, Gogol; CM ETO 6637, Pittala)".

There was thus nothing in the evidence to afford a reasonable basis for the inference of the alleged intent. The record, however, is legally sufficient to support the findings of guilty to the extent they find accused guilty of absence without leave.

6. As in the Lape case, supra, tried by the same division as the instant case, the Board of Review views with misgivings the inadequate preparation and conduct of the proceedings in this very serious capital case. The investigating officer reported that he had secured no statements of witnesses (only one six-line statement by the first sergeant who testified at the trial appears in the accompanying papers); the same officer stated that no explanatory or extenuating circumstances were developed; the advice of the Staff Judge Advocate consists of a mimeographed form; a first lieutenant sat as law member of the court; the testimony of the sole witness was reported on two pages; the defense asked him not a single question and offered no evidence upon the issues; the record does not reveal that either the prosecution or defense addressed

an argument to the court; and the review of the Staff Judge Advocate, as above indicated, is based largely upon facts not in evidence and is most cursory in its treatment of the issues in the case. The following comments of the Board of Review in the Lape case, supra, are appropriate and are reaffirmed:

> "In view of the magnitude of the offenses charged, and the Anglo-Saxon tradition of a fair and full trial, it is thought that the Board of Review can state with propriety that these proceedings are not conducive to the appropriate contribution of justice to discipline in the Army, or defensible under public scrutiny".

7. The record shows (R2) that the trial was held only three days after the charges were served on accused. In view of his express consent to trial at that time (R6) and in the absence of indication of injury to his substantial rights, the error if any was harmless (CM ETO 8083, Cubley, and authorities therein cited).

8. The charge sheet shows that accused is 24 years four months of age and was inducted 7 January 1944 at Chicago, Illinois, 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. 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 only so much of the findings of guilty as involves findings of guilty of absence without leave from 24 January 1945 to 5 February 1945 and legally sufficient to support the sentence.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(374)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 JUL 1945 TO: Commanding General, United States Forces, European Theater, 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 U.S.C. 1522) and as further amended by the Act of 1 August 1942 (56 Stat.732; 10 U.S.C. 1522), is the record of trial in the case of Private FRED E. SIGLASKY (36785057), Company A, 317th Infantry.

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

(Findings vacated in part in accordance with recommendation of Assistant Judge Advocate general. GCMO 313, ETO, 4 Aug 1945.)

JJP 8649

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

BOARD OF REVIEW NO. 1 20 JUL 1945

EC ETO 8689

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Molsheim, France, 16 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JEROME N. WEXLER (32518946), Company K, 30th Infantry	

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

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

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

CHARGE I: Violation of the 58th Article of War.
(Disapproved by Confirming Authority).

Specification: (Disapproved by Confirming Authority).

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

Specification: In that Private JEROME N. WEXLER, Company "K", 30th Infantry, having received a lawful command from Captain John E. Dwan, Adjutant, 30th Infantry, his superior officer, to return to his Company then in training, did at Holtzheim, France, on or about 8 December 1944, willfully disobey the same.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and specifications. Evidence was introduced of two previous convictions by

8689

special court-martial, one for absence without leave for eight days in violation of Article of War 61, and one for absence without leave for seven days "knowing he was on order for transfer to P.O.E.", stated to be in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 3rd 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, disapproved the findings of guilty of Charge I and its Specification, confirmed the sentence but, owing to unusual circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the Eastern Branch, United States Disciplinary Barracks, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence established the fact that Captain John E. Dwan, Regimental Adjutant, 30th Infantry, on 8 December 1944 issued a direct oral order to accused:

> "Private Wexler, I am giving you a direct order to leave this room and get on a 2½ ton truck outside and it will take you back to your company" (R7,9).

