E. T. O.
BOARD
OF
REVIEW

OPINIONS

CM ETO 6342
CM ETO 7988

VOLS. 17-18

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

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Juege Advocate General's Department

Holdings and Opinions

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

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 17 B.R. (ETO)

including

CM ETO 6342 - CM ETO 7189

(1945)

Office of The Judge Advocate General

Washington : 1946

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BY CARL E. WILLIAMSON, LT. COL.
JAGC, ASST EXEC, ON 20 MAY 54

7/83

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Branch Office of The Judge Advocate General
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European Theater of Operations
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8 FEB 1945

BOARD OF REVIEW NO. 1

CM ETO 6342

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private JOSEPH R. SMITH (33503967), attached unassigned 341st Replacement Company, 65th Replacement Battalion (formerly of Casual Detachment 13, 17th Replacement Depot)	Trial by GCM, convened at 187th General Hospital, Tidworth, England, 19 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for seven years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Joseph R. Smith, 341st Replacement Company, 65th Replacement Battalion, formerly of Detachment 13, 17th Replacement Depot, Ground Force Replacement System, did, without proper leave, absent himself from his organization at Camp Hinton Saint George, Somerset, England, from about 28 May 1944 to about 7 October 1944.

He pleaded not guilty to and, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions:

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one each by summary court and special court-martial for absence without leave for 98 and two days respectively, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence but remitted three years of the confinement, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

a. During June 1944 Casual Detachment 13 of the 17th Replacement Depot (for convenience hereinafter referred to as the 17th Depot) moved from Camp Hinton Saint George, England, to the continent. Prior to its departure it transferred some men, in various status, to the 65th Battalion of the 12th Replacement Depot (for convenience hereinafter referred to as the 12th Depot). First Lieutenant Lyle W. Loomis of the 12th Depot, testified that he was stationed at Camp Hinton as personnel officer of his unit and that in that capacity he received original official records pertaining to the men who were transferred. A morning report of the 17th Depot for 30 May 1944 was among these records. He stated that the records were turned over to him to take official custody of them. The prosecution offered in evidence an extract copy of this morning report of the 17th Depot certified on 18 December 1944 as a true and complete copy by Lieutenant Loomis as personnel officer of the 12th Depot. The entry indicates accused's status from duty to AWOL effective 28 May 1944. Defense counsel objected to the admission of the extract copy on the ground that Lieutenant Loomis was not the official custodian of morning reports of the 17th Depot (R4,5; Pros.Ex.1). The objection was overruled and the extract copy was admitted in evidence. Presumably defense counsel's objection was directed at the authentication of the extract copy.

b. As Prosecution Exhibit 2, over objection by the defense, the court admitted in evidence an extract copy of the morning report for 27 June 1944 of "Det 65 Ground Force Replacement System" i.e., the 12th Depot. The entry indicates accused's transfer from the 17th Depot in AWOL status. Lieutenant Loomis as personnel officer of "Det 65 GFRS" i.e., the 12th Depot, certified it on 18 December 1944 as a true and complete copy (R5-6). Captain John S. White, 341st Replacement Company, testified that accused had never been physically present in the company since he had been commanding (R8).

c. As Prosecution Exhibit 3, the defense stating it had no objection, the court admitted in evidence an extract copy of the morning report for 11 October 1944 of the 12th Depot. The pertinent part is as follows:

> "33503967 Smith, Joseph R. Pvt.
> Fr AWOL to abs hands of Mil Auth Yeovil, Somerset 0300 hours 7 Oct 44, abs hands Mil Auth Yeovil, Somerset to abs hands Mil Auth, Provost Marshal 12th Repl Depot, 10 Oct 44. EM held in 12th Repl Depot Guardhouse" (Pros.Ex.3).

It is certified by Lieutenant Loomis in identical form and of same date as the two previous prosecution exhibits. Corporal Gilbert J. Krackenberger, Headquarters Company, 12th Replacement Depot, testified that accused had been in the guardhouse since "October 10 or 15" (R9).

4. After an explanation of his rights, accused elected to remain silent (R10). The defense offered no evidence.

5. The only issues requiring consideration pertain to the rulings on the admissibility of the extract copies of the morning reports.

a. Though the trial record is not as explicit as it might be in reference to Lieutenant Loomis' relation to the 17th Depot, the Board of Review will take judicial notice of the peculiar transitory nature of personnel and administration of necessity prevalent in Replacement Depots. It may thus fairly be inferred that the 12th Depot became the successor to the 17th Depot and as such records of both units merged into the common legal custody of the personnel officer of the succeeding unit. Thus Lieutenant Loomis became the official custodian of original records of both the 12th and 17th Depots. In that capacity he was competent to certify extract copies from original records of either unit.

> "An extract copy of a morning report authenticated by an officer who certifies himself to be, or whose official signature indicates that he is, the custodian of the original, is admissible in evidence without further authentication by the commanding officer of the regiment or similar unit of which the organization is a part" (CM 197624 (1931), Dig. Op. JAG 1912-1940, sec.395 (17) p.212).

b. As heretofore noted (subpar. a., supra) Prosecu-

tion Exhibit 2, the morning report extract copy reciting accused's transfer in AWOL status was properly authenticated. Defense's objection was directed at the competency of the facts recited on the original morning report entry. Counsel asserted the entry was not the best evidence to prove the transfer in AWOL status. In a desertion case in considering the admissibility of an entry similar to the instant one, the Board of Review (sitting in Washington) stated the principle involved as follows:

> "The morning report entries were admissible to establish prima facie, the facts stated therein in so far as it was the duty of the commanding officer of the 3d Recruit Company to know the facts and to make a record of them. Par. 117a, M.C.M., 1928. The law presumes that public officers do as the law and their duty require them, and the presumption prevails until the contrary is shown. Op. JAG, Aug. 4, 1890, P. 42, 246. The entries therefore were admissible to establish the fact that the accused was assigned to the 3d Recruit Company and was absent without leave therefrom. It is the unqualified duty of a company commander to know what officers and men are assigned to his organization and to know their status, that is, whether present or absent and, if absent, whether with or without leave. The company commander's entries in the morning report as to such matters are therefore based on personal knowledge and are primary evidence of the existence of those facts" (CM 199270, Andrews, 3 BR 342).
>
> * * *
>
> "Morning report entries do not and are not intended to recite all preliminary or intermediate facts forming the basis of the authority for making them, and their administrative regularity must be and is presumed. For example, it is presumed, in the usual case, that the soldier was duly transferred to and assigned for duty with the organization from which the report reciting his absence without leave comes. It is only when the accuracy or regularity of the recital is impeached that the presumption falls" (CM 189682, Myers, 1 BR 179; quoted with approval in the Andrews case, supra).

In the instant case there was no attack on the verity of the report but conversely it was corroborated by the testimony of Captain White, the company commander, who testified that accus

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had never been physically present in the company since he had been commanding. The law member did not err in overruling defense's objection to the admissibility of this exhibit.

c. Prosecution Exhibit 3 was properly certified (sub-par. a., supra). The defense expressly stated it had no objection to its admission. There was no attack on the verity of what it reported and it was in fact corroborated by the testimony of Corporal Krackenberger. The Board of Review (sitting in the European Theater of Operations) recently ruled as admissible an extract copy of a morning report in which the entry, as in the instant case, reported accused's change of status from absent without leave to confinement. Prosecution Exhibit 3 was properly received in evidence (CM ETO 4740, Courtney; 28 USC 695, sec.1; 49 Stat. 1561).

6. The record contains competent and substantial evidence that accused did, without proper leave, absent himself from his organization at Camp Hinton Saint George, Somerset, England, from about 28 May 1944 to about 7 October 1944.

7. The charge sheet shows that accused is 20 years and one month of age and that he was inducted at Waynesboro, Pennsylvania, 12 March 1943 to serve for the duration of the war plus six months. He had no prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2 24 FEB 1945

CM ETO 6376

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, 8 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JAMES D. KING (34547867), Company C, 379th Infantry	)	

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

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

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

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

Specification: In that Private James D. King, Company "C", 379th Infantry, did, at or near Saarlautern-Roden, Germany, on or about 16 December 1944, while before the enemy, by his disobedience endanger the safety of his squad position, which it was his duty to defend, in that he refused to stand his tour of guard.

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

(8)

Specification: In that * * * having received a lawful order from Sergeant Frank A. Volpe, Company "C", 379th Infantry, to go on guard, the said Sergeant Frank. A. Volpe, being in the execution of his office, did, at or near Saarlautern-Roden, Germany, on or about 16 December 1944, fail to obey the same.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of both charges and specifications. Evidence was introduced of four previous convictions by special court-martial, one for absence without leave for one day, breaking restriction and making a false statement, in violation of Articles of War 61,69, and 96; two for absence without leave for one day and two days respectively in violation of Article of War 61 and one for failure to obey an order of a superior officer, in violation of Article of War 96. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for 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's evidence shows that the second platoon of Company C, 379th Infantry, on 16 December 1944 was fighting in Saarlautern-Roden, Germany (R7). They had just completed an attack on the enemy, and at about one or two o'clock in the afternoon had cleared some prisoners out of a building, had set up their security and guard and were awaiting further orders. The platoon was cut down to 17 men at the time. They had made up a guard roster and had arranged security (R8) which was continuous day and night. No man had to stand a double shift (R9) and had four hours off and two hours on guard. There was no break in the guard from the time the house was taken (R25). Two heavy machine guns were in the room on the ground floor (R8,14,19,20,21,25), at the front of the house with three men in support, one man was in front in the hallway and one man in the rear door of the building, also covering the cellar in such a position that the first man could see the second (R21). This was all the security they had (R21-22). The men who were not on guard were to keep out of sight downstairs in the cellar where they slept (R8,22). The Germans held the building across the street variously estimated to be 20 or 30 feet distant (R8,10) to 50 yards (R11), and there was enemy firing on the street continuously all night (R7,8,19, 22). These were the conditions prevailing at nine o'clock in the evening of that day (R7).

Private First Class Charles H. Gwathney of the platoon attempted to wake accused at 15 minutes to nine that night, for guard duty (R11,15,18) but when awakened, accused continued to lay there and although he was called three times over a period of ten minutes, he did not get up (R11) but just said, "OK, I'll get up in a minute" (R12). Sergeant Frank A. Volpe of the same platoon had awakened Gwathney, whose duty it was to get the others on the shift up (R22) and he was standing at the head of the stairs, heard the shouting and went downstairs. Gwathney was trying to get accused up and Volpe shook him and told him to get up without result. Volpe then gave accused a direct order, repeated two or three times, to go on guard and accused shouted at the top of his voice "Are you going to make me go on guard" (R12,18,23). As the enemy was just across the street (R23) and there were openings all over the cellar covered only by blankets (R24) and accused was exceptionally loud (R12,13,14,18,23) they were forced to do something so Volpe pulled him up from the bed and told him to quiet down. Accused kept talking and Volpe with closed fist (R24) struck him once across the face when accused tripped and fell (R13,16,23). He continued to talk and yell and Volpe (R23) who was very angry (R24) struck him in the face again (R13,23) whereupon accused loudly stated, "By God, I am not going on guard now at all" (R13). The noise awakened Platoon Sergeant Bundy who asked what was going on. When told, he said to accused, "Just forget what they said, I'm ordering you to go on guard". Bundy repeated the order twice to accused who replied, "By God, I am not going on guard, now, at all" (R13). Bundy then said, "OK, forget about it, we'll take care of him later" (R24,27). Accused had been sleeping with his shoes (R16) and his other clothing on (R18). Gwathney had gone from the cellar to his post and accused was to have the BAR as security from the rear. Gwathney went to the rear to take accused's place, and covered two posts as accused's failure to go on guard left them short one man, there being no other man to take his place (R25). At the time of the trial Sergeant Bundy was in the hospital (R14-15).

4. Accused, as the only defense witness, testified that he was first on guard duty on 16 December, from five to seven o'clock, and was then to have four hours off, from seven till eleven o'clock. He pulled off his shoes when he came off duty at seven o'clock and went to bed in the cellar. The next he remembered Sergeant Volpe pulled his covers off and said, "Get the hell up and go on guard" (R30). He raised up to put his shoes on when Volpe repeated the order twice and was told by accused to "Take it easy". When he got his shoes on and stood up, Volpe hit him in the eye with his doubled fist. He had gotten up voluntarily but fell down when hit and on getting up again, Volpe again hit him in the face with the flat of his hand (R31). He denied he ever said he would not go on guard.

Then Sergeant Bundy came over and told Sergeant Volpe, "Never mind, we'll take care of him when we get to the rear. We're leaving tonight at twelve". Bundy then returned to the phone and Volpe disappeared (R32). Accused was not placed under arrest at that time but "just sat there. He told me not to go on guard". He testified that there was only one machine gun in the front of the house and he had helped set it up (R33,35,37). He admitted he was yelling loud enough to be heard in the next room and that he knew the Germans were near (R33) but they couldn't hear the way he was talking (R34). He denied Gwathney woke him up (R34,36) and insisted that the incident occurred about a quarter to eleven (R34-37).

Sergeant Volpe, recalled as a prosecution witness, testified that when he shook him to get him up, accused had his shoes on and that it was more than five minutes after giving accused the order to get up that he struck him (R38).

5. "Any officer or soldier who, before the enemy, misbehaves himself * * * or by any misconduct, disobedience, or neglect endangers the safety of any fort, post, camp, guard, or other command which it is his duty to defend * * * shall suffer death or such other punishment as a court-martial may direct" (Article of War 75).

"Misbehavior is not confined to acts of cowardice. It is a general term and as here used /in AW 75/ it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms. * * *

Under this clause may be charged any act of treason, cowardice, insubordination or like conduct committed by an officer or soldier in the presence of the enemy" (MCM, 1928, par.141a, p.156).

The essential elements of proof are (a) that accused was serving in the presence of an enemy; and (b) acts or omissions of the accused as alleged (MCM, 1928, par.141a, p.156).

This offense (a violation of AW 75) may consist in

"such acts by any officer or soldier, as * * * refusing to do duty or to perform some particular service when before the enemy. * * * The offence may be committed in a fort or other

> military post as well as in the open field, - as where an officer or soldier fails or neglects properly to defend or guard the post or its approaches, when threatened, attacked or beseiged by the enemy. * * * The act or acts, in the doing not doing, or allowing of which consists the offence, must be conscious and voluntary on the part of the offender" (Winthrop's Military Law and Precedents, 1920, Reprint, p.623).

The evidence shows and accused admits that his platoon was located just across the street from the enemy by whom they were under fire. They were before the enemy (CM ETO 1249, Marchetti). There is a conflict between the story of accused and that of the other witnesses in part only. Accused denied he ever said he would not go on guard but the testimony of the other witnesses is that he did not get up, that he failed to obey the repeated orders given him and that finally he definitely refused to obey the order. This was a question of fact which the court alone may decide and whose decision unless palpably in error, may not be disturbed upon review (CM ETO 1191, Acosta; CM ETO 1953, Lewis).

The phrase "which it was his duty to defend" may be rejected as surplusage as the remaining allegations state facts sufficient to constitute an offense under the clause of the Article which declares that "any * * * soldier who, before the enemy, misbehaves himself * * * by any misconduct, disobedience or neglect" is guilty of an offense (CM ETO 1249, Marchetti).

That such order as alleged was repeatedly given accused is shown by the evidence and admitted by accused. He denies that he refused to obey the order but it is clearly shown and admitted by accused that he did not obey the order to go on guard.

The Board of Review is of the opinion that the court was warranted in finding accused guilty of violation of the 75th Article of War at the time and place and in the manner alleged.

6. The charge sheet shows that accused is 20 years and seven months of age. Without prior service, he was inducted 10 March 1943.

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

(12)

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. 2 14 MAR 1945

CM ETO 6380

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private ROBERT J. HIMMELMANN (37613271), 217th General Hospital	Trial by GCM, convened at United States Naval Base, Exeter, Devonshire, England, 1-4 November, and at Burnshill Camp, Depot G-50, Norton-Fitzwarren, Somerset, England, 13 and 18 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. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Robert Joseph Himmelmann, 217th General Hospital, APO 645, U.S. Army, did, at or near Exeter, Devonshire, England, on 3 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Phyllis Irene Kent, a human being, by stabbing her with a knife.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification and the Charge. No evidence of previous con-

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

3. The evidence for the prosecution shows that deceased was a private in the British Auxilliary Territorial Service, billeted at Rowancroft, an "ATS" Hostel, at Exeter, Devonshire, England (R35,39). Her room was on the ground floor near the stairway leading from the entrance hall to the first floor (R36-37). At approximately 2200 hours 3 August 1944, she ran screaming from the direction of her room into the hall and halfway up the stairs (R71,76-78,80), where she collapsed (R78). Blood spurted from a knife wound at the base of her neck in the region of the collar bone and on the left side (R98,107) and she said to the girls who quickly gathered around her that she was dying - bleeding to death - and that she had been attacked in her room by an American soldier (R54,88,90,98-99,200). Despite first aid and hospital treatment, she died about an hour later from the effects of the wound (R11-17,103,107). Deceased was wearing at this time a white woolen jumper (R175).

Accused, leaving the hostel hurriedly, was encountered by girls entering the front door, attracted there by deceased's screams (R40,41,52,84,143). He was immediately pursued by several persons who were just outside the hostel when he emerged (R40-41,52,143). Running fleetly along the highway, he kept ahead of them for about a hundred yards, then dived into some bushes bordering a drive (R41,113). One of his pursuers, executing a flying tackle of accused through the shrubbery, fell with him into the ditch on the opposite side and was assisted by the immediate arrival of others. Accused lay there on the ground in an unconscious or semi-conscious condition for about three-quarters of an hour until the police arrived (R113,149,155-157). He was searched and a bloodstained knife was removed his pocket (R156,Ex.I). The field jacket he was wearing was bloodstained (R167, 170). His breath was alcoholic , he had smears of blood on his face (R118) but no injury (R131) and had to be carried to the car in which he was transported to the police station, and again when he was removed from the police station to the hospital some two hours later. He was not drunk (R117,118,119,156-161).