Accused deliberately refused performance of this order although he understood its meaning and knew it was given by his superior officer (R12-13; Pros.Ex.C). Accused was manifestly guilty of the offense charged (CM ETO 2469, Tibi; CM ETO 6457, Zacoi; CM ETO 6694, Warnock; CM ETO 7549, Ondi; CM ETO 7687, Jarbala).

4. The charge sheet shows that accused is 23 years of age and was inducted 3 October 1942 to serve for the duration of the war plus six months. He had no prior service.

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

6. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (Cir.210, WD, 14 Sept. 1943, sec.VI as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 20 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army

1. In the case of Private JEROME N. WEILER (32518946), Company K, 30th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 8689. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 8689).

E. C. McNEIL,

Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence as commuted ordered executed. GCMO 296, ETO, 31 July 1945.)

8689

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

BOARD OF REVIEW NO. 1

25 APR 1945

CM ETO 8690

UNITED STATES	)	104TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Brand, Germany, 8 February 1945. Sentence as to each accused: To be shot to death with musketry.
	)	
Privates First Class BLUME J. BARBIN (38336775) and JOSEPH PONSIEK (32627647), both of Company B, 415th Infantry	)	

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

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

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

BARBIN

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

Specification: In that Private First Class Blume J. Barbin, Company B, Four Hundred Fifteenth Infantry did, at Kruisweg, Belgium on or about 25 October, 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Brussels, Belgium on or about 9 January 1945.

8690

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

Specification 1: In that * * * did, in conjunction with Private First Class Joseph Ponsiek, Company B, Four Hundred Fifteenth Infantry, at Brussels, Belgium, on or about 8 January 1945, with intent to deceive, falsely make in its entirety a certain order in the following words and figures, to wit:

CONFIDENTIAL

R E S T R I C T E D

HEADQUARTERS 104TH INFANTRY DIVISION
Office of the Division Commander

APO 104, U.S. ARMY
8 January 1945

SUBJECT: Travel Orders

TO : Personnel Concerned

1. The following named personnel of units indicated will proceed by government vehicle from their present stations on or about 8 January 1945, to Brussels, Belgium, on temporary duty in connection with 104th Infantry Division activities. Upon completion of this temporary duty, personnel named will return to their proper stations:

Capt.	Donley, Robert W	O 324 283 415th Inf.
T/4	Price, George G.	34 835 674 415th Inf.
Pfc	Barbin, Blume J	38 336 775 415th Inf.
Pfc	Ponsiek, Joseph	32 627 647 415th Inf.

2. "K" rations will be carried.
3. TCNT TON 38/654 P 243/02 A 121/76489,
4; This order issued under authority of Letter, Headquarters European T of Opns, U.S.Army, 6 July 1944, and Letter Headquarters XVIII Corps, APO 109 U.S. Army, 15 October 1944.

By Command of Major General ALLEN

/s/ William C. Swan
/t/ William C. Swan
Captain AGD
Assistant Adjutant General

DISTRIBUTION
1.-G-1
2.-Each Officer
1.-EM (3)
1.-Each Unit
1.-File

8690

R E S T R I C T E D
CONFIDENTIAL

which said order was a writing of a military nature which might operate to deceive another.

Specification 2: In that * * * did, at Brussels, Belgium, on or about 9 January 1945 wrongfully, and with fraudulent intent to pass the same as true and genuine, have in his possession an order in the following words and figures, to wit:

(Same as Specification 1)

a writing of a military nature, which might operate to deceive another which said order was, as he, the said Private First Class Blume J. Barbin, then well knew, falsely made.

PONSIEK

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

Specification: In that Private First Class Joseph Ponsiek, Company B, Four Hundred Fifteenth Infantry did, at Kruisweg, Belgium on or about 25 October, 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Brussels, Belgium on or about 9 January 1945.

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

Specification 1: In that * * * did, in conjunction with Private First Class Blume J. Barbin, Company B, Four Hundred Fifteenth Infantry, at Brussels, Belgium, on or about 8 January 1945, with intent to deceive, falsely make in its entirety a certain order in the following words and figures, to wit:

(Same as Specification 1, Charge II, Barbin)

which said order was a writing of a military nature which might operate to deceive another.