Earlier that evening , beginning about 1800 or 1830 hours, accused with a fellow soldier had drunk beer, whiskey and gin

at various pubs in Exeter, then visited a fish and chips shop, where they met two British civilian girls (R23-24,27). The four left together for a walk, accused and one girl maintaining a distance of about fifteen paces behind the other couple (R31). Accused did not appear drunk at that time (R25,31,45). As they passed Rowancroft accused disappeared. His comrade left the two girls and entered the shrub-bordered drive of Rowancroft in search of the accused (R24-25,27). Through an open window of the recreation room, he inquired of "ATS" girls inside if they had seen him. Learning that they had not, he abandoned his search and returned to his station alone (R25,31-32,50-51). A few minutes after his comrade left Rowancroft, accused approached the same window and was told that his friend had been looking for him. He stood there, winked at his informant, then proceeded toward the front door of Rowancroft (R51-52). About 2130 hours the "ATS" company sergeant major saw him at the foot of the stairs and asked him what he was doing there. He muttered unintelligibly, staring in an abstracted manner, so she told him to clear out. He made no move until she seized his arm and turned him round, whereupon he walked out quickly. She followed him outside, found him concealed in the shrubbery near the drive, and again told him to leave. He remained where he was without speaking. After informing him that she was going to do so, she telephoned for the military police. She then returned to the driveway and engaged in conversation with some of the girls and their escorts who had just arrived, when she heard deceased's screams. She saw accused run out of the front door, tried unsuccessfully to trip him and joined in the chase (R39-40). Accused was not drunk (R45,55,81).

Another "ATS" girl, going downstairs to the bathroon which was near deceased's room on the ground floor, saw accused at the foot of the stairs a few minutes before deceased started screaming. This last witness asked accused "what he thought he was doing in the house as he had already been ordered out" (R70-71). She then proceeded to the bathroom and started running her bath but before it was ready she heard deceased's screams and followed her as she ran up the stairs (R71,78-79).

A qualified pathologist and medical practitioner testified that he performed the post mortem on deceased and found that death was caused by hemorrhage and shock due to a stab wound of the upper left chest by a sharp instrument which had penetrated a distance of 4½ centimeters obliquely inwards and downwards, severing two large veins and puncturing the apex of the left lung (R172-174). He took a blood type of deceased and found it to belong to group "O". Her jumper and brassiere were saturated with blood of this type. He also analyzed the stains in a field jacket and on a knife brought to him by an agent of the Criminal Investigation Division, of the United States Army and found the stains on each to be human blood, type "O". The blade of the knife also had adhering to it several fine fibres, one of which was a woolen fibre identified with the fibres of the jumper (R176,180). The assistant of the Chief of Labratory

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Service, 67th General Hospital, with the consent of accused, typed his blood and found it to belong to type "A" (R188).

Prior to the trial, after proper warning, accused made a statement that he remembered nothing from the time he was walking with the civilian girls whom he had met in the fish and chips shop until he awoke in the hospital the next morning. He acknowledged ownership of the bloodstained knife and stated it was in his possession when he left the barracks on the evening in question. He further stated that he did not know how the blood got on his knife or on his field jacket (R190-191, Ex.M).

During the trial, court adjourned 4 November 1944, to permit an examination into the mental condition of accused (R203-205). On 18 December the trial was resumed (R214). Captain Charles Lawrence Holt, Medical Corps, testified that he was a member of a regularly appointed medical board which conducted such an examination, as a result of which the board concluded that accused "was sane and responsible after the time that we saw him under interview and at the time of the alleged incident" (R215).

4. For the defense, Captain Henry Peskin, Medical Corps, testified that at about 0100 hours 4 August 1944, accused was brought into the station hospital where witness was detailed as administrative officer (R229,232). Peskin was present and observed accused's condition during a physical examination which consumed about 45 minutes (R229,231). Accused was in an alcoholic stupor (R229,232) and his condition was such, at that time, that he "could probably have been not as (sic) responsible for his actions within the previous thirty minutes". As the net result of his examination witness could draw no conclusion as to accused's condition three hours prior thereto (R231).

5. After accused's rights were explained to him, he elected to remain silent (R232).

6. The record of trial indicates, beyond a reasonable doubt, that accused inflicted upon deceased the stab wound which resulted in her death an hour thereafter. The chain of significant circumstances established by abundant uncontradicted testimony appears here "more convincing than a plausible /eye/ witness" (MCM, 1928, par.112b, p.111). Moreover, accused's conduct prior to and immediately following the stabbing supports the inference that "an intention to cause the death of, or grievous bodily harm to /the prosecutrix/" coexisted in accused's mind with the act which caused her death (Ibid., par.148a, p.163).

> "A sane person is presumed to have intended the natural and probable consequences of acts which he is shown to have committed. * * * Malice is presumed from the use of a deadly weapon" (Ibid., par.112a, p.110).

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Accused's knife, as used, was such - and "malice aforethought may exist when the act is unpremeditated" (Ibid., par.148a, p.163).

The sole remaining issue is his sanity. During the trial the court adjourned for a period of more than a month to permit a properly constituted medical board to examine and report on the mental condition of accused at the time of the offense and at the time of the trial. The board concluded he was sane and responsible for his acts at both times. Although the board did not know the exact quantity of liquor accused had consumed on the evening of and prior to the offense, they knew it was considerable and they had information as to his physical condition when apprehended. The only testimony that might be regarded as tending to suggest mental incapacity at the time of the offense was Captain Holt's opinion that a person could consume enough intoxicating liquor to relieve him of responsibility for his actions; and Captain Peskin's opinion that, three hours after the offense, accused was in such an alcoholic stupor as to indicate that his sense of responsibility was affected during the previous thirty minutes. Although the evidence shows that accused had been drinking heavily a short time prior to the offense, his studied persistance in re-entering Rowancroft, and his prompt, spirited, and almost successful attempted escape, manifest purpose, coordination and an awareness, for the time being, of the situation then existing, adequate to support an inference of intent and concomitant responsibility. The court's determination, in this regard, is therefore final (CM ETO 3812, Harshner).

7. The charge sheet shows that accused is 19 years nine months of age, and that he was inducted at Jefferson Barracks, Missouri, 28 April 1943. No prior service is shown.

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

9. Confinement in a penitentiary is authorized for the crime of murder (AW 42; Federal Criminal Code, sec.275; 18 USC 454). The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement is proper (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1 9 FEB 1945

CM ETO 6383

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private CLARK D. WILKINSON (33692878), attached unassigned, 341st Replacement Company, 65th Replacement Battalion.	Trial by GCM, convened at 187th General Hospital, Tidworth, England, 19 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 12 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private Clark D. Wilkinson, 341st Replacement Company, 65th Replacement Battalion, did, without proper leave, absent himself from his organization at Camp Hinton, St. George, Somerset, England, from about 27 June 1944 to about 23 October 1944.

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

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Specification: In that * * * did, at Yeovil, England on or about 23rd October 1944 without proper authority, wrongfully take and use for his own pleasure and benefit one 1/4 ton 4x4 truck, the property of the United States Government, furnished and intended for the military service thereof.

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

Specification: In that * * * did, without proper leave absent himself from the 12th Replacement Depot Guardhouse, Tidworth Barracks, Tidworth, Wilts, England, from 8 November 1944 to about 9 November 1944.

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

Specification: In that * * * having been duly placed in confinement at 12 th Replacement Depot Guard House about 30 October 1944, did escape from said confinement at 12th Replacement Depot Guard House, Tidworth Barracks, Tidworth, Wilts, England, about 8 November 1944, before he was set at liberty by proper authority.

He pleaded not guilty, and was found guilty of all charges and specifications. Evidence was introduced of two previous convictions by special court-martial for absence without leave for six and 25 days respectively in violation of the 61st Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence but reduced the period of confinement to 12 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial contains competent and substantial evidence to establish all the offenses of which accused was convicted. The only question for determination presented by the record is whether penitentiary confinement is authorized for any of the offenses herein.

District of Columbia Code, Title 22, section 2204 (6:62) defines the offense of unauthorized taking and using of a motor vehicle of another and provides as punishment "a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment". District of Columbia Code, Title 24, section

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401 (6:401) provides in pertinent part that "where the sentence is imprisonment for more than one year it shall be in the penitentiary". Article of War 42 authorized penitentiary confinement where the offense is punishable by penitentiary confinement by "some statute of the United States, of general application within the continental United States, * * * or by the law of the District of Columbia". It follows therefore that penitentiary confinement is authorized for the unauthorized taking and using of a government vehicle.

4. The charge sheet shows accused is 27 years and four months of age and that he was inducted at Pittsburg, Pennsylvania, 9 June 1943, 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 and the sentence.

6. Confinement in a penitentiary is authorized for the offense of unauthorized taking and using of a government vehicle (par.3, supra). Article of War 42 authorizes penitentiary confinement upon conviction of two or more acts or omissions, any of which is punishable by confinement in a penitentiary. Inasmuch as the sentence includes confinement for more than ten years, the designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b as amended).

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens, Jr. 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 6 APR 1945

CM ETO 6397

U N I T E D S T A T E S	LOIRE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private First Class DON BUTLER (36791393), 577th Quartermaster Railhead Company	Trial by GCM, convened at Palais de Justice, Le Mans, France, 14 November 1944. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for six years. Loire Disciplinary Training Center, Le Mans, France.

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 and sentence. The record of trial has now been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General in charge of said Branch Office.

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

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

Specification 1: In that Private First Class Don Butler, 577th Quartermaster Railhead Company, did, at Le Mans, France, on or about 15 September 1944, with malice aforethought, willfully, deliberately, feloniously and unlawfully, drive a quarter-ton 4 x 4 truck (a motor vehicle of the United States Army) at excessive speed, and with complete disregard for probable consequences, upon and over a public place in said city where many other vehicles and pedestrians were then readily observable, and did thereby strike and kill Madame Madeleine Papin, a human being.

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Specification 2: In that * * * did, at Le Mans, France, on or about 15 September 1944, with malice aforethought, willfully, deliberately, feloniously and unlawfully, drive a quarter-ton 4 x 4 truck (a motor vehicle of the United States Army) at excessive speed, and with complete disregard for probable consequences, upon and over a public place in said city where many other vehicles and pedestrians were then readily observable, and did thereby strike and kill Monsieur Auguste Trouillard, a human being.

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

Specification: In that * * * did, at Le Mans, France, on or about 15 September 1944, without authority, wrongfully take and use a motor truck, quarter-ton 4 x 4, value more than fifty ($50.00) dollars, property of the United States Army.

He pleaded not guilty and was found guilty of specifications 1 and 2 of Charge I, except, in each case, the words "with malice aforethought", "deliberately", and "and with complete disregard for probable consequences where many other vehicles and pedestrians were then readily observable", of the excepted words not guilty; not guilty of Charge I, but guilty of violation of the 93rd Article of War; and guilty of Charge II and the Specification thereunder. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for six 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 by General Court-Martial Orders Number 22, Headquarters Loire Section, Communications Zone, European Theater of Operations, APO 573, 30 November 1944.

3. The prosecution's evidence may be summarized briefly as follows:

On the evening of 15 September 1944, accused and three other colored soldiers of his company drank two bottles of calvados in accused's tent. Accused drank more than two-thirdsof one of these bottles (R12). The group separated about 2030 hours and accused was not seen again that evening by his companions (R7,8,9,11,12). Later, at about 2100 hours, a government jeep containing two soldiers was observed going at a high rate of speed and zigzagging along Rue de Tesse in Le Mans, France. Witnesses could not say whether the soldiers were white or colored. The vehicle struck a push cart which was being propelled by Albert Papin, of 39 Rue du Pre, Le Mans, France, then accompanied by his wife, Madeleine Papin. Auguste Trouillard, on or with his bicycle, was near by (Pros.Ex.11). Madame Papin and Trouillard each received at the time of this collision a mortal injury which caused the immediate

death of the former and the death of the latter on the day following (R19,22,23,24,26,27,28; Pros.Ex. 10). The jeep went on after the collision without stopping (R28). At about 2230 hours, a jeep numbered 20330219 was discovered on highway N-23, about six miles from Le Mans (R40). It was in a ditch, tilted at an angle of about 45 degrees (R36). Accused was lying in an unconscious condition along the right side of the vehicle, his head toward its rear and his feet on the step. He bore no evidence of injury (R29,31,32,33,36,37). The following morning it was noted that this vehicle was missing from accused's organization and had been taken without authority (R14). Examination of the vehicle disclosed a substance which looked like blood on the windshield, hood, and side of the bumper, which was broken. The hood was dented where most of this "blood" was found (R31,33,37,38,42,43,45,46).

At the close of the prosecution's evidence, the defense asked for an acquittal on the ground that no evidence showed that accused "was ever in this vehicle on the night alleged" (R52). The motion was denied (R55).

4. a. For the defense, the testimony of Major Frederick W. Gieb, Medical Corps, 19th General Hospital, who was "experienced in neurology, many cases of alcoholism", showed that his examination of accused when "it was getting on toward midnight" (R62) on 15 September 1944 disclosed no injury and "we couldn't find even a hair out of place" (R62), but

> "The man was paralized drunk and in addition he seemed as if he had been drugged. He was more than the usual type of intoxicated person that we see. I had a blood alcohol study done on him which came out to 330 milligrams per cent. That is a tremendous amount of alcohol in a man's system. There was also a heavy odor of ether from the test that you never see in an ordinary drunken person" (R56).

Accused was "immobile, as it were, out cold". He "wouldn't respond". Most drunken people, no matter how drunk, can be slapped or punched so that some sort of reaction is obtained, but accused was

> "just like a limp doll and there was no motion. You could slap him or punch him and there was no reaction - - he was dead, but breathing" (R58).

In the opinion of the witness, accused was drugged, he "was different than the ordinary type of drunken, stagnant drunk type of case that you get" when compared with the "thousands of /drunken/ cases" he had seen (R58). It would have been impossible for accused to have been driving up to 2229 hours that day "with 330 milligrams per cent of alcohol" because

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> "When you have 200 milligrams per cent of alcohol you really have a tremendous amount of alcohol in your blood and the experience I have had with the soldiers with high alcohol contents in their blood you rarely see one over 230 milligrams per cent and I can't remember of one as high as this one, just from the use of blood alcohol test, which of course is common in the Army. Our experience is much more on the Army type of drunkenness. The cases that I have seen over the years that I have been in the Army have been very rarely much more than 250 milligrams per cent" (R61).

In answer to a hypothetical question the witness gave his opinion that a normal individual who takes approximately one-half to three-quarters of a liter of alcoholic beverages containing ethyl alcohol at about "one-twenty to one-forty proof" in a period of from one-half hour to one hour shortly after a "normal Army evening meal" will not be on his feet

> "much after one hour to an hour and a half after he stopped drinking. I am going to the maximum amount that he could have stood on his feet. I know I couldn't do it. That would have to be a pretty rugged individual, indeed" (R61).

Asked "If this person had no supper and started drinking at six in the evening, at what time would he have been off his feet?" he answered:

> "One hour. I think alcohol of that proof which is 70 per cent alcohol on an empty stomach, the man ought to have been paralyzed very rapidly",

and the witness indicated that would be by 2000 hours (R62). Accused was "coming to" around 0800 hours the next morning and was answering questions coherently and intelligently by 1000 hours (R63).

Captain Henry H. Leber, accused's company commander, testified that he had known accused since May 1944. His character was excellent and he used accused in various capacities as supply clerk and checker. He promoted him from private to private first class and had been considering him as a noncommissioned officer as soon as a vacancy occurred. He never had trouble with accused concerning alcohol and never knew him to be drunk before (R64).

b. After his rights were explained (R64-65) accused elected to be sworn and testified that on the night of 15 September 1944 he "didn't have any chow" because of duties which pevented it. Three men came into his "pup tent" and they started drinking at about 1745 hours. He recalled drinking the first bottle and they had started the second

bottle when "one by one we started dropping out". He had to go to the latrine and started out of his tent. He knew it was then about 1945 hours because he heard "the Corporal of the Guard calling the guards that the third relief for guard was to go on and that it was getting late". He stepped in a hole and remembered no more until "the next morning I was in the 19th General Hospital and Major Gieb was standing over me" (R66-67).

5. Although it is generally recognized that a conviction may be supported by circumstantial evidence alone (CM ETO 3200, Price; CM ETO 2686, Brinson and Smith), "circumstantial evidence must not only prove all the elements of the offense but must at the same time exclude every reasonable hypothesis except guilt" (CM 233766 (1943), Nicholl, 20 BR 121; II Bull.JAG, sec.453, p.238). A conviction upon circumstantial evidence is not to be sustained unless the circumstances are inconsistent with innocence (People v. Galbo, 218 N.Y. 283, 112 N.E. 1041, 2 ALR 1220, and authorities therein cited).

There is no direct evidence of accused's participation in any of the acts alleged in the charges and specifications. The testimony of Major Gieb most convincingly indicates that accused, because of drunkenness that reduced him to a rare and astonishing state of inebriety by 2000 hours on 15 September 1944, was then physically incapable of either operating or taking a motor vehicle as alleged. That he was at that time "paralized drunk" was made impressively manifest by the alcoholic content of his blood as revealed by test thereof taken just before midnight on 15 September and which warranted the witness' descriptive hyperbole that he then was "dead, but breathing" (R58). How the "dead" drunk accused came to be lying, unscratched and unhurt, beside the ditched government jeep is a matter of conjecture. (See CM ETO 339, Gage, wherein the effect of proof of intoxication to the degree that it incapacitates an accused from commission of a criminal act is discussed).

The record of trial reveals, therefore, no direct or sufficient circumstantial evidence that accused operated the government vehicle at the time and place alleged in the specifications of Charge I, or that accused took or used the vehicle as alleged in Specification of Charge II. In accordance with the foregoing authorities, the Board of Review is of the opinion that the record of trial is legally insufficient to sustain the findings of guilty and the sentence, which therefore are invalid and should be vacated.

6. The charge sheet shows that accused is 27 years ten months of age and was inducted 28 July 1943. No prior service is shown.

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

B. Franklin Peter Judge Advocate

Wm. F. Simpson 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. 6 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private First Class DON BUTLER (36791393), 577th Quartermaster Railhead Company.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which he has been deprived by virtue of said findings and sentence so vacated be restored.

3. The accused may still be tried for being drunk under circumstances discrediting to the service and for any other offenses not included in the instant charges.

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

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

Incl. 1 - Record of trial
Incl. 2 - Form of Action
Incl. 3 - Draft GCMO

((Findings and sentence vacated. GCMO 167, ETO, 17 Sept 1945).

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

BOARD OF REVIEW NO. 1

25 JAN 1945

CM ETO 6405

U N I T E D S T A T E S	FIRST UNITED STATES ARMY
v.	Trial by GCM, convened at Soumagne, Belgium, 24 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.
Private JACK BECKETT (14044534), 3687th Quartermaster Truck Company	

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 found legally sufficient to support the sentence.

2. Confinement in a penitentiary is authorized for the offense of assault with intent to do bodily harm with a dangerous weapon by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). Prisoners, however, under 31 years of age and under sentence of not more than ten years, will be confined in a Federal correctional institution or reformatory. The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1a (1),3a).

_____ Judge Advocate

Malcolm C. Sherman Judge Advocate

Edward L. Stevens, Jr. 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. 2 14 MAR 1945

CM ETO 6406

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, 1 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JAMES D. WAY (14037076), Company M, 28th Infantry	

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

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

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

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

Specification: In that Private James D. Way, Company M, 28th Infantry, did, at or near Vossenack, Germany, on or about 13 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, and did remain absent in desertion until he surrendered himself at Eupen, Belgium, on or about 17 December 1944.

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

Specification: In that * * * did, at or near Vossenack, Germany, on or about 19 December 1944, misbehave himself before the enemy when, having received a lawful command from First Lieutenant Robert F. Spurrier, 28th Infantry, his superior officer, to get ready and go back to his company, which was then engaged with the enemy, willfully disobey the same.

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

3. The evidence for the prosecution shows that accused, a member of M Company, on or about 10 December 1944, was temporarily attached to K Company, which was then engaged in an attack, during the course of which, the enemy broke through and cut off the machine gunners from the rest of the riflemen (R16). Accused was a member of the detachment thus isolated and one of its five survivors who, about an hour later, withdrew through the woods after their group had suffered "quite a few" casualties and had had one of its guns knocked out (R17). These survivors succeeded in finding "the battalion" the following morning, after spending the night in the woods. When they reported to the battalion executive, the sergeant in charge was instructed to send the men to dugouts, then take them back to K Company on the opposite hill - and to be ready to move out at a minutes notice. Accused, who was with the sergeant, told him that "he couldn't do it, he had tears in his eyes, he said he went through a lot of hell, he looked like on the verge of fatigue and said he is going back to the medics"(R17). The sergeant gave him permission to go and thereafter to the battalion executive about accused's "going to the medics"(R17).

Two days later on 13 December accused arrived at the field train from the hospital. He was re-equipped by the M Company supply sergeant and conducted by him to the M Company command post in Vossenack (R7,9-14,18-19). A little later when ready to move up accused could not be found. He returned to the supply sergeant's rear station

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three times and stated to him that "he didn't want to go up there" (R10). The battalion, at that time, was in line nearby, in contact with the enemy and continuously attacking, while subjected to artillery, mortar and small arms fire - "everything the jerry had" (R7, 16,18,19). Accused was a gunner and ammunition carrier (R16,19). His duty was up in the front line (R19). Accused's absence was reported by the platoon leader to the company commander, First Lieutenant Joseph C. Hillman. Neither the platoon leader or company commander, who were continuously on duty between the 13th and 27th of December 1944, saw accused during this period, and he had no permission to be absent from his organization. The prosecution and defense stipulated that accused voluntarily returned to military control at Eupen, Belgium, on 17 December 1944 (R15,16,19,22).

The evidence further shows that on 19 December 1944, accused was under guard (R9,21) at a motor pool located roughly four or five miles behind the line under command of the motor officer, First Lieutenant Robert F. Spurrier. Lieutenant Spurrier was instructed to equip the accused and have him report to his company that evening. He "instructed Way to get his equipment and come up with me to the company with the chow vehicles that evening". The accused replied: "I don't see why I should have to go up there, I'm going to be court-martialed anyway". The instruction was given the accused as an order of a commissioned officer which the accused said he "realized" and when asked if he refused to obey said "he was going to be court-martialed anyway". He did not go to the company (R21).

4. After an explanation of his rights, accused elected to remain silent. No evidence was introduced by the defense.

5. As to Charge I and its Specification, competent uncontradicted evidence establishes that accused absented himself without proper leave from his organization on 13 December 1944 and that he remained absent without authority until he surrendered himself to military control at Eupen, Belgium on 17 December 1944. At the time of his initial absence his battalion was in the front line attacking the enemy and was subjected to heavy German artillery, mortar and small arms fire. Accused was a gunner and ammunition carrier and his duty required his presence and services in the front line. Instead of contributing his part to the assault against the enemy, accused, newly returned, re-equipped, from the hospital, refrained from reporting to his platoon for combat duty but took it upon himself to go back to the rear, without authority, remaining there in unauthorized absence for a period of four days while the battle with the enemy continued. Although the evidence shows that accused had recently suffered combat fatigue and that during his absence, he stated to a companion that he was sick, these somewhat alleviating circumstances in no sense preclude the inference that his unauthorized absence was motivated by the specific intent to avoid hazardous duty, within the meaning of Articles of War

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58,and 28, as charged (CM ETO 1400,Johnson; CM ETO 2473, Cantwell; CM ETO 5555, Slovik and authorities cited therein).

Concerning Charge II, the evidence shows that on 19 December 1944 accused, while a prisoner under guard, was given a direct order by a superior officer to prepare his equipment and to return to his company which was engaged in combat with the enemy. At this time accused was at the motor pool located about four or five miles behind the front lines. He refused to go back to his unit, stating that he was going to be court-martialed anyway. The fact that he was a prisoner under guard did not relieve him of his obligations to perform military duties assigned to him by proper authority. In this instance the order involved an opportunity to demonstrate his worthiness as a soldier, despite his recent lapse. It was a challenge to his courage and his self respect. His refusal was - from a military point of view - clearly misbehavior. Although at the time the order was given accused was not in the front line in actual conflict with the enemy his battalion and company were engaged in combat with the enemy. "The words 'before the enemy' mean * * * in contact with the enemy, either in the front line in actual conflict or in reserve immediately to be engaged" (Dig. Op. JAG, 1912-1940, sec.433(2), p.303) (See also CM ETO 2602, Picoulas and authorities cited therein). Accused knew his organization was in contact with the enemy and actual fighting was in progress. He succeeded in avoiding the hazard incident to combat with the enemy, by failing to comply with the order to rejoin his organization. Such conduct under the circumstances constitutes an act of misbehavior before the enemy within the meaning of Article of War 75 (Winthrop's Military Law and Precedents, Reprint 1920, p.622-623). The Board of Review is of the opinion that the findings of guilty of Charge II and its Specification are sustained by substantial evidence (CM ETO 4820, Skovan; CM ETO 5114, Acers; CM ETO 6177, Transeau and authorities cited therein).

6. The charge sheet shows that accused is 22 years of age and that he enlisted without prior service, 12 December 1940.

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

8. The offenses of desertion and misbehavior before the enemy in violation of Articles of War 58 and 75, respectively, are punishable as a court-martial may direct, including death, if committed in

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time of war (AW 58,75). The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 2 1 MAR 1945

CM ETO 6428

U N I T E D S T A T E S v. Private First Class VASCO BOSTIC (36792548) and Privates EWING SWEATT (34716305) and JESSE J. THOMPKINS (33746781), all of 533rd Port Company	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Newport, Monmouthshire, South Wales, 7,8 November 1944. THOMPKINS Acquitted. Sentence as to BOSTIC and SWEATT: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification 1: In that Private Jesse J. Thompkins, 533rd Port Company, Private Ewing (NMI) Sweatt, 533rd Port Company, and Private First Class Vasco (NMI) Bostic, 533rd Port Company, acting jointly, and in pursuance of a common intent, did, at or near Abertillery, Monmouthshire, England, on or about 5 August 1944, with intent to do bodily harm, commit an assault upon Master Sergeant Harry Hensley, by striking him on the head with a dangerous weapon, to wit: a pistol.

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Specification 2: In that * * * acting jointly and in pursuance of a common intent, did, at or near Abertillery, Monmouthshire, England, on or about 5 August 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of First Lieutenant CLARENCE A. DERMONT, one (1) Hamilton wristwatch, the property of the United States Army, value about $15.10.

Specification 3: In that * * * acting jointly, and in pursuance of a common intent, did, at or near Abertillery, Monmouthshire, England, on or about 5 August 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Master Sergeant Harry Hensley, two (2) billfolds and currency, the property of the said Master Sergeant Harry Hensley, value about $150.00

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

Specification: In that * * * acting jointly, and in pursuance of a common intent, did, at or near Abertillery, Monmouthshire, England, on or about 5 August 1944, strike First Lieutenant CLARENCE A DERMONT, their superior officer, who was then in the execution of his office, on the head, body, and limbs with pistols, their fists, and kicked him with their feet.

Each accused pleaded not guilty and, three-fourths of the members of the court present when the vote was taken concurring, accused Bostic and Sweatt were each found guilty and accused Thompkins was found not guilty, of all charges and specifications. No evidence of previous convictions was introduced as to any accused. Three-fourths of the members of the court present when the vote was taken concurring, Bostic and Sweatt 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 the term of his natural life. The reviewing authority approved each sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of both accused and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

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3. Evidence for the prosecution shows that at about 2 o'clock on the morning of 5 August 1944, First Lieutenant Clarence A. Dermont, with Master Sergeant Harry Hensley as driver, stopped his vehicle, a ¼ ton reconnaissance car, at a crossroads near Abertillery, Monmouthshire, Wales; another "jeep" which was "very crowded" went by at an excessive rate of speed. He followed it for 3 or 4 miles and finally overtook it. When halted, three colored soldiers and four white women were observed in this vehicle. Lieutenant Dermont asked the driver for his dispatch ticket and upon being informed that he had none, interrogated him concerning his authority to transport civilians in the army vehicle (R6,7,10,12). Dissatisfied with the answer given, the Lieutenant, who was in uniform and wearing insignia designating his proper rank, ordered the driver "to get out of the jeep" (R7,12). He testified concerning the events that occurred thereafter as follows:

> "He [the driver] and the other man in the front seat jumped out of the jeep with 45 Colt Automatics in their hands. They covered Sergeant Hensley and myself * * * The driver ordered us over to the right side of the road [threatening to] blow [our] brains out. * * * I turned around and * * *was struck along the right hand side of the head with a fist. It staggered me * * * I received another blow in the back of the head * * * with a gun. I went down, * * * [and then] * * * received another blow [on] the head that left me * * * woozy" (R7,8).

He added that he felt someone remove his wallet from his pocket and a watch from his wrist. The watch had a value of $15 and was identified by its make, the number of jewels and serial designation (R7,8,9). A watch of this description, identified as government property and as the one taken from accused was received in evidence as Prosecution's Exhibit 1 (R8,9,12,44).

At the same time Sergeant Hensley was also assaulted and robbed. He corroborated the testimony of the lieutenant and testified in addition that they were ordered to put their hands up and that one of the colored soldiers "put a pistol" on his "temple" (R14,15). He received several blows on his head, which stunned him. Both of his hands were bruised and smashed in using them to shield his head and face. He was knocked down and, while lying prostrate, was kicked and robbed of two wallets containing $140 in United States currency and £2 in British money. The colored soldiers then drove away with both vehicles, leaving the officer and noncommissioned officer

beaten and bleeding and in a semi-conscious condition (R15-17). However they were able to find their way to the village police station where they reported the assaults and robberies (R7,8, 15,16).

Lieutenant Dermont and Sergeant Hensley each positively identified accused Bostic as the driver of the jeep and as one of the assailants (R7,10,11,16,18). Both stated that they believed accused Sweatt to be one of the other participants in the crimes but they were not positive in their identification of him (R9,16,18).

Mrs. Beatrice Edwards and Mrs. Dilys Venn testified that at approximately midnight of 4 August 1944, while walking along a roadway towards Abertillery, they were invited to ride in a jeep with two American soldiers. They recognized the driver of the vehicle, Bostic, as "Shorty", and the other occupant in the front seat, Sweatt as "Peewee", as they had been out with them earlier in the evening (R26-28,33-35). They proceeded some distance before stopping to "pick up" two other girls, Misses Joan Davies and Freda Leonard, who also identified the accused Bostic and Sweatt from their previous associations (R19-21,23-25,37-38). After boarding the car, the four girls and three accused continued their drive until overtaken by the vehicle occupied by the officer and his sergeant. The testimony of the four women, regarding the assaults and robberies, is substantially identical with that of the lieutenant and sergeant, although not too detailed. Miss Davies testified that one of the soldiers told her to remove the officer's watch and that "I done it". She noticed one of the colored soldiers with the watch and another with a wallet in his possession after they got back in the jeep (R23,24). At an identification parade held at accused's camp, in which approximately 600 colored soldiers were present, she identified both Bostic and Sweatt as two of the occupants of the jeep in which she was riding on the evening in question (R20,21,24,43). Mrs. Venn identified accused Bostic (R29). Mrs. Edwards recognized and picked out each of the accused Bostic and Sweatt (R34,35). Miss Leonard did not make any identifications at the formation held for this purpose, although she attended the parade and viewed the soldiers therein (R39). She, as did the other witnesses, identified Bostic and Sweatt in court as two of the soldiers she was with on the evening and early morning of 4-5 August 1944 (R38).

4. After an explanation of his rights as a witness, accused Bostic elected to be sworn and to testify in his own behalf. The court failed to explain to accused Sweatt his rights in this connection. However, his defense counsel stated that he had been so

advised and the record otherwise shows that he had the benefit of explanation of their rights given to the other accused. Sweatt declined to testify or to make an unsworn statement (R48,49,57).

Bostic denied that he left his camp on the evening of 4 August 1944, that he drove the jeep or committed the offenses alleged. In explanation of his actions on this date, he stated that, after finishing his work and eating supper, he returned to his barracks where he remained for sometime. He lay down and rested, later got up and washed, "sat around" with the boys for a while, took a drink, again went to the mess hall, ate some food, returned to his barracks about midnight and went to bed and fell asleep. He stated he stayed there until reveille the following morning. He was included among those present at the identification parade held the next day and insisted that, although he was "picked out" by some of the women as one of the soldiers who participated in the assaults and robberies, they were mistaken in their identification. He testified that Mrs. Edwards said she was sorry when she stopped in front of him at the formation and that Misses Leonard and Davis passed him three times and that Miss Leonard "pulled away" from her father, who accompanied her, and refused to identify accused. He denied knowing any of the women. He requested his defense counsel to obtain for him certain witnesses to show that he was in his barracks on the evening in question, but indicated that nothing was done to comply with his request. He named several soldiers of his barracks whom he believed could vouch for his presence in his quarters, if available as witnesses. He had no objection to any member of the court, made no request for a continuance of his trial and stated that he did not feel that his rights were prejudiced (R49, 50,57).

It was stipulated between the prosecution and the defense, the accused expressly consenting, that if Lieutenant Sidney Weitzer, were present he would testify that he conducted bed check in accuseds' barracks at midnight before the robberies occurred in the early hours the following morning and that Bostic and Sweatt were present and asleep in bed and that neither was later observed absent (R48).

At the request of the court, First Lieutenants Frederick E. Thorpe and Robert L. Pelz, the regularly appointed Assistant Defense Counsel and Defense Counsel, who represented accused Thompkins only at the trial, appeared as witnesses. Lieutenant Thorpe testified that on 29 September 1944 he interviewed Bostic and Sweatt for more than an hour, during which time he discussed with them the nature of their defense and obtained from them the names of the witnesses they desired to have brought into court.

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He made notes in connection with the case and later gave the list of witnesses to Lieutenant Pelz, together with his other notations in connection with accuseds' defense. Pelz stated that on 4 October 1944, he interviewed all of the men of accuseds' organization and their barracks mates who "were interested" in the case and who were at that time available. He spent all day on these interviews and covered all information of benefit to the accused. He interviewed all witnesses requested by accused except a Major Anderson, whose testimony, he believed, would be fully covered by other witnesses. Thereafter accuseds' company departed for the continent and, as defense counsel, witness arranged with the prosecution to stipulate as to the testimony of certain unavailable witnesses. (There were five such stipulations, four of which related only to accused, Thompkins, who was acquitted). About a week before the trial he saw Bostic and Sweatt again and told them that he thought their interests would be best served by the use of special defense counsel. He suggested First Lieutenant Pascal C. Reese who had been in accuseds' Battalion, and as they knew him, each seemed pleased to have this officer represent them. Accused did not request a continuance or make any suggestion that anything further be done in their behalf (R69,70). Lieutenant Reese testified that he was requested to serve as special defense counsel a week before the trial, at which time he received all papers pertaining to the case. On the day before the trial, he interviewed accused and discussed the evidence to be presented in their behalf. Sweatt made no mention of any additional witnesses whom he wished called and Bostic asked about his barracks companions and Major Anderson as witnesses. Inasmuch as accuseds' company was on the continent and stipulations containing the testimony of four witnesses had previously been obtained by the regularly appointed defense counsel, Reese considered the available evidence sufficient "to go to trial with". He did not think Major Anderson's testimony would be of material value, in view of what accused stated they expected his testimony to be (R70,71).

5. The crime of robbery is defined as

> "the taking with intent to steal, of the personal property of another, <u>from his person</u> or in his presence, against his will, <u>by violence</u> or intimidation" (MCM, 1928, par.149f, p.170) (Underscoring supplied).

The evidence for the prosecution conclusively establishes all of the elements of the crime of robbery. Two pocketbooks of Sergeant Hensley, containing the amount of money alleged, were taken from

his person after he was held up at the point of a pistol, and then knocked down by the butt of the weapon with violent blows on his head. Accused Bostic and Sweatt were identified as the assailants. Lieutenant Dermont was similarly assaulted and put in bodily fear and, after he had been overpowered and while he was lying on the ground, a wrist watch was taken from his person.

The evidence further shows that in the accomplishment of the robberies accused Bostic and Sweatt, "acting jointly and in pursuance of a common intent", assaulted Sergeant Hensley and struck Lieutenant Dermont, their superior officer who was in the execution of his office, in the manner and under the circumstances alleged. Each accused was armed and participated together in these crimes. They were principals in a joint enterprise and are therefore equally guilty and jointly responsible for all of the unlawful acts regardless of who committed the particular elements of the assaults and robberies (CM ETO 3740, Wilson and Anderson and authorities cited therein).

The testimony of record raised a question of fact of prime importance regarding the identification of accused as the perpetrators of the crime. Each denied committing the offenses. Thompkins was acquitted. However, Bostic and Sweatt were positively identified by several witnesses as two of the soldiers present and participating in the commission of the crimes on the evening in question. Lieutenant Dermont definitely recognized Bostic as the driver of the jeep and as one of the soldiers assaulting and robbing him. He believed Sweatt was another of those present that night. Sergeant Hensley and four women positively identified both Bostic and Sweatt. The identifications by the women were based on their seeing them that night and from previous association with accused. The women had been in company with Bostic and Sweatt earlier on the evening in question, and at the time of the commission of the assaults and robberies. Three of them identified accused in the formation held for the purpose of identification of the culprits, and all four identified them in court. Their identifications under the circumstances carries great weight. Although it was stipulated that Lieutenant Weitzer if present, would testify that accused were present and asleep in bed at midnight on the evening in question, this fact is not altogether inconsistent with nor does it render impossible accuseds' presence at the place nearby where the crimes were committed two hours later. Questions concerning the credibility of witnesses and the resolving of disputes of fact are issues for the sole determination of the court and such findings, where supported by substantial evidence, will not be disturbed by the Board of Review (CM ETO 1899, Hicks; CM ETO 1953, Lewis). The record herein contains both substantial and convincing evidence of the correct identification of each accused (Bostic and Sweatt) and of their joint commission of the several offenses as alleged (CM ETO 3628, Mason; CM ETO 3478, Marchegiano, et al and authorities cited therein). The separate specifications, in this case, do

not constitute an illegal or improper multiplication of charges (MCM, 1928, sec.27, pp.17,18; Bull JAG, May 1943, sec.428 (5), p.187; Bull JAG, September 1944, sec.422(1), p.379).