Specification 2: In that * * * did, at Brussels, Belgium, on or about 9 January 1945 wrongfully, and with fraudulent intent to pass the same as true and genuine, have in his possession an order in the following words and figures, to wit:

(Same as Specification 1, Charge II, Barbin)

8693

a writing of a military nature, which might operate to deceive another, which said order was, as he, the said Private First Class Joseph Ponsiek, then well knew, falsely made.

Each accused pleaded not guilty, and all of the members of the court present at the times the votes were taken concurring, each was found guilty of the charges and specifications preferred against him. No evidence of previous convictions was introduced against either accused. All of the members of the court present at the times the votes were taken concurring, each accused was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 104th Infantry Division, approved 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 the sentences and withheld the order directing execution thereof pursuant to Article of War 50½.

3. The following facts proved by the prosecution are undisputed:

On the afternoon of 25 October 1944, Company B, 415th Infantry, in readiness for its first combat, moved into the vicinity of Kruisweg, Belgium. A security detail was posted. Detonation of battle guns was audible at the company location. Company officers were aware that a night attack was planned (R8,9,13,14).

Accused Ponsiek, a member of the 1st squad, 1st platoon, was seen by his squad leader in the afternoon of that day, but was absent when the squad was checked immediately prior to the midnight attack (R8,9). Accused Barbin, of the 2nd squad of the same platoon, was likewise seen in the afternoon, but not at night (R11). Each accused in his own oral pre-trial statement, voluntarily made, admitted that he knew of the imminent attack, and that he left the organization without leave before it began (R10,21-24). No passes whatever were issued that day (R9,13). Testimony of soldiers on duty in the company also established the further absence of each accused on the next day, 26 October, and continuously thereafter until 9 January 1945, except that no evidence was presented covering the absence of Ponsiek during the period of 27 to 31 October (R8,11,15,16).

Part of accuseds' battalion was committed during the afternoon of 25 October, and at about 1900 hours attack orders were received by Company B. These were transmitted to the men of each accused's squad shortly thereafter, and at about 2200 hours the company moved into attack across the Holland border. It received fire and sustained casualties. The engagement was broken off at 1300 hours the next day, but was soon resumed and continued (R9-13).

8696

Both accused were apprehended 9 January 1945 in Brussels, Belgium, at the Maple Leaf Club, by an agent of the Criminal Investigation Detachment. To escape detention, each exhibited purported division travel orders signed by "William C. Swan, Captain, AGD, Assistant Adjutant General, 104th Infantry Division", a non-existent person (R17-19; Pros.Exs.1,2). After due warning of his rights, each accused later in the day voluntarily made a separate and full confession. Each stated he left without authority Barbin seven or eight weeks before 9 January 1945, and Ponsiek on 1 November 1944. Progress to Brussels was by "hitchhiking". At a hotel where they obtained use of a typewriter Ponsiek on 8 January 1945 typed the orders used, in the presence of Barbin, and signed an officer's name thereto (R20,21).

Each made another similar and voluntary confession to the officer investigating the charges. The date of each departure was, however, fixed as 25 October 1944 and each confessed knowledge of the imminent attack (R23,24).

4. Each accused, after his rights as a witness were fully explained to him, elected to remain silent and no evidence was introduced in behalf of either (R26).