6. The charge sheet shows that accused Bostic is 25 years and three months of age and was inducted at Fort Custer, Michigan, 24 August 1943; accused Sweatt is 19 years and five months of age and was inducted at Camp Forrest, Tennessee, 4 June 1943. No prior service by either accused is shown.

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

8. The crimes of assault with intent to do bodily harm with a dangerous weapon and robbery are punishable by confinement in a penitentiary (AW 42; sec.276 and 284 Federal Criminal Code; 18 USCA 455 and 463). The offense of striking a superior officer while in the execution of his office is punishable by death or such other punishment as a court-martial may direct (AW 64). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, of each accused, is authorized (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 1 23 FEB 1945

CM ETO 6435

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION.
	)	
v.	)	Trial by GCM, convened at Senningen, Luxembourg, 30 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private HAROLD G. NOE (31406621), Antitank Company, 8th Infantry	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Harold G. Noe, Antitank Company, 8th Infantry, who was then Special duty with Service Company, 8th Infantry, did, near Paris, France, on or about 25 August 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself near Antwerp, Belgium, on or about 30 November 1944.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for eight

days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence showed without contradiction that accused, a member of the Antitank Company, 8th Infantry, was on 25 August 1944 attached to the Service Company of the regiment in the GRO section (R8,10). The Service Company arrived at a small town about 25 miles south of Paris, France, on the evening of 24 August, and remained for the night in that bivouac (R6,7,10). Accused was present with the company at that time (R6). At 1030 hours 25 August the company was alerted, and it was expected that the company would move in the direction of Paris about 1600 or 1700 hours (R7,11). About 1530 hours accused and two other soldiers went to a cafe located about one-half mile from the company area where they drank wine. After the expiration of about 25 minutes, accused left the cafe, without either an expression of his intentions or explanation of his conduct to his comrades (R11,12). He was not with the company when it resumed its journey toward Paris at about 1630 hours (R12) nor was he with it thereafter (R8,9,12). He had no permission to be absent from the company (R5). It was stipulated that accused returned to the military service by surrendering himself at Antwerp, Belgium, on or about 30 November 1944 (R13).

4. After an explanation of his rights, accused elected to remain silent. No evidence was presented by the defense (R14).

5. Accused was absent from military control without permission or authority for 97 days during the height of operations which eventually liberated the greater part of France from enemy domination. He offered no explanation of his absence. The court was fully warranted in finding him guilty of desertion as alleged (MCM, 1928, par.130a, p. 143; CM ETO 1629, O'Donnell; CM ETO 2343, Welbes and authorities therein cited; CM ETO 5406, Aldinger; CM ETO 5414, White).

6. The charge sheet shows that accused is 29 years of age. He was inducted 29 September 1943 at Ansonia, Connecticut. He had no prior service.

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

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

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Branch Office of The Judge Advocate General
with the
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BOARD OF REVIEW NO. 1 26 JAN 1945

CM ETO 6441

UNITED STATES	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Sarrebourg, France, 29 December 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.
Privates GEORGE CAMPBELL (36021288), and JOHN H. COOKS (39236863), both of 4382nd Quartermaster Truck Company	

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

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

2. Confinement in a penitentiary is authorized for the offense of robbery by Article of War 42 and section 284, Federal Criminal Code (18 USCA 463). However, prisoners under 31 years of age and with sentences of not more than ten years will be confined in a Federal correctional institution or reformatory. The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is, therefore, proper (Cir. 229, WD, 8 June 1944, sec.II, pars.1a(1), 3a).

Brinton Riter Judge Advocate

Warren C. Sherman Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 1

27 JAN 1945

CM ETO 6444

U N I T E D S T A T E S v. Private First Class RAFE JONES (34419171) and Private CHARLIE HORN (38477396), both of 952nd Quartermaster Service Company	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at St. Laurent-Sur-Mer, Calvados, France, 11,12 December 1944. HORN, acquitted. Sentence as to JONES: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

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

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

2. Confinement in a penitentiary is authorized for the offense of assault with intent to commit rape by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). Prisoners, however, under 31 years of age and under sentence of not more than ten years, will be confined in a Federal correctional institution or reformatory. The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1), 3a).

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
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BOARD OF REVIEW NO. 1 31 MAR 1945

CM ETO 6457

U N I T E D S T A T E S	35TH INFANTRY DIVISION
v.	Trial by GCM, convened at Oriocourt, France, 5 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private THEODORE J. ZACOI (36586012), Company I, 137th 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.

Specification: In that Private Theodore J. Zacoi, Company "I", 137th Infantry, did, at Gremecey, France on or about 27 September 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he returned to his organization on or about 30 October 1944.

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(54)

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

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

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 35th Infantry Division, approved the sentence and forwarded the record of trial "for action under 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 it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½. This case is considered as having been forwarded to the confirming authority under the provisions of Article of War 48, notwithstanding the recital in the action of the approving authority, that it was forwarded "for action under Article of War 50½".

3. Prosecution's evidence established the following facts: Accused was a rifleman in a squad of Company I, 137th Infantry led by Staff Sergeant Franklin E. Maize (R7). On 25 September 1944, the company was in the village of Gremecey, Germany. As a result of a counter-attack by the Germans it was disorganized and part of it moved to a neighboring woods where it established its front lines in an effort to stop the attack. Maize's squad and other soldiers formed a detachment which remained in the town to guard the battalion command post. On 27 September Maize and other soldiers including accused left Gremecey in jeeps intending to join those elements of the company in the woods. Enroute the party encountered Germans who had infiltrated through the American lines. The enemy blocked the road with tanks. Maize and his men were forced to return. Upon arrival they were dispersed in groups of three's to guard the flanks of the town (R7-10). As accused left on this duty, Maize saw him for the last time until he met him in court. A day or so later runners were sent about the town to assemble the men of the company in preparation to move to the lines in the woods. At that time accused was absent (R9). The company commander did not give him permission to be absent. A morning report of the company showed

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that accused returned to duty on 30 October 1944 (R10; "Govt." Ex.A).

On 30 October Lieutenant Colonel Alfred K. Clark was the regimental executive officer. The military police brought a group of stragglers which included accused to regimental headquarters at Alincourt, France, where Lieutenant Colonel Clark gave accused a direct oral order to return to his company and report to his company commander at once. Accused replied "he could not comply". Thereupon the executive officer delivered to him a written order which directed him

> "to report to your Commanding Officer, Co I, 137th Infantry, without delay. Failure to do so may subject you to trial by General Court-martial, the consequences in time of war may be death" (R12; "Govt." Ex.C).

Accused acknowledge in writing the receipt of the order, but repeated that he "couldn't return to his company". Had accused indicated his willingness to comply with the order he would have been guided to his company or transportation would have been provided for him. He was then placed in arrest and sent to the service company (R12,13).

4. After his rights were explained, accused elected to be sworn as a witness on his own behalf (R14). He asserted that after his arrival in France from England he suffered an infection of his feet and had been hospitalized. About the middle of September 1944, the infection again became active and he left his company in order to secure treatment. He spent two days at the battalion aid station where his feet were bandaged. He continued absent from his company for a period of not less than ten days during which time he visited several military organizations. Finally he returned to his company about 27 September. He then described the events as proved by prosecution's evidence (R15,16,20,21) and stated that he and two companions after their effort to reach the company lines had taken cover in a cellar in Gremecey at about 1000 hours on 27 September where he remained until about 1600 hours. The town was under enemy shell fire during this period. There had been an enemy counter-attack in the woods and the 3rd Battalion was surrounded. All Americans in the town commenced to fall back to Pettoncourt. Accused and another soldier rode a truck of an antiaircraft unit to that town where he remained in a barn overnight. He declared that at this time he

> "wasn't with Company I in Gremecey. I was just returning to Company I * * * I didn't leave the organization because I wasn't with the organization"(R19).

He did not know where to find any one in Gramecey Forest (R25). When asked why he did not go back to the forest when the shelling ceased

he answered:

> "Do you think I was going to walk up to Gremecey Forest by myself? There had been a counter-attack up there and I didn't know what to do. There was no company there. There was just a few scattered men there - this bunch and that bunch. There was no one in direct command * * *"(R25).

The next day he went to Nancy where he remained two days, and then reported to the military police who returned him to Headquarters 35th Division. Two days later he was sent to his regiment. He"was pretty nervous and pretty well banged around". He "didn't like the idea of goint up there to the lines". He was sent by a Captain Friedman to see Captain Schwartz, the division psychiatrist, but failed to see him because he had no appointment (R17,18). He was then sent to an area where he handled barracks bags for about 2½ or 3 weeks and at the end of that time absented himself without permission and went to Nancy, where he remained from four to six days when he surrendered to the military police who sent him to his regiment (R18,22). At regimental headquarters Lieutenant Colonel Clark gave him an order to return to his company. It was both oral and in writing. He was confused and nervous when he received the order.

> "I can truthfully say that I didn't know at that time what refusing to obey an order of a superior officer was, and I didn't have explained to me - - Well, I didn't say, 'No, I am not returning to the company'* * * I was absent from the company only - the only time I was actually absent without leave was the week I was in Nancy"(R18,19).

He didn't disobey Lieutenant Colonel Clark's order

> "Because I, at the time, was still suffering from shock from several close calls I had, and I wanted to talk to Captain Schwartz. I wanted to see if I could get transferred to another outfit" (R20).

He received no explanation of the penalty if he refused to obey the order and he didn't have any idea of the seriousness of his offense (R23).

5. a. Charge I and Specification: Prosecution's evidence, which is corroborated in its vital particulars by accused's own testimony, showed that his company on 27 September was attacked by the enemy and forced to adjust its position and lines. The exigencies of the situation compelled its commander to divide his force and station part of it in the town of Gremecey to guard the battalion command post while the remainder of the company sought to establish new lines in the Forest in order to stop the enemy counter-attack. Accused's place of duty was with the command post guard which although separated from the main body remained a part of that organization. When the detail including accused was foiled in its attempt to reach the newly established lines and was compelled to return to the town where flank outposts were established, it was accused's duty to remain with his detachment. The fact that it was under enemy artillery fire increased his responsibility rather than lessened it. He was in the midst of the combat activities and to attribute to him knowledge of the critical situation of his company and the threats to the lives, and physical well-being of its personnel not only does no violence to rights of accused but is the only permissible inference within reason or probability. Finding himself in this situation he left his command without authority. The court was fully justified in concluding that his departure was motivated by the intent to avoid further hazards of battle. All of the elements of the offense alleged were proved by substantial evidence (CM ETO 7687, Jurbala; CM ETO 7413, Gogol, and authorities therein cited).

b. Charge II and Specification: The evidence substantially supports the finding that accused willfully and knowingly violated Lieutenant Colonel Clark's order to return to his company and report to its commander. It was the court's duty to resolve conflicts in the evidence and its findings are conclusive upon appellate review. There can be no doubt as to accused's guilt (CM ETO 7687, Jurbala, supra; CM ETO 7500, Metcalf and Wloczewski).

6. The charge sheet shows that accused is 26 years of age and was inducted 17 March 1943. No prior service is shown.

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

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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

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 31 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private THEODORE J. ZACOI (36586012), Company I, 137th Infantry, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 6457. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 6457).

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

(Sentence as commuted ordered executed. GCMO 100, ETO, 4 April 1945.)

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

BOARD OF REVIEW NO. 1

21 FEB 1945

CM ETO 6468

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, 12 January 1945.
Private MAURICE PANCAKE (35676663), Company D, 318th Infantry)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Place of confinement not designated.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Maurice Pancake, Company D, 318th Infantry, did, in the vicinity of Thionville, France, on or about 15 November 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 Cherbourg, 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 Specification. Evidence was introduced of two previous convictions, one

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by special court-martial for absence without leave for 13 days and one by summary court-martial for absence without leave for 8 hours, both in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence but did not designate a place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution established the following facts:

On 15 November 1944 accused was a private in Company D, 318th Infantry, and served as a jeep driver. He was engaged in hauling ammunition for the first machine-gun platoon of the company, which was then located in the proximity of Thionville, France (R8). That platoon operated with one of the rifle companies of the regiment. It was in a defensive position three or four kilometers from the town. On that date and until the end of November the platoon was engaged with the enemy (R7,8,10).

On the above-mentioned date accused was ordered to the motor pool for a gasoline inspection. He informed his platoon sergeant that he intended to go to the pool and that was the last he was seen by the sergeant (R8). The company commander and the first sergeant of the company instituted a search for him during the evening but he was not found (R10).

The officer who investigated the charge against accused interviewed him and, after he was duly informed of his rights, accused made a statement. The investigating officer narrated this statement as follows:

> "He said he went AWOL. * * * he said he was a jeep driver and in the afternoon he was moving up some stuff with his car, he was getting some rolls from the roll truck and I believe he told his platoon sergeant that he had a flat and after the detail was finished he went to the next town and while he was there he had himself treated at the aid station for a bad cold and he met a fellow by the name of Private Brown who was returning to duty after being hospitalized and had got up as far as the rear train and that he and Brown went AWOL from the aid station in the vicinity of Thionville, France. He drove his jeep back to the aid station and went off by hitch-hiking and he rode most of the night and walked quite a way too, and they kept this up

for five days and that he went generally in the direction of Cherbourg, France and I believe I asked how come he got picked up and he said the MP's made a three day search there looking for AWOL's and were stopping all GI's and that's how they picked him up. I don't believe it was in Cherbourg they picked him up but it was in a town close to Cherbourg. * * * he said he had been a bazooka man and an ammunition bearer and that he had flat feet and they made him a jeep driver. He said once before he had been under an artillery barrage and that shook him up and that he was hospitalized for seven days" (R6-7).

4. The evidence for the defense summarizes as follows:

Technical Sergeant Stanley A. Palmer, sergeant of accused's platoon, on cross-examination testified that all of the soldiers of his platoon were "pretty good men". He never noticed anything exceptional or anything discreditable as to accused (R9).

Private Fred E. Beck, of accused's company, testified that accused complained to him concerning headaches. He "got dizzy and then he had to sit down for awhile" (R12).

Private First Class Luther W. Scheel, a cook of accused's company, stated that accused had complained that he suffered from headache. He talked in his sleep and when he awoke he seemed frightened. He was "mighty good" as a kitchen helper (R13).

Private First Class Patrick R. McCarthy, a squad mate of accused, testified he worked with accused under combat conditions, and particularly in "/cleaning/ out some snipers and things of that sort". He was a brave man and alert. At Sil le Guilliume, while the company was yet "green", it was under heavy sniper fire. Accused performed creditably. At St. Genevieve accused came under heavy artillery fire and "from that time on he didn't seem to be the same, he was nervous and seemed very fearful from that time on of the consequences to himself" (R14).

Major Isidore Tuerk, Medical Corps, division neuropsychiatrist, examined accused, who had been under his care for battle fatigue.

"He was a patient from September 23d 1944 to September 27th 1944 at which time he was sent to the convalescent station and then returned to duty on September 30th, 1944. He claimed at the time that he came in on September 23d that his head ached and that he was nervous and torn up" (R15).

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Witness examined accused on 10 January 1945.

> "At that time he told me that when he left the convalescent station, his head bothered him a little but he took a job as a jeep driver and got along rather well except on occasion when there was a lot of noise and then his head bothered him. However, on November 15th he said he got nervous and scared under artillery fire and took off because he was nervous and his head ached. He finally got back to his outfit some time early in December and since then he says he has been getting around rather well but at times he gets nervous and headaches bother him. He is preoccupied about his family, his sister and his father and his mother who he claims were dependent upon him and he worries about them and is concerned about them. He knew that it was wrong to leave without permission and it was my opinion that he was sane at the time of the examination, that he knew the difference between right and wrong, that he was sane at the time of the alleged misdeed and that he could be held responsible for his actions". (R15).

5. After his rights were explained to him, accused elected to remain silent (R16).

6. Assuming that proof of physical disablement of an accused to the extent he is unable to perform his duties is a defense to the instant charge, the court by its finding resolved this issue against accused. Such finding is binding on appellate review (CM ETO 4702, Petruso and authorities therein cited).

The evidence is clear and uncontradicted that accused's platoon on 15 November 1944 and for a considerable period thereafter was actively engaged with the enemy. Accused was an ammunition bearer whose duty required him to supply ammunition to the front lines. He took advantage of the opportunity afforded him when he went to the motor pool on the evening of that date to leave his command without authority and remained absent until he was apprehended five days later. The evidence considered as a whole was of such substantial and pertinent nature as to justify the court in inferring therefrom that accused deliberately quit his place of duty with the platoon without permission; that he was fully informed as to the hazards and perils to be encountered and knew they would continue indefinitely; and that he deliberately absented himself to escape the same. The prosecution proved all elements of the charge against accused in a substantial manner (CM ETO 4054,

Carey et al; CM ETO 4570, Hawkins; CM ETO 5155, Carroll and D'Elia).

7. Evidence was admitted which showed that accused had been convicted by a summary court on 9 December 1944 for absence without leave for eight hours and 15 minutes on 7 December 1944 in violation of the 61st Article of War. The offense and conviction occurred after the offense involved in the instant case but before the trial thereof. The evidence of this conviction was improperly admitted (CM 199969, Harris, 4 B.R. 205; CM 230826, McGrath, 18 B.R. 53). The error did not influence the findings of guilt but only the sentence. A reconsideration of the sentence by the reviewing authority is thus indicated.

8. The charge sheet shows that accused is 23 years and six months of age. He was inducted 9 December 1942 to serve for the duration of the war plus six months. He had no prior service.

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

10. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). By supplemental action, the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, should be designated as the place of confinement (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.

10 FEB 1945

CM ETO 6497

U N I T E D S T A T E S	)	FIRST UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Saint
	)	Trond, Belgium, 4 January 1945.
Private WALTER GARY, Jr.	)	Sentence: Dishonorable discharge,
(34628558), 3168th Quarter-	)	total forfeitures and confinement
master Service Company.	)	at hard labor for 20 years. United
	)	States Penitentiary, Lewisburg,
	)	Pennsylvania.

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

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

2. The Specification, Charge I, alleges that accused deserted 7 September 1944, and remained absent in desertion until apprehended 2 November 1944, a period of 57 days. The reviewing authority approved only so much of the findings of guilty of the Specification, Charge I, and of Charge I, as involves conviction of desertion on 7 September 1944 and remaining absent therein until 1 October 1944. Mere unauthorized absence for 24 days does not, of itself alone, constitute a substantial basis, nor is any other circumstance shown to support an inference of the requisite intent to establish desertion. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification, Charge I, and of Charge I, as involves finding accused guilty of absenting himself, without proper leave, from his command in the vicinity of Marolles, France, from about 7 September 1944, to about 1 October 1944, in violation of Article of War 61.