5. a. Oral evidence was introduced concerning the verbal confessions made by each accused to the person testifying and later reduced to writing. No reason or cause was shown for failure to introduce the writings as the best evidence; they were apparently in court and are now among the attached papers. The defense offered no objections. Such practice was formerly held to constitute fatal error (CM 134547 (1919), Dig. Op. JAG, 1912-40, sec.395, p.218). Thereafter, the Manual for Courts-Martial, 1928, provided that failure to object to oral proof of the contents of a writing on the ground that the original is not available, may be regarded as a waiver of the objection (MCM, 1928, par.116b, p.120). The rule is considered to have been changed by this provision and the procedure here used is not now erroneous (CM ETO 739, Maxwell, and authorities there cited). Civilian courts are in accord (Underhill's Criminal Evidence (4th Ed. 1935), par.278). It is logical to assume that the defense feared the oral recitation less than the full written account. The court was fully justified in regarding the failure to object as a waiver.

b. The Adjutant General of the 104th Infantry Division, who signed the indorsement which referred the case to trial, on behalf of his commanding general, sat as a member and president of the court. The signing of the indorsement was a ministerial act by command of his superior, concerning which he exercised no discretionary power. The right of challenge, duly accorded the defense was not exercised. Under such circumstances, the officer was not disqualified (CM ETO 3948, Paulercio).

c. The trial judge advocate stated in open court that he, the defense counsel and the accused had entered into an oral stipulation to the effect that no such person existed in the division as the purported signer of the travel orders in evidence. Neither the accused nor his counsel expressed assent in the presence of the court, but the stipulation was accepted as evidence. It is a necessary requisite, particularly in a capital case, that the accused understand what is involved in such stipulations (MCM, 1928, par.126b, p.136). There can be little doubt of the understanding of each accused of this matter. Each had already confessed the orders to be false. The undisputed evidence showed each to have been absent without leave for 75 days on the date of the orders, a circumstance importing invalidity thereof. The non-existence of this person in the office of the division adjutant general was a simple uncontested matter, wherein a stipulation properly saved time, and silence gave assent (MCM, 1928, par.45b, p.35; CM ETO 6810, Shambaugh).

6. a. As to Charge I and Specification:

Each accused left his company immediately prior to its first combat. Each had knowledge of the impending action and each abandoned his comrades to bear without his help the awful burden and hazard of battle. Intent to avoid hazardous duty and to shirk important service, provable under the specification (CM ETO 9257,Schewe, and authorities therein cited), was abundantly shown (CM ETO 8083, Cubley). Intent to remain away permanently may also be inferred from such action. The accused could hardly have meant to incur the shame of facing those comrades again. The same intent may, and should be, inferred from the long absence of 76 days the possession of deceitful means to avoid return, and the fact of apprehension (MCM, 1928, par.130a, pp.142,144).

b. As to Charge II and Specifications:

The fraudulent orders fall within the condemnation of the Federal statute prohibiting the making and possessing with wrongful intent of false military passes and permits(Act June 15, 1917, sec.3, Tit.X; 40 Stat.228); 18 USCA 132)). Free passage through Army lines and posts were to be achieved by their use. Violations of this statute are offenses not capital under the 96th Article of War (MCM, 1928, par.152c, pp.188-189; CM ETO 2210, Lavelle et al). The specifications and evidence set forth also constitute offenses to the prejudice of good order and military discipline under that article (Ibid, par.152a, p.187). Barbin was properly convicted as a principal in making the orders, for they were prepared as a joint venture, wherein the two accused visited a hotel together, borrowed a typewriter, and Ponsiek did the actual typing pursuant to common design and common use. Barbin participated as an aider and abettor, and he accepted the benefits; it does not excuse him that the actual mechanics were

8690

executed by his confederate (Gooch v. United States, (CCA 10th 1936) 82 F. (2d) 534, cert. den. 298 U.S. 658, 80 L.Ed. 1383 (1936); CM ETO 1922, Forester and Bryant; CM ETO 5068, Rape and Holthus). Each offered the same as genuine when questioned for authority to visit Brussels (R17,18).

7. The charge sheets show the following with respect to accused: Barbin is 22 years of age and was inducted 21 November 1942 at Shreveport, Louisiana. Ponsiek is 22 years of age and was inducted 12 November 1942 at New York City. Each was inducted to serve for the duration of the war plus six months. Neither had prior service.

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

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

B. Franklin Riter Judge Advocate

Wm. T. Sarnow 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. 25 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Privates First Class BLUME J. BARBIN (38336775) and JOSEPH PONSIEK (32627647), both of Company B, 415th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial, which is delivered to you herewith. The file number of the record in this office is CM ETO 8690. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 8690).

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

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

1 Incl.
Record of Trial.

(Sentence confirmed, but after reconsideration, commuted to dishonorable discharge, total forfeitures and confinement for life. Sentence as commuted ordered executed. (Ponsiek) GCMO 142, ETO, 8 May 1945). (Same action as to accused Barbin. GCMO 143, ETO, 8 May 1945).

8690

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

BOARD OF REVIEW NO. 2

24 APR 1945

CM ETO 8691

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private First Class HAZE HEARD (34562354), 3105th Quartermaster Service Company	Trial by GCM, convened at Granville, Manche, France, 25 January 1945. Sentence: To be hanged by the neck until dead.

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

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

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Haze Heard, 3105th Quartermaster Service Company, did, at Mesnil-Clinchamps, France, on or about 13 October 1944 with malice aforethought, willfully, deliberately, feloniously unlawfully, and with premeditation kill one Madame Berthe Robert, Mesnil-Clinchamps, Villiage Le Bosc Benard, Calvados, a human being by shooting her with a 1903 Model Calibre .30 US Army Rifle.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, approved the sentence, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 13 October 1944 accused was a member of the 3105th Quartermaster Service Company, which organization was located at Mesnil-Clinchamps, France (R30,31). At about 8:00 o'clock pm on this date accused, a colored soldier armed with a rifle, entered the home of Monsieur and Madame Eugene Robert, located nearby. Present that night in addition to M. and Mme. Robert were their two children, Alfred, aged 21, and Yvonne, aged 18, and Jules Guilloche a farm laborer (R9,15,17,25,27). Accused asked for cider and Alfred gave him a glass of this beverage, which accused drank, after pouring some brandy into it from a bottle which he had brought along with him (R12,13). This bottle was more than half full and during the time accused remained at the Robert residence, he drank a second glass of cider mixed with brandy (R12,13,17,24). The measure of the glass was of "ordinary" size, approximately five inches in height. Following the drinking accused became somewhat drunk but, "not so drunk that he didn't know what he was doing" (R13). Eugene Robert testified that accused walked about the room during the evening and that he had no difficulty in walking (R14). Alfred Robert described his condition as "not off balance", stating that he walked "very straight" (R19). His sister Yvonne, testified that, in her opinion, he was drunk, but "not very drunk", and that "he knew very well what he was doing" (R27,29). Monsieur Guilloche testified that the soldier was "not completely" drunk, as he walked "very well" and did not "stagger at all" (R24,25). From time to time Eugene Robert spoke to accused and told him that he should be on guard duty but accused replied that all he had to do was relieve another sentinel at nine o'clock. Accused looked often at the clock (R9,17,18,26,28). While the family ate dinner he walked about the table and several times mentioned "Mademoiselle, New York" (R17,23,25). He purchased two eggs, paying for them and also for four other eggs which he had obtained at the Robert home during a preceding visit there recently. He gave Madame Robert a 500 franc note and received 480 francs in change, which he counted, said "OK" and placed in his wallet (R9,12,17,25). At 9:00 pm accused said "good night" and left the house (R18). He returned at about 9:10 or 9:15 pm and was admitted again after he had knocked at the door (R10,15,18,23). He still

had his gun and asked for "Mademoiselle" but was told to leave by Monsieur Robert, as it was time to go to bed (R10,18,23). He thereupon left by way of the front door which was locked behind him. Almost immediately thereafter two shots were fired through the window from the outside, both entering the head of Madame Robert, killing her instantly. She was sitting, at the time about one meter from the window and there was"a little light, but there was light" in the room (R10,11, 16,18,23). A moment later two shots were fired through the door, these did not strike any of the people present, but lodged in a closet inside the house.