3. Penitentiary confinement is not authorized on conviction of a violation of Article of War 61. The designation of the place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (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. 2 14 MAR 1945

CM ETO 6522

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private EDWARD CALDWELL (34418519), 3412th Quartermaster Truck Company	Trial by GCM, Paris, France, 7 December 1944. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for five years. Loire Disciplinary Training Center, Le Mans, France.

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and EVINS, 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 and the sentence. The record of trial has now been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE I: Violation of the 92nd Article of War.
(Nolle Prosequi)
Specification: (Nolle Prosequi)

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

Specification: In that Private Edward Caldwell, 3412th Quartermaster Truck Company, did, at Chartres, France, on or about 6 October 1944, with intent to do him bodily harm, commit an assault upon Edmond Champroux by wrongfully holding a dangerous weapon, to-wit: a knife, against the throat of the said Edmond Champroux and thereby placing him in fear.

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He pleaded not guilty to the charges and specifications. The prosecution thereupon nolle prossed Charge I and its Specification. He was found guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for five (5) years. The reviewing authority approved the sentence, ordered its execution, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 7, Headquarters Seine Section, Communications Zone, European Theater of Operations, United States Army, 5 January 1945.

3. Evidence introduced by the prosecution showed that accused is a private in the 3412th Quartermaster Truck Company (R10,12; Pros.Exs. 1,2). On 6 October 1944, Edmond Champroux of Paris, France, was walking on the highway between Courville and Chartres, accompanied by his twelve-year old daughter. This was at about 2100 hours (R7). Monsieur Champroux testified that he was pushing a bicycle. At that time, he was accosted by two colored men. In his testimony the witness called one "the big one", and the other "the little one". He was unable to identify accused. However, from the subsequent testimony of accused "the big one" was identified as Private Abbott and "the little one" as accused (R5,6,13,14). Abbott said to Champroux: "Chocolate". The latter refused. Then his daughter, walking behind him, shouted "Papa, Papa", and he himself was taken "at the throat from behind" by Abbott. He was also struck "at the shoulder". Turning around, Champroux saw another colored man, accused, going off with his daughter. A struggle followed between Champroux and Abbott, during which the former was stabbed in the left arm by Abbott. The Frenchman fell down and Abbott sat on him, holding a knife at his throat to prevent him screaming (R5,6,8). "A moment later", accused came back to replace Abbott. Champroux said Abbott gave accused his knife. "He [accused] held me with his knife at my throat to prevent me from shouting" (R6). Champroux continued:

> "A moment later the big one came back. He took me under his arm and lay me over into the middle of the field. He threw me to the ground and he held me down with his knife. My little girl was about two or three meters distance from me. She was lying in a hole and the big negro who had gone away from me was lying on top of her. From time to time the two negroes talked between them but I couldn't understand what they were talking about. Sometimes when cars were passing on the highway and illuminating the surroundings, he put his knife closer to my throat and said 'sh, sh.' The little negro hid his face in his hand in order that I may not recognize him. A moment later the little one got off me and I took advantage of his movement and got to my feet, too. When I got off

I saw the big one of the two arranging and drawing up his trousers, and then the little one said something and they took some money out of their pockets. He crumpled it in his hand and threw it to the ground. I took the money up because I saw by this money there might be a possibility to discover them. After this event I said to my daughter, 'Now let's go home.' We went up to the highway where I took up my bicycle which was lying on the ground. At this moment my little daughter said 'Papa, Papa, the negro is coming back.' They actually came back and went up to hole in which my daughter was lying. It seemed to me they had forgotten or lost something because they were searching their pockets. Later they went away. I went away myself with my little daughter and myself and about one hundred meters later I fell down and fainted. When I came to myself again I asked my little daughter to go over to Chartres and ask for help. She went over to the gendarmerie, police, and I myself went over to Chartres and there a policeman brought me to a hospital to have my wounds treated and there I found my daughter. Later on the American Military Police brought us to the camp of the negroes but I couldn't recognize the colored men" (R6,7).

On cross-examination Champroux again said that accused, whom he described as "the little one" held the knife in his left hand and said "sh,sh", when the cars went by on the road. The prosecution also showed that accused made two statements, after being warned of his rights (R10,11; Pros.Exs.1,2). In the first statement accused said that Abbott took him up the road and showed him a male French civilian and a woman lying on the ground. He said that when he saw the couple he started to back away and, despite threats made by Abbott, fled the scene and returned to camp. In the second statement made on 12 October 1944, a few days after the first, accused admitted that he had been present during the entire occurrence, admitted certain acts of cooperation, but claimed that this was due to threats made by Abbott.

The prosecution introduced as a witness Claudine Champroux, the daughter of Champroux, a twelve-year old girl. Claudine testified without having first been placed under oath. The trial judge advocate asked the court's permission to examine the daughter without placing her under oath, to which request the law member answered "The court grants permission". Among other things she said that she "saw the little one hold his knife to the throat of my father". (R9,10)

4. Accused, advised of his rights, testified on his own behalf. He said that on the night in question Private Abbott called him from a campfire where he was heating a box of rations and without explanation took him up the road towards Chartres. Accused said he thought they were going to get a drink (R13,14,17). On the road, going the same direction, there was

man and a little girl. The man was pushing a bicycle and the little girl was walking behind. Accused said that he thought that Abbott would pass the man, but that Abbott walked up behind the man and, instead of passing, grabbed him from the back. The little girl shouted "Papa, Papa". Abbott said to accused "Boy, get that woman". Accused explained, "Well, I got the little girl by the hand and went out into the field about 10 feet and I looked back and I couldn't see Abbott or the man, either one". He then returned to where Abbott was holding Champroux, the girl following him, and Abbott told accused to hold the man and threatened to cut off his head if he did not comply. Abbott had a knife out and the blade was open. Accordingly he "squatted down by the man but" according to accused "I did not have anything in my hand". He insisted that he did not have a knife in his hand and that when he squatted down beside the man he did not do anything, but that he only told him "I am good. I am not going to hurt you". Asked why he told this to the Frenchman accused answered: "Well, he was struggling like he was hurt, or something or worrying". He also testified that Champroux and his daughter looked like the couple that he and Abbott had met that night (R14-20).

5. The record shows that the unsworn testimony of Claudine Champroux, the 12 year old child, was received by the court without objection by the defense. The defense did not expressly waive its right to object to this testimony. The admission of the testimony of this girl was clearly erroneous (Dig. Op. JAG 1912-1940, sec.395, (58), p.238, CM 185972, 186545 (1929); Bull JAG Vol.I, sec.376(3), CM 220359, Archibald; A.W. 19).

In determining whether the error of the court in accepting this unsworn testimony injuriously affected substantial rights of accused, it is necessary to apply the established rule that

> "The reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty of the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty" (CM ETO 1201, Pheil; CM ETO 1693, Allen; CM ETO 2195, Shorter).

The evidence shows that at the time and place alleged in the specification there was an assault with a dangerous weapon, a knife, made upon Edmond Champroux. This assault lasted and continued from the time that the struggle started between Champroux and Abbott, during the subsequent period when Abbott stabbed the Frenchman in the left arm, got him down, and sat on him, holding a knife at his throat to prevent him from screaming, after which he, Abbott, was relieved by accused who took his place, up until the time that Champroux was finally released and permitted to leave the scene. The fact that the assault had changing aspects such as the physical struggle, the actual stabbing, the change in the position of the knife to one of close proximity to the throat, the change in the person of the assailant or the guard, does not alter the fact that it was one continuing assault.

Nor is the foregoing conclusion dependent on the knife being in close presence of the victim at all times. Even if accused did not have the knife in his possession when he was guarding Champroux, it remained a continual threat since it had already been used as a weapon of intimidation and was available for use by Moore on a moment's notice should Champroux start struggling to escape from accused.

The evidence, found in the admission of accused on the stand that when Abbott grabbed the father, he at the direction of Abbott "got" the little girl by the hand and took her out into the field, shows that Abbott and accused were acting jointly with each other and in pursuance of a common purpose. Accordingly, the act of the one was the act of the other (MCM, 1928, par.114c, p.117; Wharton's Criminal Evidence, 11th Ed. 1935, sec.699, pp.1183-1188).

If Abbott held a knife at the throat of Champroux during this assault, since this was a joint undertaking, that act was the act of accused, could be charged against him, and would afford the basis of a finding of guilty against accused. Nor is the rule thus applied affected by the fact that Abbott and accused were not charged jointly nor by the failure of the specification to allege that accused was acting in conjunction with Abbott (MCM, 1928,par.27, p.18, appendix 4, par.X, p.237; Wharton's Criminal Evidence, ibid, S701, p.1190).

Proof that the knife was held by Abbott rather than by accused, as alleged in the Specification, was not a fatal variance. "An indictment may charge a defendant with being a principal in the commission of an offense, and conviction will follow if the evidence sufficiently shows that he was merely present, aiding and abetting" (Wharton's, ibid, sec.1032, p.1814).

Entirely disregarding all of the girl's testimony, there still remains compelling evidence to support the court's findings of guilty.

In view of the foregoing, it is the opinion of the Board of Review that the acceptance in evidence of the unsworn testimony of the daughter was harmless and did not constitute error prejudicial to the substantial rights of accused (Bull. JAG, vol. III, No 5, p. 185, sec.382(2), CM ETO 1693, Allen).

7. The charge sheet shows that accused is 23 years of age and was inducted at Fort Benning, Georgia, on 12 October 1942 to serve for the duration of the war plus six months. He had no prior service.

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

9. The offense of assault with intent to do bodily harm with a dangerous weapon in violation of Article of War 93, is punishable by confinement for five years (MCM, 1928, par.104c, p.99). The designation of Loire Disciplinary Training Center, Le Mans, France, as the place of confinement is proper (Ltr., Hq. European Theater of Operations, AG 252 Op TPM, 19 Dec. 1944, par.3).

Judge Advocate

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. 2

24 FEB 1945

CM ETO 6523

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
First Lieutenant JOHN R. KNAPP (O-1107523), 816th Engineer Aviation Battalion	Trial by GCM, convened at Paris, France, 7-8 November 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that First Lieutenant John R. Knapp, 816th Engineer Aviation Battalion, European Theater of Operations, United States Army, did, in conjunction with Private Lloyd D. Thomas, 816th Engineer Aviation Battalion, European Theater of Operations, United States Army, at Paris, France, on or about 2 October 1944, in the nighttime feloniously and burglariously break and enter the dwelling house of Andre Dales, 19 Rue Lauriston,

with the intent to commit a felony, viz, larceny therein.

Specification 2: In that First Lieutenant John R. Knapp, 816th Engineer Aviation Battalion, European Theater of Operations, United States Army, did, at Paris, France, on or about 2 October 1944, in conjunction with Private Lloyd D. Thomas, 816th Engineer Aviation Battalion, European Theater of Operations, United States Army, and Private Dolliver Spurlock, 816th Engineer Aviation Battalion, European Theater of Operations, United States Army, feloniously and wrongfully take, steal and carry away from the dwelling house of Andre Dales 180,000 francs, French currency, of the value of about $3,600.00, the property of the aforesaid Andre Dales.

He pleaded guilty and was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. He was sentenced to be "dishonorably" dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for ten years. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under the provisions of Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The prosecution's evidence substantially shows that on 2 October 1944, M. Andre Dales was the proprietor of a cafe at 19 Rue Lauriston, Paris, where accused had visited a number of times and had become friendly with Dales who asked accused if he would be able to bring him some champagne from the country. Accused agreed to do so and on the night of 2 October, visited the cafe and informed Dales that the truck with champagne was waiting outside Paris and Dales and his friend Jimmy de Mont-Saint Amand, who spoke English, went with accused to the water disposal plant of St. Ouen, where two armed soldiers appeared and talked with accused (R8-9). Dales was then informed by accused that the truck had either broken down or been taken by the police and they all returned with accused to the cafe, where

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accused asked Dales if he really had the money to pay for the champagne (R10). On being told that Dales had the money, accused asked to see it and was taken by Dales to his apartment over the cafe and shown the money, about 180,000 francs, including about 15 English pounds and some American dollars, in a little iron box. There were two ways to get into the apartment, one from the back of the cafe and one from the street. This visit to the apartment occurred about ten o'clock that night. They then returned to the cafe downstairs where the two soldiers waited and the three of them (accused and two soldiers) left shortly after (R11). About one o'clock that night, the cafe was closed and Dales returned to his apartment upstairs where he found the street door open, the lock on it broken and the iron box and money gone. He immediately reported his loss to the American Provost Marshal. The next morning he saw accused on the street in his truck and accused indicated he wanted to see Dales. After he was arrested accused took the money from his blouse in the presence of the police; they counted it together and Dales put it in his pocket. It was later turned over to the police (R12-13,14,17-18, 25). Accused was not drunk on the night of 2 October 1944 (R14). Accused, after due warning of his rights in so doing, gave an agent of the Criminal Investigation Division, United States Army, on 4 October 1944, a signed sworn statement (R22; Pros.Ex.D) amounting to a complete confession as follows:

> "On 2 Oct. 1944 at about 1900 hrs. I arrived in Paris with pvts. Spurlock and Thomas, from my organization.
>
> We had just been paid and we had come to Paris to do some drinking. We went to a cabaret, I don't know the name of the street and entered a bar called 'Mauritzon' as closely as I can remember.
>
> After having a few drinks the proprietor approached me and asked me if I would transport some champagne for him.
>
> I asked him if he had the money to pay me if I did. He then took me upstairs to his apartment and showed me his strong box full of francs, dollars and pounds.
>
> Thinking to myself that this man was no good we decided to bust into his room and take the money.

We went downstairs again and drank for a couple of hours and left at about 2300 hrs.

In about 15 minutes Thomas and myself returned and went upstairs to the man's apartment, and Thomas pushed open the door breaking the lock. I was standing at the bottom of the stairs and told him where the money was. He took the money and we fled to the waiting jeep. Spurlock was behind the wheel ready to drive as he knew where we had gone and what we were going to do.

We stopped on the way back to camp.

On 4 Oct. 1944 I gave a man whom I recognized as the proprietor of the cabaret known as 'Mauritson' the sum of 180,000 francs, in English, French and American money.

This sum was obtained from Thomas, Spurlock, and myself and is the approximate amount we had obtained Monday night, 2 October 1944 when we broke into the apartment.

This man gave me a receipt for the 180,00_ [sic] francs".

4. For the defense, the officer in charge of the prison office, Seine Section Disciplinary Training Center, Paris, testified that accused, assigned to administrative work for the previous month in that office, had been a clear, dependable and willing worker. Defense counsel stated that the right of accused to testify had been explained to him. This right was not explained by the court and accused did not become a witness (R26-27).

5. The effect of accused's plea of guilty was explained to him by the court. It is in effect a confession of the offense charged (CM ETO 1266, Shipman; CM ETO 1588, Moseff). Good practice and a proper consideration of the elements involved in a plea of guilty require that some evidence, if available, of the circumstances of the offense be presented to the court (CM ETO 839, Nelson; CM ETO 3056, Walker). This was done.

The evidence submitted herein in no way denied or contradicted the plea of guilty and the plea of guilty and the findings of guilty of the Charge and of both specifications are fully supported.

6. The charge sheet shows that accused is 26 years of age and was inducted 5 June 1942 at Chicago, Illinois. He was commissioned in December 1942. No prior service is shown.

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

8. Dismissal and confinement are authorized under Article of War 93. The designation of the Eastern Branch, United States Disciplinary Barracks, as the place of confinement is authorized (Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

Judge Advocate

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(80)

1st Ind.

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

1. In the case of First Lieutenant JOHN R. KNAPP, (O-1107523), 816th Engineer Aviation 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 6523. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 6523).

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

(Sentence ordered executed. GCMO 63, ETO, 3 Mar 1945.)

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

BOARD OF REVIEW NO. 2

23 FEB 1945

CM ETO 6524

U N I T E D S T A T E S	2D ARMORED DIVISION
v.	Trial by GCM, convened at Headquarters 2d Armored Division, APO 252, U. S. Army, 6 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private GLEN C. TORGERSON (37651192), Company A, 67th Armored Regiment	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Glen C. Torgerson, Company "A", 67th Armored Regiment, did, at 1-1/2 mile north of Ubach, Germany, on or about 10 October 1944, desert the service of the United States by absenting himself without proper leave from his organization and place of duty with intent to avoid hazardous duty, to wit: to engage in combat with the enemy, and did remain absent in desertion until he was apprehended at Brunssum, Holland, on or about 17 October 1944.

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He pleaded to the Specification of the Charge, guilty, except the words "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: to engage in combat with the enemy" and "in desertion", substituting respectively therefor the words "absent himself without proper leave from his organization and place of duty" and "without leave", to the excepted words, not guilty, to the substituted words, guilty; to the Charge, not guilty but guilty of a 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 found guilty of the Charge and Specification. No evidence of previcus 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 shot to death with musketry. The reviewing authority, the Commanding General, 2d Armored Division, approved the sentence with the recommendation that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 20 years, 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 only so much of the sentence as provided that accused be shot to death with musketry but, "owing to special circumstances and the recommendation of the convening authority for clemency", commuted the sentence as confirmed to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 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 the provisions of Article of War 50½.

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

On 10 October 1944, Company A, 67th Armored Regiment, to which company accused was assigned as assistant driver of a light tank, was in a reserve position approximately one mile and a half north of Ubach, Germany (R5,6,7). Accused's platoon was

> "dug in, in a line formation across open country, and our mission was to defend the area and to attack if the enemy attached from the direction of Waurichen" (R6).

The platoon was separated from the front lines by a distance of some two miles with approximately a company of infantry and a battalion of tanks deployed between it and the enemy (R7). On the afternoon of 10 October, as the result of a report received from accused's tank commander, the platoon sergeant searched the area occupied by the platoon and found accused to be absent (R6). The absence was reported to the first

sergeant, who searched for accused "around the area of the rear C.P." without success (R9). The platoon remained in the area a mile and a half north of Ubach for approximately four days after which it relieved another platoon in the front lines near Waurichen, Germany, where its mission was "to ward off counter blows if any came through" (R6). Accused was not with the unit during this time (R6,8,9). On 17 October accused was returned to his organization, at which time, after being advised of his rights, he voluntarily made the following statements to his company commander:

> "After asking him where he had been he answered he had been in Brunssum, Holland. I then asked him why he had left his assignment and he stated that he did not like his job in the tanks while on the line, that he wanted to go back to a maintenance vehicle called a 'T-2', I further questioned him as to the discrepency as to why he was in Brunssum and not at the 'T-2', and he stated that he went back to see a girl friend back in Brunssum. I asked him where he had stayed during the time he was in Brunssum and he stated he stayed in Brunssum with his girl friend. I asked him why he came back and he stated that the M.P's. had brought him back, that they had apprehended him and brought him back" (R8).