After determining that his wife was dead, Monsieur Robert left, by way of the rear door of his home, to procure the help of officers whom he knew to be about 300 meters away (R11,18,23). Accused then entered the house through the rear door and pointed his rifle at those remaining in the room. Alfred Robert took accused by the arm and pointed to his deceased mother, showing him the result of his act, whereupon accused manipulated the bolt of his rifle and made ready to fire again at the deceased. He then approached Yvonne saying, "Mademoiselle, zig-zig?" Yvonne, in anger, took his gun away from him and "threw it out" (R18, 22,26). Thereupon Alfred and Jules Guilloche, together with the girl, grappled with accused, subdued him and took him outside and tied him to an apple tree (R18,22,24,27).

About half an hour later, Monsieur Robert returned accompanied by Major Mead Hartwell and Captain Joseph Bronstein, the latter being the commanding officer of accused's organization. They found the body of the deceased woman inside the house slumped in a chair in a pool of blood and a colored soldier lying on the ground tied to a tree outside. The soldier appeared kicked and beaten. His face was cut and swollen (R30,32,35). He was begging for mercy and one of the Frenchmen was restrained from kicking him any more. (R30). When asked his name accused replied that he didn't remember but that he was from a truck company. Captain Bronstein turned to leave, whereupon the soldier called to him, stating that he was Haze Heard of the 3105th Quartermaster Service Company. At this time he talked "very coherently". No odor of alcohol was detected on accused and according to the Captain accused was not drunk (R30,32). He was sober (R35). Mademoiselle Yvonne recovered his weapon, a "30 caliber '03 rifle", and handed it to Major Hartwell, who in turn delivered the piece to Lieutenant Alex Marcowitz, who had arrived in the meantime with a guard. The lieutenant placed accused under arrest, loosened the rope around his hands, removed the bonds from his legs and took him to his unit area (R34,35). He detected no odor of alcohol on him at any time (R36). About two hours after the incident the rifle was examined but no odor of breech fire was detected (R35). A helmet and three shells "from the '03 rifle" were discovered about five feet in front of the window at the Robert residence (R35,36).

4. Accused, after his rights as a witness were explained to him,

elected to remain silent (R37,40). The defense produced only two witnesses, First Sergeant William McNabb and Private Glen Brown,Jr., both members of the 3105th Quartermaster Service Company. Sergeant McNabb testified that he had known accused for about a year and that he had never had any trouble with him. He rated him "good" and indicated he was "as good as the average man" and possessed "a very fine character" (R37-38). Private Brown stated that he had known accused since September 1944 and that he was a "very quiet man" and "never talked very much" (R39). The company commander of accused's organization (Captain Bronstein) testified, on cross-examination, that accused had been a member of his organization for about ten months; that he had never caused any trouble; that during this time he "performed his duties in the best manner of any soldier in the company", and that he had the "best rating" as to character and efficiency (R33,34).There were received in evidence, without objection by the prosecution, copies of English translations of statements in French made by Monsieur Eugene and Mademoiselle Yvonne Robert to the investigating officer on 15 October 1944. These documents stated that accused was "very drunk" (R14,27;Def.Exs.1,2). No additional evidence was introduced on behalf of accused.

5. Murder is the unlawful killing of a human being with malice aforethought (MCM, 1928, par.148a, p.162-3). The word "unlawful" as used in the above definition means without legal justification or excuse. The term "malice", in legal contemplation, "does not necessarily mean hatred or personal ill-will towards the person killed nor an actual intent to take his life " (MCM, 1928, supra). Malice is implied "Where no considerable provocation appears or where all the circumstances show an abandoned and malignant heart" (26 Am. Jur.sec.41, p.186).

> "Malice is presumed from the use of a deadly weapon" (MCM, 1928, par.112a p.110).