Accused's platoon sergeant did not give him permission to leave on 10 October and the first sergeant testified that "to my knowledge" accused had no permission to absent himself on that date (R6,9). Subsequent to his departure he was carried on the morning report as absent without leave (R10). After his return to the company on 17 October, he was placed on a full duty status (R8). Prior to October 10 he had performed his duties in a satisfactory manner and he never before had been in any difficulty in the company (R7,10).

4. After having been advised of his rights as a witness, accused elected to be sworn as a witness in his own behalf. In explanation of his absence he testified as follows:

> "Well, First Sergeant Patton came along, he came by the 'T-2' and said, 'You are going on a tank, Torgerson', and I didn't think very much of that after being up there and pulled back knocked-out tanks and seen guys in them after they had been hit. So I gets my stuff off the 'T-2' and gets on the light tank and gets out there and don't think much of it and they started dropping in a few shells and it didn't bother me

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that night, but I didn't think much of that as you couldn't get out of the tank. And I got tired of sitting in there and I don't know, I got all excited and just went and took off and came back on the 17th, and after I left the tank it started getting dark and I had to think up some place to stay after I'd left and I happened to think of this girl and thought I'd better stay with her a couple of days and come back to the company and maybe they wouldn't put me in the light tank any more, and I goes down to turn myself in to the M.P's. and one came along just before I could turn in and I tried to get him to let me go as I wanted to turn into the M.P's., but he said no and he wouldn't let me do that, and he was a Second Armored M.P., and then I came back to the Company" (R11).

He did not take his helmet or weapon with him when he departed but left them in the tank (R11). It was developed on cross-examination that the company command post was approximately a mile to the rear of the area where the tanks were in position and that accused passed within a quarter of a mile thereof after leaving his tank (R12). Upon being asked by the court to state the reason for his departure on 10 October, accused stated he had no previous training in tanks and that his familiarity therewith was limited to the information which he had been able to secure from the driver through inquiry and "what I had picked up while there on the front". He stated that had he been assigned previously to tanks, rather than to a maintenance vehicle, he "probably wouldn't have minded it so" (R12).

5. a. Accused was charged with deserting the service of the United States by absenting himself without leave from his organization and place of duty with intent to avoid hazardous duty in violation of Article of War 58. That accused absented himself without leave at the time and place alleged is established not only by his own testimony while on the stand but also by other competent evidence of record. Further, accused pleaded guilty to the lesser included offense of absence without leave in violation of Article of War 61. With reference to the second element of the offense charged, the evidence shows that accused, an assistant tank driver, left his platoon at a time when it was in a reserve position some two miles from the enemy lines. Its mission at that time was to defend the area in question and to attack if the enemy attacked from the direction of Waurichen. Four days after accused absented himself, his platoon moved into the front lines. While on the stand, accused stated that, when he was assigned as assistant driver of a tank, he "didn't think very much of that after being up there and pulled back knocked-out tanks and seen guys in them after they had been hit". The area from which accused left was shelled on the night previous to his

departure. He remained absent for about seven days until he was apprehended by military police. From these facts the court could reasonably conclude that accused quit his organization with intent to avoid hazardous duty.

b. The evidence shows that accused was returned to duty upon rejoining his unit. An unconditional restoration to duty without trial by an authority competent to order trial may of course be pleaded in bar of trial for the desertion to which such restoration relates (MCM, 1928, par.69b, p.54; CM NATO 2139, Grabowski; Dig.Op.JAG, 1912, p.415, IX N). The evidence in this case does not show by what authority accused was restored to duty. However, it is presumed that defense counsel performed his full duty toward accused and, since he entered no plea in bar of trial based upon constructive condonation, it is presumed that accused's restoration to duty was not effected by an authority competent to order trial for desertion (CM ETO 4489, Ward). It thus appears that the instant trial was not barred because of constructive condonation of the offense.

6. The charge sheet shows that accused is 23 years of age and was inducted at Camp Dodge, Iowa, on 18 December 1942. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record is legally sufficient to support the findings of guilty and the sentence 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 Sep 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 23 FEB 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private GLEN C. TORGERSON (37651192), Company A, 67th Armored Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 6524. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 6524).

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

(Sentence as commuted ordered executed. GCMO 62, ETO, 2 Mar 1945.)

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

BOARD OF REVIEW NO. 2

2 MAR 1945

CM ETO 6545

U N I T E D S T A T E S v. Private MANESS L. JETT (38079362), Battery C, 203rd Field Artillery Battalion	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Granville, Manche, France, 2 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. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Maness L. Jett, Battery C, 203rd Field Artillery Battalion, did, in the vicinity of St. Sever - Calvados, France, on or about 9 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Denise Soul.

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

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

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

At about 1600 or 1630 hours on 9 August 1944, Denise Soul, 20 years of age, and her brother, Jules Soul, 21 years of age, returned from St. Mauvier Bocage, where they had been refugees, to their home near La Vicomtiere in the St. Sever Forest (R6,7,10,27,28,42). Upon reaching the house they noticed that the lock on the door was broken and that there was a "bottle with calvados" near the door (R28). They also saw three soldiers in the yard, one of whom was the accused. The other two soldiers are usually referred to in the record as "the red-haired soldier" and "the short, dark soldier". The soldiers entered into a conversation with Denise and Jules, asked for and received cider, and entered the house where they drank some of the cider after mixing it with some cognac or calvados which they had with them (R7,11,12). The soldiers were friendly and amiable at this time (R30). After remaining in the house with the soldiers for approximately one-half hour, Jules and Denise went to perform various tasks around the farm, Jules to bury a dead cow and Denise to attend to the cattle which had been neglected in their absence (R7,12). The three soldiers joined Jules and worked with him for about an hour and a half or two hours in disposing of the dead cow (R12,28,31). While they were thus engaged, Denise heard the sound of several shots (R13). After Jules and the three soldiers finished their task, they returned to the house (R7). At this time two infantrymen joined the group and the drinking was resumed (R28,32). The infantrymen asked for chicken and two chickens were killed and picked. Denise, who returned to the house at about this time, was given the task of cooking the chickens (R13,28,32). Some incident not clearly brought out by the record then occurred which apparently caused the soldiers, or at least the two infantrymen, to distrust Jules and Denise and all five soldiers began to search the house. Jules testified that the soldiers appeared to believe that "there were some Boche on the farm" (R14,33,34). At or during this time a Sergeant Wilfred Caro and a Private First Class Paul Mayeux "strolled" down to the house from a nearby gun position (R32,42,44). One of the infantrymen asked Mayeux, who spoke French, to question Denise and Jules. Caro testified that, although the soldiers at the farmhouse were intoxicated at this time, they appeared to be "thinking reasonably" (R44). Caro and Mayeux then left the scene and the search through the house apparently continued (R33). A radio was found and thrown out into the yard (R14, 19,42). During this time several shots were fired in and about the house and one of the infantrymen threatened Denise and Jules with his rifle (R13,16,33). Denise was frightened and crying at this time and accused "defended" her by taking her aside into a small room in order to avoid trouble. He made no attempt to molest her while in this room (R8,15,17,33,34). Later a fight developed among the men, blows were

exchanged, and the two infantrymen departed (R16,34). The accused and the two other soldiers then began to eat some of the chicken which had been prepared. Denise testified that the soldiers also "make us eat the baked chickens" (R17). All three of the soldiers continued to drink and they also forced Jules to drink (R14,15). During the time the chicken was being eaten or shortly thereafter, accused and the short, dark soldier threw Denise on her brother's bed in the kitchen and, according to Denise, the short, dark soldier "started to rape me" (R8). By "rape" she meant "when a man introduce his organ into the private organ of the woman without her consent". However, he did not succeed in his purpose at this time (R9,20). The short, dark soldier then took her into the garden and returned with her to the house shortly thereafter (R20,21,30). On their return, accused and the red-haired soldier seized her and threw her on her brother's bed (R9,10,17,18,30). She shouted for help but "not very long because they put their hand on my mouth, over my mouth" (R10). She also tried to push accused back with her hands and feet. However, accused effected penetration. During this period the red-haired soldier was holding Denise (R9,10,17,18). Accused struck Denise earlier in the evening but did not strike her "very much" at this time. She testified that she struck accused "when he wanted to rape me" but "I could only do it once because he was striking my face" (R18-19). Her brother was present at the time and heard his sister shout for help but was unable to come to her aid because, as he testified, "one soldier had hit me in the face and put me on the ground, and as soon as I was moving he was striking me". He could not remember how many times she shouted because he was "half-dazed" from the blows (R28,39). Accused had intercourse with Denise again about an hour or two later on the bed in the kitchen, and the two other soldiers also later took her into her own bedroom and had intercourse with her there (R17,20). During this time accused was on her brother's bed in the kitchen (R20,39). At one time during the night Jules heard Denise say, "I'd rather die than to suffer like I do now" (R35). Accused slept on Jules' bed in the kitchen until about 0700 hours the following morning at which time he and the other two soldiers left the house. Denise testified that her "drawers" were torn during the night and that her corset was "ripped from top to bottom" (R25). She received minor bruises and scratches in her struggles (R26,28). Although it was dark when certain of the evening's occurrences took place, both Denise and Jules positively identified accused as one of the participants in the attacks upon her (R25,30).

Caro and Mayeux returned to the house at about 1100 hours on the following day, 10 August 1944. As they entered the house Denise began to cry (R42,46). She appeared nervous at the time (R46). She did not have any marks or bruises on her face but did have a bruise on her arm (R43,48). Jules' face was bruised (R43). Denise told Mayeux of the occurrences of the previous night and Mayeux reported the matter to the authorities (R46).

On 11 August 1944 Denise was examined by Major Robert E. Rougelot, Medical Corps, who testified that, as the result of his examination, he was of the opinion that the girl had had intercourse within two to five days

preceding the date of his examination and that previous thereto she had been a virgin (R51,52). He could not state how much, if any, violence had been used in accomplishing such intercourse since, although there was bruising and inflammation of the genitalia, a certain amount of injury was to be expected even in normal intercourse with a virgin. His examination revealed no bruises except in the region of the genitalia other than a bruise about two inches in diameter on her right upper arm (R49-53).

4. Accused, after having been advised of his rights as a witness, elected to be sworn as a witness on his own behalf. He testified that his battery received "cease firing" on 7 August for the reason that "the enemy had got out of reach". This being true, his commanding officer told the battery that some time would be taken to clean "the gun" after which forward movement would be resumed (R55). On 9 August he, together with two other members of the battery, began drinking about 1030 hours. They exhausted their supply at about 1430 hours whereupon they left the battery area in search of cognac. They secured some "pretty hot stuff" at a farmhouse, filled a jug, and continued on. They stopped at another farmhouse and there encountered Jules and Denise Soul (R56,57). His version of the events next occurring does not differ materially from that related by the prosecution witnesses up to and including that portion of their testimony relating to the events which took place after the two infantrymen left the house (R57,58). Accused stated that, during the period when the infantrymen were firing in and around the house, he became somewhat nervous, "drank down" a half of a glass of cognac and shortly thereafter became ill and vomited (R58,59). After the infantrymen left he returned to the house and

> "there is the leg of the chicken in the pan. I picks it up and takes a bite and everything started going around and around, and I laid back, seems like, on that bench, and goes to sleep. When I come to my senses it was in the morning" (R59).

He did not remember how he got to the bed upon which he found himself when he awoke (R62). He stated that he was "pretty well intoxicated" during the evening but that until he fell asleep in the kitchen he was conscious of his actions because "as long as I am on my feet I know what I am doing" (R58,60). He expressly denied that he threw Denise on the bed or that he had intercourse with her at any time (R60).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.149b, p.165). The instant record of trial presents an issue of fact with respect to the underlying question whether accused had carnal knowledge of the prosecutrix, entirely aside from the questions whether such carnal knowledge was by force and without consent. The testimony of Major Rougelot indicates that someone had intercourse with the prosecutrix on the night in question. Accused

firmly denied that it was he. On the other hand, the testimony of Denise, corroborated to a substantial degree by that of her brother, indicates that accused carnally knew Denise on the night alleged. Thus, despite accused's denial, there was substantial evidence from which the court could find that accused had carnal knowledge of the prosecutrix, as alleged. The testimony of the prosecutrix and her brother was to the effect that accused and another soldier seized the prosecutrix and threw her on a bed after which accused effected penetration. Previous to the night in question she was a virgin. The testimony indicates that at least one of the acts of intercourse was accomplished by accused with the active assistance of one of the other soldiers and that a third soldier forcibly prevented her brother from coming to her aid. There was testimony that she cried out at the time and that her outcries were stifled either by the accused or the soldier who was helping him in the furtherance of his design. There was also testimony that accused struck her and that her clothes were torn sometime during the night. Her appearance and behavior on the day following were consistent with her version of the events of the preceding night. From this testimony, which the court could accept as true despite the conflicting testimony of the accused, the court could reasonably conclude not only that accused carnally knew the prosecutrix but also that such carnal knowledge was by force and without her consent (Cf CM 227809, Bull.JAG, Vol.1, No.7, 450(9), p.363). The evidence is therefore sufficient to support the court's finding that accused was guilty of rape, as alleged.

6. The charge sheet shows that accused is 26 years four months of age and was inducted on 10 February 1942. 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 and the sentence.

8. The offense of rape is punishable by death or confinement for life (AW 92). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir.229, WD, 8 Jun 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

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BOARD OF REVIEW NO. 1 30 JAN 1945

CM ETO 6546

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 JAMES C. FRAZIER, Jr. (33749151), 3077th Ordnance Motor Vehicle Distributing Company	) Trial by GCM, convened at Cherbourg, Normandy, France, 28 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

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

2. Confinement in a penitentiary is authorized for the offense of assault with intent to do bodily harm with a dangerous weapon by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). Prisoners, however, under 31 years of age and under sentence of not more than ten years, will be confined in a Federal correctional institution or reformatory. The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1), 3a).

W. Franklin Riter Judge Advocate

Marcus C. Sherman Judge Advocate

Edward L. Stevens Jr. Judge Advocate

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BOARD OF REVIEW NO. 2

2 MAR 1945

CM ETO 6548

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Molsheim, France, 4 December 1944. Sentence:
Private HENRY T. DOBECK (33793725), Company A, 30th Infantry.	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 SLEEPER, Judge Advocates

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

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

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

Specification1: In that Private HENRY T. DOBECK, Company "A", 30th Infantry, did, at or near Bruyeres, France, on or about 25 October 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he surrendered himself at or near Bois de la Madeleine, France, on or about 30 October 1944.

Specification 2: (Finding of not guilty)

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

Specification: In that * * * having received a lawful command from 2nd Lieutenant Gilbert B. Hunt, his superior officer, to rejoin his platoon then in combat, did, at or near Bois de la Madeleine, France, on or about 1 November 1944, willfully disobey the same.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring in each finding of guilty, was found not guilty of Specification 2, Charge I and guilty of the remaining charges and specifications. The record recites (R27) that evidence of five previous convictions was read to the court, Although no certificate of previous convictions was formally introduced into evidence, such a certificate is found among the documents accompanying the record of trial proper and indicates that of the five previous convictions which reference was made three were by summary court for absence without leave for two, four and five days respectively, one by special court-martial for absence without leave for sixteen days, all in violation of Article of War 61, and one by special court-martial for absence without leave for five days and breach of arrest in violation of Articles of War 61 and 69. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced tobe 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. For the prosecution, Staff Sergeant Cleo A. Toothman, second platoon, Company A, 30th Infantry, who was accused's platoon sergeant, testified that on 25 October 1944 his company and platoon were making an approach march from Remiremont to Bruyeres, France. At that time, the company was "going into an assembly area to make an attack" which fact, was known by the accused and generally throughout the platoon. During the march accused "dropped out and I told him to come on, and he said he couldn't make it". Accused was not given permission to fall out and he offered no specific reason why he could not proceed further. At the time he fell out the company was not receiving any small arms fire but was "receiving a few shells". The company had a rest period approximately five minutes after accused fell behind but he did not rejoin his unit during this period. He was not thereafter seen by witness

until the day of trial (R7,8,9).

Technical Sergeant David H. Oglesby, acting first sergeant, Company A, 30th Infantry, testified that on 25 October 1944, during an approach march through wooded terrain and at a time when there were "some artillery shells falling around", he noticed that accused had fallen out of the column apparently for the purpose of adjusting his pack. He told accused to complete the adjustments and, when he had done so, to catch up with the end of the column (R10,13). Accused indicated that he would do so. However, although the company was proceeding along a well defined road and had a rest period shortly after the accused fell out, so that it would have been possible for him to catch up, he did not rejoin his unit on 25 October and was not again seen by witness until 30 October after the company had relieved another unit near the Bois de la Madeleine, from 25 October to 30 October.

> "The company was moving through wooded debris on an infiltration job to move in and through the Bois de la Madeleine to the valley on our front to get clear observation and to destroy any enemy on our front" (R13).

To Oglesby's knowledge, accused was not present with the company during this period (R13).

With reference to Charge II and its Specification, Second Lieutenant Gilbert B. Hunt, commanding Company A, 30th Infantry, testified that at about 0845 hours on 1 November 1944, at a time when the company was in combat with the enemy near the Bois de la Madeleine, accused came to him, stated that he "couldn't take it on the line any longer" and requested permission to go to the rear. After refusing such permission, Lieutenant Hunt asked accused how long it would take him to return to his platoon. Accused replied that it would require about ten minutes. Lieutenant Hunt, who at the time was wearing his insignia of grade, ordered accused to return to his platoon within an hour. At 1040 hours, as the result of a report from accused's platoon leader, Lieutenant Hunt and Acting First Sergeant Oglesby searched the area and accused could not be found. He never thereafter rejoined his unit (R14,15, 16). Sergeant Oglesby was recalled as a witness and his testimony was in substantial accord with that given by Lieutenant Hunt (R17,18).

4. After having been advised of his rights as a witness, accused elected to be sworn as a witness on his own behalf. His

narrative with respect to his activities from 25 October to 1 November was as follows:

> "We were on this march and going through these woods and the company started passing me by and I was falling back all the time. Sergeant Toothman told me to throw away some of the stuff and keep up. I told him I couldn't keep up. This first sergeant passed me as I fell out on the side to fix my stuff. He asked me if I was going to catch up with the company. I caught up with the company, but I was on the end and my platoon was leading. After the break, I kept moving and I discovered I had left my rifle behind, leaning against a tree. One of the fellows noticed that I didn't have a rifle and he told me I had better go back and get it, so I went back to get it. I was so tired, my head was spinning, and it was getting dark, so I unrolled my roll and stayed there for the night. And in the morning I got up and started to look for the company. I went back to where I left them, but they had gone and no one seemed toknow just where the first battalion was at that time. I stopped at a 15th Infantry CP and asked where the first battalion would be. They said it was about eight miles away. They told me a road and I went there and tried to get a ride in a jeep or a truck that was passing by. I happened to catch a jeep to 'B' Company of the first battalion and I got back to my company on the night of October 30th. And the next morning I talked with Lt. Hunt; my platoon leader sent me over there and I wanted to talk with him, so I went. He asked me what happened and I told him I just couldn't keep up with the company; my legs couldn't keep up with me. I told him I was afraid to be falling back like I did that night. I told him, Lt. Hunt, that I wanted to go back to the rear and see the Provost Marshal. He told me I could see him in the morning and to go on a patrol that night and I went on the patrol. The next morning I went to see Lt. Hunt, again, to tell him that I was going to see the Provost Marshal and he gave me a direct order and I turned in to the Provost Marshal on the 1st of November and ever since I have been locked up" (R20,21,22).

He testified that he did not fall out of the column on 25 October because he was afraid to fight (R26). His limit of endurance on marches was three or four miles after which his "legs give out and I can't keep up". He had experienced similar difficulty during training in the United States (R24). However, he had never requested permission to consult the battalion surgeon with respect to the matter nor had he ever asked for or received medical treatment in connection with this disability (R24,25). When he talked to Lieutenant Hunt, he told him that he wanted to see the division psychiatrist because he felt that there was "something wrong" with him, and was told that he would be permitted to see the psychiatrist as soon as the division was relieved. He later told Lieutenant Hunt he wanted to report back to the Provost Marshal and place himself under arrest. He desired to place himself under arrest because "My head was spinning; I couldn't stand it. I wanted to find out what was wrong with me" (R25). He again informed Lieutenant Hunt of his intention when the Lieutenant ordered him to return to his platoon on the morning of 1 November (R22). He did not obey the order given him but instead "turned in" to the Provost Marshal early that afternoon and was placed in confinement (R22,24). After he was confined he was interviewed by the division psychiatrist but was not informed of the result of the examination. Accused did not tell the doctor about his legs or of his head spinning. He was not sent to the aid station subsequent to the interview (R25,26).

5. The evidence adduced shows that on 25 October 1944, while his company was making an approach march under sporadic artillery fire to an assembly area prior to making an attack, accused fell out of the column and failed to rejoin his unit for a period of five days. He had no permission to be absent during this period. Although he voluntarily returned to his company on 30 October, two days later he requested permission from his company commander to return to the rear and, when refused such permission and ordered to return to his platoon, admittedly did not do so but instead "turned in" to the Provost Marshal and was confined. Accused denied that his behavior on 25 October was the result of his fear of combat but asserted that he fell behind as the result of physical disabilities and was thereafter unable to locate his unit until 30 October. Thus, although the evidence adduced in support of Specification 1, Charge I, and Charge I clearly shows that accused absented himself without leave on 25 October, the record presents an issue of fact with respect to the question whether his action in absenting himself was accompanied by the intent to avoid hazardous duty. This was essentially a matter for the court to decide and, upon the entire evidence, it does not appear that the court abused its discretion in resolving the issue adversely to the accused. The evidence adduced in support of Charge II and its Specification, together with accused's admissions, is amply sufficient to support the court's findings that accused willfully disobeyed the

lawful command of his superior officer, as alleged.

6. The charge sheet shows that accused is 29 years of age and was inducted on 3 August 1943. No prior service is shown.

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

8. The designation of 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
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BOARD OF REVIEW NO. 2

1 MAR 1945

CM ETO 6549

U N I T E D S T A T E S	)	3RD INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	Molsheim, France, 19 December 1944.
Private TONY A. FESTA (42057956), Company A, 7th Infantry	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life, Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
	)	
	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Tony A. Festa, Company "A" 7th Infantry did, near Fremifontaine, France, on or about 19 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he came into military control on or about 1 December 1944, at Epinal, France.

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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 one previous conviction of absence without leave for seven days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution's evidence in substance shows:

The morning reports of Company A, 7th Infantry, contain entries as to accused on 20 November 1944 "dy to AWOL 2245 hrs. 19 Nov 1944" and on 6 December 1944, "Fr. AWOL to conf. 7th Inf. Stockade as of 2 Dec. 44"(R7,8; Pros. Ex.A).

Staff Sergeant Wassil Barna, Jr., the only witness in the case, testified that on 19 November 1944, accused was a member of Company A, 7th Infantry (R9,10), second squad, 3rd platoon, of which witness was squad leader. On that day the company was located just outside of Fremifontaine, France, and was preparing to move across the Meurthe River in an attack on the enemy. At about "5:30" that day the platoon lined up their equipment preparatory to pulling out, at which time accused was present with his equipment (R10), witness told his squad to "stick around because we were going to move out at night". At about 9:30 witness wanted a man to carry a Bangalore torpedo and called for accused but though search was made, he could not be found (R11-12). They moved out of the area about 10:45 that night (R12). Accused was still missing from his squad when the attack was made across the river at about 6:45 the next morning and witness has not seen him since 19 November 1944 (R13).

By stipulation a statement was admitted in evidence, made by accused to the investigating officer, reading

> "I was with my company on 19 November 1944, and left on about that date. I was in Epinal when I was picked up by the Military Police. I did not have any of my equipment with me when I

was apprehended as I had left it in the company bivouac area near Fremifontaine, France on or about 19 November 1944. I was absent from my company and don't suppose they misses me until they made a check" (R15).

4. Accused remained silent and no witnesses were introduced for the defense.

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, sec.130a, p.142; AW 28).

It was necessary in this case to prove (a) that the accused absented himself without leave, as alleged and (b) that he intended at the time to avoid hazardous duty, as alleged.

The undisputed testimony shows that accused disappeared shortly after the platoon of which he was a member had been lined up late in the afternoon of 19 November 1944, with their equipment preparatory to move in an attack across the Meurthe River and were told to stay close for that reason. At this time, accused was present. At 9:30 that night just as the move was about to start, he was missing and has not since returned to his platoon. His absence was without leave. His platoon and company did move out and launched an attack, certainly a hazardous duty, against the enemy early the next morning. He was absent until "picked up" at Epinal on 1 December. The evidence clearly shows accused guilty of a violation of Article of War 58 (CM ETO 5287, Pemberton; CM ETO 5291, Piantedosi).

6. The charge sheet shows accused to be 19 years of age. Without prior service he was inducted 2 December 1943 at New York City, New York.

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

8. The penalty for desertion - absence without leave with intent to avoid hazardous duty 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).

Judge Advocate

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BOARD OF REVIEW NO. 1 30 JAN 1945

CM ETO 6553

U N I T E D S T A T E S	)	VI CORPS
	)	
v.	)	Trial by GCM, convened at APO 46, U. S. Army (France), 29 December
Private WILLIAM D. NANNIE (35101448), Battery A, 106th Antiaircraft Artillery Battalion	)	1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by BOARD OF REVIEW NO. 1
RITER, 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 found legally sufficient to support the sentence.

2. Confinement in a penitentiary is authorized for the offense of assault with intent to do bodily harm with a dangerous weapon by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The same article of war authorizes penitentiary confinement upon conviction of two or more acts or omissions, any of which is punishable by confinement in a penitentiary. However, prisoners under 31 years of age and under sentence of not more than ten years will be confined in a Federal correctional institution or reformatory. The place of confinement herein designated is therefore proper (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1), 3a).

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens Jr. Judge Advocate

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 3

21 APR 1945

CM ETO 6554

U N I T E D S T A T E S	LOIRE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private WALTER HILL (34752806), 3102nd Quartermaster Service Company	Trial by GCM, convened at Le Mans, France, 9 November 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Walter Hill, 3102nd Quartermaster Service Company did, at Connerre, France, on or about 24 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Janine Audineau.

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

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come 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:

Mademoiselle Janine Audineau, the alleged victim of rape, resided at Longlee, Duneau, France, with her mother, two sisters and her mother's fiance. Janine was 16 years of age; one sister was older and one ten years old (R7,8,25,26). The house in which they lived appears to have consisted of two rooms, one of which was occupied by Janine and her sisters and the other by Mme. Audineau and her fiance. The rooms were connected by a door, and there was another door leading from Mme. Audineau's room outside the house (R16,24).

On or about 22 August 1944, accused and two companions came to the Audineau home. Accused conducted himself properly and gave Janine some candy. He said something about "shoes", and that evening he returned alone and presented Janine with a pair. He stayed for about an hour and asked for cider which was given him. Janine's mother was present throughout both these visits (R9,10,12,13,25).

On 24 August 1944 at about 2330 hours, the family was disturbed by accused and another colored soldier knocking on the door and window. The knocking grew louder and finally a window pane was broken. Accused's companion entered through the window while accused stood outside with a rifle. The companion struck some matches and looked about the house. Janine's sister hid in a closet in their room and Janine concealed herself in a corner of her mother's room. Mme. Audineau opened the door and she, her youngest daughter and her fiance fled. Apparently at about the same moment, accused's companion joined him outside and then both entered the house through the door. In the interval, Janine, being unable to escape, returned to her own room and hid under the bed (R7,8,14-17,25,27). This disturbance was heard by a neighbor whose home was some 70 meters distant from the Audineau's and who, seeing "that they were not in our house", went away (R30). Mme. Audineau tried to find help, but her neighbors were not at home. She returned to her house a few minutes after leaving it, but the soldiers were still inside and she was afraid to enter. She and the others who escaped, thinking that the two girls had also succeeded in getting away, then spent the night in the fields (R20,25-26).

The two soldiers proceeded to search the house, lighting matches so that they could see. They found Janine under the bed in her room. Accused pointed his rifle at her and moved the bed a little. She got up whereupon he said "Zig-Zig, Mlle" to which she replied "never". He blew out the light and Janine began to scream. He lit

the electric light and she screamed more loudly. The soldiers then put her on the bed. One held her arms while the other got on top of her. They then changed places. Accused "deeply penetrated" into her vagina. When they both finished, they went away. This was about midnight. Janine was unable to defend herself because she was afraid they would kill her. She had never had sexual intercourse before, and after the experience she bled for about 20 minutes (R8,11,16,18-19, 21-22,36-37).

Janine's sister who was hiding in the closet in the same room heard Janine's screams and the voices of the men. She emerged from the closet when the men left and found her sister screaming and weeping. Janine told her she was bleeding. The next day (25 August 1944) Janine was examined by a civilian doctor. Examination revealed a recent "breakage" of the hymen accompanied by "a small hemorrhage, ecchymosis". There were, however, no scratches on the arms, thighs or genital parts and no other evidence of a struggle (R23-24,28). Thereafter on 28 September 1944, Janine and her mother identified accused as Janine's assailant, such identification being made at a line-up of 12 soldiers held at the guardhouse (R33-34).

4. Accused, after being warned by the law member of his rights, elected to remain silent and no evidence was presented in his behalf (R38-39).

5. The identity of accused as the offender in this case is clearly established by identification in court by Janine and her mother both of whom, as the evidence demonstrates, had previously seen accused at their home two days before. The evidence of identification by these same witnesses at the guardhouse line-up was improperly admitted (CM 270871, IV Bull. JAG 4), but in view of the other competent and compelling evidence of identification, no prejudice to the substantial rights of accused resulted therefrom.

The only remaining question meriting discussion is whether the record of trial satisfactorily shows that the victim resisted to the full extent required of her under the circumstances and that penetration by accused was accomplished.

As to the matter of consent, the evidence, including the medical testimony, indicates that no physical violence other than the intercourse itself was inflicted upon the victim. However, the uncontradicted testimony shows that the attack occurred late at night, that accused was armed and that the circumstances were such as to frighten away everyone able to escape. Janine was induced to come out from under the bed at the point of a gun. When she refused accused's suggestion of intercourse, she was forcibly put upon the bed and held by one of the soldiers while the other committed the sexual act with her. The soldiers then changed places and repeated the performance. She screamed throughout and when seen by her sister immedi-

ately after accused's departure was still screaming and weeping. Under the circumstances it cannot be said that the victim was required to offer further physical resistance or that her failure to do so was tantamount to consent (CM ETO 3933, Ferguson and Rorie).

On the issue of penetration, the evidence, possibly because of the victim's apparent unfamiliarity with the nomenclature of the sexual organs or possibly because of ineffective interpreting, is not as clear as might be desired. Her testimony and that of the doctor leave no doubt that penetration of her vagina was effected, but there is no direct evidence that such penetration was accomplished by accused's penis. However, the girl testified that "he deeply penetrated into my vagina"(R36), "he penetrated me" (R8), and "I felt something inside of me" (R19). This evidence, when combined with her testimony that accused had immediately before proposed "zig-zig" to her and upon her rejection of the proposal, put her on the bed and got on top of her while his companion held her arms, is sufficient, in the complete absence of any evidence to the contrary, to raise a fair inference that the penetration was accomplished in the normal way and to justify the court's findings to such effect (See CM ETO 5869, Williams).

6. The charge sheet shows that accused is 27 years and two months of age and was inducted 8 June 1943 at Fort Benning, Georgia. 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 United States penitentiary is authorized upon conviction of the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec.II, pars.1b(4),3b).

Benjamin R. Weeber Judge Advocate

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[illegible] Judge Advocate

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 1 12 MAY 1945

CM ETO 6564

U N I T E D S T A T E S	)	9TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Eupen, Belgium, 9 January 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private FREDERICK G. WEST (35549701), Company E, 39th 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 charges and specifications:

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

Specification: In that Private Frederick G. West, Company "E", 39th Infantry, being present with his company while it was engaged with the enemy, did near Elsenborn, Belgium, on or about 30 December 1944, shamefully abandon the said company and seek safety in the rear.

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

Specification: In that * * * , on or about 30 December 1944, near Elsenborn, Belgium, did desert the service of the United States by absenting himself without leave with the intention of avoiding hazardous duty and shirking important service, and did remain absent in desertion

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until he surrendered himself at Stolberg, Germany on or about 30 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 both charges and specifications. Evidence was introduced of one previous conviction by general court-martial for desertion with intent to avoid hazardous duty in violation of Article of War 58. Six-sevenths 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. During battle while his platoon was receiving fire in a crucial phase of the great German winter attack, accused, though ordered forward, went twenty miles to the rear. The evidence is legally sufficient to support the findings of guilty, and the one act violates both the 75th and the 58th Articles of War (CM 130018, par.428(5), p.294; CM 230222, III Bull. JAG 143,144; CM ETO 4570, Hawkins; CM ETO 5155, Carroll and D'Elia; CM ETO 7500, Metcalf and Wloczewski; 13 CJ, sec.9, pp.58-59).

4. The charge sheet shows that the accused is 20 years and eleven months of age and was inducted 5 March 1943 at Toledo, Ohio, to serve for the duration of the war plus six months.

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

6. The penalty for desertion in time of war and also for misbehavior before the enemy is death or such other punishment as a court-martial may direct (AW 58,75). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

_____ Judge Advocate

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 1

12 MAY 1945

CM ETO 6620

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Wolferdang, Luxembourg, 11 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class ROBERT GRIFFITH (35773122), Company A, 8th 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 Specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that Private First Class Robert Griffith, Company "A", 8th Infantry, having received a lawful command from Captain Gilbert P. Gammill, 8th Infantry, his superior officer, to report to his organization, Company "A" 8th Infantry, for duty, did, near Wecker, Luxembourg, on or about 23 December 1944, 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 Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be

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dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 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 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 (CM ETO 6457, Zacoi; CM ETO 7687, Jurbala; CM ETO 7500, Metcalfe and Wloczewski).

4. The charge sheet shows that the accused is 20 years of age and that he was inducted 26 August 1943 at Fort Thomas, Kentucky. He had no prior service.

5. The penalty for willful disobedience in violation of Article of War 64 in time of war is death or such other punishment as a court-martial may direct (MCM, 1928, par.104c, p.98). Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized by Article of War 42 and Circular 210, War Department, 14 September 1943, section VI, as amended.

/s/ [illegible] Judge Advocate

/s/ Wm. F. Burnett Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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BOARD OF REVIEW NO. 2

2 MAR 1945

CM ETO 6622

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Walferdang, Luxembourg, 12 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class HUDEY E. BOX (17014397), Headquarters Company, 1st Battalion, 12th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Hudey E. Box, Headquarters Company, 1st Battalion, 12th Infantry (attached Headquarters Company, 4th Infantry Division) did in the vicinity of Consdorf, Luxembourg on or about 22 December 1944, desert the service of the United States by absenting himself without leave with intent to avoid hazardous duty, to wit: defensive action against attacking German forces, and did remain absent in desertion until he surrendered at Luxembourg, Luxembourg, on 26 December 1944.

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

3. The evidence for the prosecution shows that on 20 December 1944, accused was on special duty with the security guard of Headquarters Company, 4th Infantry Division, which was located at Luxembourg, Luxembourg. The Commanding Officer of this organization, First Lieutenant Henry B. Yeagley, on this date, organized a provisional force of 60 men of which accused was designated a member. The group was divided into two platoons of two squads each and charged with the special mission of assisting the 12th Infantry in defending against a German attack during their December offensive. At approximately on the morning of the 20th this detachment, with accused present as a member of the first platoon, reported to the headquarters of the 2nd Battalion, 12th Infantry, located at Consdorf, Luxembourg (R5,6,9). Some orientation and instruction was given to the security guard, concerning where they were going and the nature of their mission. Accused was a member of this guard (R5,7,9). On the evening of the 20th of December, the platoons were assigned the duty of holding a sector, along a line on which they were deployed, so that a company of the battalion could withdraw from their advanced positions. The platoons were subjected to small arms and artillery fire while they were "dug in" at a fire break along the road during their first night in the front line (R6,7). The following day they encountered enemy fire again but held the positions they had occupied. On the 22nd of December, a German combat patrol endeavored to break through and subjected the men of the detachment to heavy small arms and machine gun fire (R6,7). Under orders the platoon withdrew a distance of about three hundred yards to another position where they received artillery fire from the enemy but had no casualties (R7). On the morning of the 23rd, accused was reported absent by his platoon sergeant. The company commander made a personal check of his men by counting those present. He went along the entire sector contacting each foxhole. They were dug in, two men to each foxhole. Accused was not present with his unit in the line (R7,8,10). His absence was unauthorized (R7,8). The platoons remained "up" with the 12th Infantry until the 24th of December, when they were relieved and returned to the Division headquarters at Luxembourg (R7,8).

On the 26th accused voluntarily appeared at the Division Command Post and on being questioned by his commanding officer as to why he had not been with them, stated that he left his platoon because he "just couldn't take it any longer"(R8). He showed no evidence of injury or illness and his physical condition appeared to be normal (R8,10,11).

4. After an explanation of his rights as a witness accused elected to remain silent. No evidence was presented by the defense (R11).