The following principle of criminal law is pertinent and relevant:

> "If a person discharges a firearm * * * into a dwelling house in which he has reason to believe there are people living, thereby killing a person therein, though without intention to kill or injure anybody, he is guilty of murder" (26 Am. Jur. sec.211, p.300).

In the instant case the evidence conclusively establishes that accused killed Madame Berthe Robert, at the time and place and under the circumstances as alleged. There is no question concerning the identity of accused as the culprit who committed the crime. Although no witness saw accused fire the fatal shots this fact is established by strong and convincing circumstantial evidence.

The record contains no suggestion that the killing was legally justifiable. However, the defense attempted to show that accused was in such a state of drunkenness at the time of the murder as to excuse him for the commission of the crime. It is a general rule of civil law, followed in the administration of military justice, that:

> "Voluntary drunkenness, whether caused by liquor or drugs, is not an excuse for crime committed while in that condition; /however the showing of the existence of such condition/ maybe considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense" (MCM, 1928, par.126a, p. 136).

The defense produced evidence tending to show that accused was drunk on the evening in question whereas the prosecution established that accused was "not very drunk"; that he walked "very straight"; that he "did not stagger at all" and that he "knew very well what he was doing". The evidence for the prosecution also established that accused was able to verify the change given him at the time he purchased the eggs; that he was able to manipulate the bolt of his rifle accurately; that he fired his weapon with precision; that he knew his name and organization and gave them when he felt the officers might leave him to the merciless treatment of the French people at the Robert residence, and that within a short period of time after the killing accused appeared sober. Such facts negative the contention that accused was so drunk that his power of reasoning had been dethroned. On the contrary they tend to establish that he was sufficiently possessed of his faculties to know what he was doing but that he was indifferent to the consequences (CM NATO 774, II Bull. JAG, p.427). His conduct and actions manifest that he was capable of possessing the requisite element of "malice aforethought", essential to support a finding of his guilt of murder under Article of War 92 (CM 237782, Prentiss, 24 B.R.111; CM 238389, Kincaid, 24 B.R.247; CM ETO 1901, Miranda; CM ETO 6229, Creech. Furthermore, the record of trial is wholly devoid of any proof of provocation by the deceased or others of the Robert household. At the time accused fired the shots through the window, he knew, or should have known, that such action on his part would likely result in the death of or grievous bodily harm to one or more of the occupants of the house. His refiring the rifle and subsequent entry into the room, threatening the people therein and demanding sexual relations with the girl show clearly his ultimate motives. His actions were brutal and ruthless and without justification or excuse. The finding that accused murdered Madame Robert is sustained by substantial competent and convincing evidence (CM ETO 2007, Harris; CM ETO 3585, Pygate; CM ETO 4497, DeKeyser; CM ETO 5451, Twiggs; CM ETO 6229, Creech). The determination of accused's state of intoxication was essentially a question for the court and its determina-

tion, where supported by substantial evidence, will not be disturbed by the Board of Review on appellate review (CM ETO 1953, Lewis; CM ETO 3937, Bigrow; CM ETO 5561, Holden and Spencer and authorities cited therein).

The Specification describes and identifies the deceased as "Madame Berthe Robert". Although her Christian name Berthe nowhere appears in the evidence, the testimony is clear that she was the only Madame Robert involved and the person killed. Witnesses referred to deceased as Monsieur Eugene Robert's wife, as "the woman of the house" and as the mother of Alfred and Yvonne Robert. The deceased was thus adequately identified. There was no variance between the name as set out in the charge sheet and that proved by the evidence.

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

7. The charge sheet shows that accused is 22 years and four months of age and was inducted 18 December 1942 at Fort Benning, Georgia. He had no prior service.

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

(ON LEAVE) Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private First Class HAZE HEARD (34562354), 3105th Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial, which is delivered to you herewith. The file number of the record in this office is CM ETO 8691. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 8691).

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

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

1 Incl.
Record of Trial.

(Sentence ordered executed. GCMO 137, ETO, 11 May 1945.)

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

BOARD OF REVIEW NO. 2

CM ETO 8692

4 JUN 1945

U N I T E D S T A T E S)	9TH INFANTRY DIVISION
)	
v.)	Trial by GCM, convened at Eupen,
)	Belgium, 22 January 1945.
Private LIONEL E. MARTIN)	Sentence: Dishonorable discharge,
(31358792), Company B,)	total forfeitures, and confinement
39th Infantry)	at hard labor for life. Eastern
)	Branch, United States Disciplinary
)	Barracks, Greenhaven, New York.

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review 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 58th Article of War.

Specification: In that Private Lionel E. Martin, Company "B", 39th Infantry, did, at or near La Cuillourie, France, on or about 21 July 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and shirk important service, and did remain absent in desertion until he was apprehended at Cherbourg, France, on or about 23 August 1944.

8692

He pleaded not guilty, and all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for eight days in violation of Article of War 61. All of the members of thecourt present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 9th Infantry Division, approved the sentence, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but owing to special circumstances in this case commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence discloses that on the afternoon of 21 July 1944, Company B, 39th Infantry, was relieved of its position in the front lines and withdrawn to an assembly area near La Cuillourie, France, about six hundred or a thousand yards to the rear for the purpose of reorganization. The accused, a rifleman in the company, apparently participated in the withdrawal but disappeared almost immediately thereafter and did not return (R6-13,18) to military control until apprehended at Cherbourg, France, about one month later (R18,20). He had no authority to be absent (R8,9).

4. The Division Psychiatrist, the only witness for the defense, testified that after a thorough examination of the accused, he came to the conclusion that the accused was sane and responsible for his actions at the time of trial and at the time the offense was committed, that he had no mental condition which would warrant discharge, but that he could be considered for discharge under section VIII for the benefit of the Army, except for the fact of this offense. The psychiatrist believed that had accused appeared for induction at the time of his trial, he would have been classified as a "bad risk", considering the money and time which would be required to make a soldier of him, because of the accused's life history of unfavorable reaction to authority (R21-26).

8692

5. It is fairly obvious that the accused absented himself at a time when his unit was performing hazardous and important service as part of the greatest invading force the world has ever known. The initial landing had been made only a month and a half earlier and the situation was still critical. The unit had been suffering casualties when it was in the line and enemy artillery was still inflicting casualties as it reorganized a few hundred yards to the rear in the company area.

The only question presented by the case is one of intent. For every other element of the offense the proof is more than adequate. If the accused absented himself because he thereby intended to avoid hazardous (as well as important) service it seems strange, at first glance, that he would have chosen the very moment when the hazards appeared to be on the decrease rather than on the increase. The court must have regarded this only as a temporary respite, as it actually appears to have been, and assumed that the accused also recognized it as only temporary. In any event the unit was in contact with the enemy, the hazards though less than before, were still impressive, and no other reason for desertion is apparent. Under these circumstances the court's findings should not be disturbed.

6. The charge sheet shows that accused is 20 years one month of age and that, without prior service, he was inducted 27 May 1943 at Boston, Massachusetts.

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

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

8692

Judge Advocate

Judge Advocate

Judge Advocate

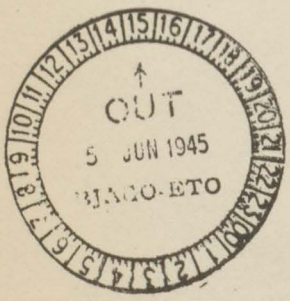
(398)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 JUN 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private LIONEL E. MARTIN (31358792), Company B, 39th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 8692. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 8692).



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

(Sentence as commuted ordered executed, GCMO 229, ETO, 28 June 1945.)

CONFIDENTIAL

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