5. A recital of the undisputed evidence disclosed a typical "battle line" desertion case. Accused was a member of an emergency detachment which had been dispatched on a mission of great importance. In company with men of his unit he marched to the front, engaged the enemy and encountered their shellfire. At the crucial moment when his organization was under attack and his services most needed, he left his command and did not return until the enemy action was concluded. When he absented himself from his platoon on the night of the 22nd of December, he had full knowledge of the hazards and perils which confronted him. He left to avoid these risks and dangers. The Manual provides that:

> "any person, subject to military law, who quits his organization or place of duty with intent to avoid hazardous duty or to shirk important service shall be deemed a deserter" (AW 28; MCM, 1928, par.130, p.142).

The only credible inference which can be drawn from the evidence of accused's conduct under the circumstances is that he understood that his presence at his post of duty involved tremendous risks of his life and that he deliberately absented himself to avoid these battle hazards. Proof of commission of the offense with which accused was charged is fully established by convincing and substantial evidence (CM ETO 4570, Hawkins; CM ETO 5155, D'Elia et al; CM ETO 6625, Anderson and authorities cited therein).

6. The charge sheet shows that accused is 22 years and four months of age. He enlisted, without prior service, at Camp Robinson, Arkansas on 11 March 1941.

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

8. The offense of desertion, in time of war, is punishable by 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).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 1 23 FEB 1945

CM ETO 6623

U N I T E D S T A T E S	4TH INFANTRY DIVISION.
v.	Trial by GCM, convened at Walferdang, Luxembourg, 10 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch United States Disciplinary Barracks, Greenhaven, New York.
Private EDWIN F. MILNER (35294221), Company L, 12th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Edwin F. Milner, Company "L", 12th Infantry, did, in the vicinity of Hurtgen Forest, Germany, on or about 11 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: an engagement with the enemy, and did remain absent in desertion until he surrendered himself at Esneaux, Belgium, on or about 1 December 1944..

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He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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. Uncontradicted evidence for the prosecution showed the following facts:

On 8 November 1944 Company L, 12th Infantry, was part of the forces which relieved the 28th Infantry Division in the Hurtgen Forest in Germany. The company was engaged in active combat and had visual contact with the enemy. It was subjected to concentrated and continuous fire from heavy artillery, mortars, and small arms. In addition, mines and "booby traps" made the advance dangerous and bloody. From 8 November to 11 November its casualties amounted to 50% of its strength. From 11 November until it was relieved from duty in the Forest, its casualties amounted to 85% of its membership. The terrain in which it was engaged was mountainous and wooded and great difficulties in operations were encountered (R6).

Accused was a rifleman in the third platoon of the company and was with it when it entered the Forest. On the night of 10 November he came to the company command post during a heavy artillery barrage. The company commander ordered him to take cover in a foxhole with directions to remain in it until the barrage lifted and then to return to his platoon. Later in the evening a search of the area was made and he could not be found. The next morning the first sergeant of the company again searched the area of the foxhole and determined he was not with his platoon. He was not present with the company from 11 November to 4 December 1944, when he was returned to it. He had not been evacuated through medical channels and had received no permission to leave his platoon (R5,6). On 1 December 1944, accused surrendered himself to military control at Esneaux, Belgium, several miles to the west and rear of the scene of the fighting (R7).

4. After his rights were explained, accused elected to remain silent. The defense offered no evidence (R7).

5. The evidence discloses a typical "battle line" desertion case. The accused left his platoon when it was under fire and appeared at his

company's command post during a heavy artillery barrage. He was temporarily sheltered in a foxhole under orders to return to his platoon when the barrage lifted. He violated this order and absented himself without leave for 20 days in a place of comparative safety in the rear, during which time his company was engaged in sanguinary conflict with the enemy and suffered tragic casualties. The only inference which can be honestly deduced from this evidence is that accused, with full knowledge of the fact that his presence at his post of duty involved tremendous risks to his life, deliberately left it in order to avoid these battle hazards and perils. This offense was proved beyond all doubt (CM ETO 4570, Hawkins; CM ETO 4701, Minnetto; CM ETO 4743, Duff; CM ETO 5293, Killen).

6. The charge sheet shows that accused is 19 years old. He was inducted 22 October 1943 at Sandusky, Ohio, 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 is legally sufficient to support the findings of guilty and the sentence.

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

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 1 22 FEB 1945

CM ETO 6625

U N I T E D S T A T E S	4TH INFANTRY DIVISION.
v.	Trial by GCM, convened at Walferdang, Luxembourg, 12 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class IRVING G. ANDERSON (37273655), Company B, 12th Infantry (attached to Headquarters Company).	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Irving G. Anderson, Company "B", 12th Infantry, (attached Headquarters Company, 4th Infantry Division) did in the vicinity of Consdorf, Luxembourg, on or about 22 December 1944, desert the service of the United States by absenting himself without leave with intent to avoid hazardous duty, to wit: defensive action against attacking German forces, and did remain absent in desertion until he surrendered at Luxembourg, Luxembourg, on or about 25 December 1944.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for 11 hours in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution established the following facts:

On 20 December 1944 accused was on special duty with the security guard of the Headquarters Company of the 4th Infantry Division, which was located at Luxembourg (Luxembourg). On that date he was designated as a member of a detachment of 60 men (divided into two platoons of two squads each) charged with the special mission of assisting the 12th Infantry in defending against the attack of the Germans in their December offensive. The detachment reported to the Headquarters of the 2nd Battalion, 12th Infantry, at 1015 hours on said date. It was commanded by First Lieutenant Henry B. Yeagley. Accused was designated leader of the first squad of the first platoon. (R4,5,9).

On the evening of 20 December the two platoons were assigned the duty of holding a sector while a company fell back through the platoons. En route to their position the platoons were subjected to enemy small-arms fire. On 21 December the platoons encountered enemy small-arms fire and fell back to a fire break where they "dug in". On 22 December the platoons held the last-described position until they withdrew a distance of 400 yards under battalion orders to another position where in the evening they received small-arms fire. During the process of withdrawal, and as the platoons commenced to "dig in" at the new position, a German patrol fired on them. Accused and another soldier then ran to the rear (R10-11). The platoons remained in that position until they returned to Division Headquarters on 24 December (R6,9,10). From the night of 22 December until they withdrew on 24 December the platoons received artillery, mortar and rocket fire from the enemy. Two casualties were suffered (R7,13).

Although no permission had been given accused to be absent from his detachment (R6), he was absent therefrom on the morning of 23 December, and search by the detachment commander failed to disclose

his presence. His absence continued during 24 December (R13).

On 25 December, after the platoons had returned to the Division Headquarters, accused voluntarily appeared at the guardhouse. He made no explanation of his absence. At that time he carried no evidence of injury or illness and his physical condition appeared to be normal (R7,13).

4. After an explanation of his rights, accused elected to remain silent and presented no evidence (R41).

5. a. A recital of the undisputed facts of the case is all that is necessary to support the court's findings of guilty. Accused was a member of an emergency detachment which had been dispatched on a mission of supreme importance. At the crucial moment when his unit was under attack he left his command and did not return until its action was concluded. It is obvious that when he left his platoon on the night of 22 December he understood full well the nature of the perils which confronted him. He left to avoid them. Commission of the offense with which he is charged was proved beyond doubt (CM ETO 4570, Hawkins; CM ETO 4701, Minnetto).

b. The failure of the Specification to allege the organization or place from which accused absented himself without leave is not a fatal defect (CM ETO 5359, Young).

6. The charge sheet shows that accused is 25 years and eight months of age. He was inducted 8 May 1942 at Fort Snelling, Minnesota. He had no prior service.

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

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

B. Franklin Potter Judge Advocate

Malcolm C. Sherman Judge Advocate

Edward L. Stevens Jr. Judge Advocate

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with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

14 MAR 1945

CM ETO 6626

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Walferdang, Luxembourg, 10 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private EMMETTB. LIPSCOMB (33227709), Company B, 802nd Tank Destroyer Battalion	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Emmett B. Lipscomb, Company B, 802nd Tank Destroyer Battalion, did, at Beyren, Luxembourg, on or about 1700 18 December 1944 desert the service of the United States by absenting himself without leave from his organization with intent to avoid hazardous duty, to wit: an anticipated engagement with the enemy, and did remain absent in desertion until he was apprehended and turned over to the 4th Infantry Division Military Police Luxembourg on or about 1630 29 December 1944.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of

the Specification except for the words "was apprehended and turned over to the 4th Infantry Division Military Police, Luxembourg, on or about 1630 29 December 1944", substituting therefor the words "surrendered himself to Third Army Military Police at Canach, Luxembourg, on 25 December 1944", of the excepted words not guilty, of the substituted words guilty, and guilty of the Charge. Evidence was introduced of one previous conviction by summary court for absence without leave for two days 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 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 his company commander that accused was, on 18 December 1944, a private, Company B, 802nd Tank Destroyer Battalion. On 17 December, this company was outside of Beyren, Luxembourg, eight or ten miles east of the city of Luxembourg. At eleven o'clock that morning, the company was alerted by its captain as a result of information received by him (R4,5,7). He gave instructions to his platoon leaders (R5), who in turn communicated them to the company section sergeants (R6). As a result of this, the communication was passed down to the sergeant who led the first squad, first platoon (R7, 8), of which accused was a member. This sergeant, following his instruction, thereupon told each of his men that morning, including accused, that he was not supposed to leave the area, that the company had been alerted, and that "we were supposed to move to a certain area and when the counter attack started the move was ordered, and until further notice to be there on a thirty minute alert" (R9) (Underscoring supplied). The captain had told his platoon leaders that he had learned through channels that the German counter attack had started (R5). Under the company operating procedure, all the members of the command were supposed to stay in the immediate vicinity of their respective platoons. Three or four days after 17 December, the date of this alert, although the enemy was not "actually" contacted, the company moved up into "firing positions" in support of the 12th Infantry, 4th Infantry Division. During 17 and 18 December about two enemy shells dropped in Beyren (R5,7,10). At five or five-thirty in the afternoon of 18 December, accused's squad leader checked his squad and accused was then missing and did not thereafter return to his squad (R7,10; Pros.Ex.A). Accused had no permission on either 17 or 18 December to leave his platoon area (R7,10). Accused's absence was terminated by his surrender to military police at Canach, Luxembourg, on or about 25 December (R11).

4. Accused, advised of his rights as a witness, elected to remain silent. He called as his witnesses his company commander and his squad

leader. The captain testified that accused had given trouble before: "drinking and wandering off". When not drinking, he was "working all right." But "off hand" the captain "would say he was" an habitual drinker, not giving any trouble when not drinking (R13,14). Accused's first sergeant said accused had been a member of his organization since July 1942 and that "other than for his drinking I have had no trouble with him at all. He is a very good worker. * * * he drinks pretty heavily and too often". When not drinking, accused was a "pretty valuable man - as far as his work is concerned". Under fire, in actual contact with the enemy, he acted like the average person; "he didn't flinch. When they came too close we all jumped" (R11,12). The sergeant said further:

> "Well, I'll tell you, sir. On the morning of the 18th evidently he found some liquor somewhere and, well, I happened to go out on patrol that morning with the lieutenant and when I came back at about 3:00 in the afternoon Lipscomb came back from somewhere and had been drinking and was feeling quite high. At that time we knew we were on the alert and I told him he was sort of misbehaving and to stay around there. That was about 3:00 o'clock, and then the platoon leader called us all together again for about an hour's critique. Then I went back and Lipscomb was gone and I haven't seen him until last night" (R12).

Told by the court that he had said that he reminded accused of the alert on the afternoon of 18 December, and asked if in his opinion accused was rational enough to understand, the sergeant answered:

> "That is hard for me to say, because I really don't know. He might have and he might not. Personally, I don't think he did understand very much and didn't realize what I was telling him. And, then, I really couldn't say, because when a man is half intoxicated you never can tell just what his mind is doing" (R12).

5. The evidence thus shows that at the time and place alleged in the Specification accused absented himself without leave from his organization when it was close to the enemy, was alerted and was momentarily expecting to take an advanced position to resist the enemy counter attack. The proof rather indicates that the motive for accused's conduct was not fear. Rather, it appears that he went off to indulge his appetite for liquor, or that his conduct resulted from his having theretofore overindulged to the extent that he lost all sense of responsibility for the performance of essential duty at a crucial time. Accused had a known

and grave propensity for drink. The evidence indicated that by 3 pm, 18 December, he was in a state of intoxication. But his condition was voluntary. His willingness to put himself hors de combat through drink necessarily involved an intention to shirk his duty, hazardous duty at that particular time and known by him to be such.

In a charge of desertion involving Article of War 28, as here, it is necessary to show that at the time accused absented himself he had the specific intent of avoiding hazardous duty (CM ETO 5555, Slovik; CM ETO 2368, Lybrand; CM ETO 5958, Perry and Allen).

When a man has a known duty to perform, a deliberate engagement by him in conduct which he knows will render impossible performance by him of his duty certainly carries with it, legally, an intent not to perform his duty. And if as a consequence of his misconduct, involving such intent to flout duty, he separates himself from his command, he can properly be said to have intentionally absented himself.

Accordingly it is the opinion of the Board of Review that under the circumstances there was an intentional absenting of himself by accused from his command to avoid hazardous duty. Article of War 28 does not condemn such conduct only when it is inspired by fear. It is probably far worse for a man to keep out of combat through laziness or through preference for a few hours sleep than it is for a youngster who is so afraid that his feet won't move. The language of Article of War 28 is certainly susceptible of this conclusion.

The findings of guilty of the Charge and Specification were fully sustained by the evidence (CM ETO 5555, Slovik; CM ETO 2368, Lybrand; CM ETO 5958, Perry and Allen, all supra; and CM ETO 3234, Gray).

6. Accused at the time of the trial was 32 years of age. He was inducted into the Federal service on 13 October 1942.

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

8. Desertion in violation of Article of War 58 is, in time of war, punishable by such sentence as a court-martial may direct, including death. 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

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

BOARD OF REVIEW NO. 1

21 APR 1945

CM ETO 6637

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Bruyeres, France, 14 November 1944. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for ten years. Loire Disciplinary Training Center, Le Mans, France.
Private JAMES J. PITTALA (32373205), Medical Detachment, 7th 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. Accused was tried upon the following charges and specifications:

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

Specification: In that Private James J. Pittala, Medical Detachment, 7th Infantry, did, near Vy les Lure, France, on or about 17 September 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he surrendered himself at Faucogney, France, on or about 20 September 1944.

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

Specification: In that * * * did, near Rupt-Sur-Moselle, France, on or about 27 September 1944, run away from his place of duty, with Company "D" 7th Infantry, which was then engaged with the enemy, and refused to return thereto.

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 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 25 years. The reviewing authority approved the sentence, but reduced the period of confinement to ten years, ordered the sentence as thus modified duly 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 by General Court-Martial Orders No. 6, Headquarters 3rd Infantry Division, APO 3, U.S. Army, 9 January 1945.

3. On 17 September 1944, accused and five other soldiers were transferred from the division's organic medical battalion to the 7th Infantry Regimental Medical Detachment, and reported to the Assistant Regimental Surgeon at the regimental aid station located in Vy les Lure, France. The surgeon informed accused that he was assigned to the detachment's section of the regiment's 1st battalion of infantry, and ordered him to remain in an adjacent room until transportation would be available to carry him to his place ofduty (R7,8,10). The 1st Battalion and the regiment were then in combat in the vicinity of Lure, France, which was a matter of general knowledge (R8,10). Later in the day when transport was ready, accused was not in the room and could not be found in the area after search by the detachment's first sergeant. He had no permission to be absent. He was not in the detachment again until hesurrendered at the regimental aidstation in Faucogney, France, on 20 September 1945 (R8-11; Pros.Ex.A).

On 27 September 1945, after accused had performed his duties for two days in the 1st Battalion Medical Section as a company aid man attached to a platoon in B Company, he was again missing when needed. The platoon was then in combat with the enemy in the vicinity of Rupt-sur-Moselle, France (R13). He had no permission to be absent, and was found by his section leader in a building on a hill some two and a half miles away (R14,15). He said he "could not take it" and "would not go back up". He later returned to the rear aid station about 4½ miles from his proper place (R15,16).

4. Accused, after his rights were fully explained to him, elected to make an unsworn statement through counsel (R17). It was stated that he had been in the service since June 1942, and overseas since September 6637

that year. He served as a litter man with the 36th Infantry Division throughout the Tunisian campaign, and with the 3rd Infantry Division at Casino, Anzio and Rome, and in the campaign of southern France. His service was without previous conviction by court-martial or time lost through hospitalization (R17-18). No other evidence was introduced in his behalf.

5. a. The case is that of a soldier with long and honorable service transferred from the comparative safety of the Red Cross marked installations of a medical battalion, forward to duty with an infantry battalion, whose hazards he knew from experience.

b. Specification, Charge I: The Board of Review may take judicial notice of the landing ofthe Seventh Army and the 3rd Infantry Division as a unit thereof on the southern coast of France on 15 August 1944; the Army's rapid northern advance and junction with the Third Army near Chaumont, France, 14 September 1944, and of the Seventh Army's capture of the City of Epinal, France, 24 September 1944 (CM ETO 7413, Gogol, and authorities therein cited). These events were described in the press throughout the world as they occurred, and in communiques issued by the high command. Reference to any authentic map reveals the following pertinent facts: Lure, France, the proven location of the 1st Battalion in combat 17 September 1944 is 335 miles from the Mediterranean, representing an advance of that distance in 33 days; Vy les Lure, the location of the regimental aid station on that day, is four miles south of Lure; Faucogney, the aid station's site at the time accused surrendered there 20 September 1944, is 11½ miles north of Lure; and Rupt-sur-Moselle, the scene of accused's alleged offense in the action there on 27 September is 7½ miles northeast of Faucogney. Epinal is about 35 miles north of Lure.

Under such circumstances, there can be no reasonable doubt of accused's knowledge on 17 September 1944 that the regiment was in combat as testified. During combat, that there will be certain unmistakable battle activity in and around regimental installations is so self-evident as to be axiomatic within the military knowledge of line officers, of which the court was composed.

> "Some matters of judicial knowledge are so self-evident as to be ever present in the mind, so that they naturally enter into a decision of any point to which they have application" (31 C.J.Sec.,sec.13c,p.522).

There had been the continued rapid movement of the campaign. There is also to be considered the fact that accused was then at an aid station within four miles of the front lines, where he could hardly have failed to see and hear friendly and enemy cannon and to observe the tenseness, the excitement of men, and the rush of traffic. They are the inevitable accompaniments of battle which at a regimental installation could not have been unobserved or misunderstood. Accused received notice of his assignment to a battalion section, which, as he must have known from experience, meant duties as a company aid man or litter bearer in close proximity to the front lines (T/O and E7-11, W.D., 26 Feb.1944, sec.Ib, clm5). Hazardous duty related to

combat, of which he had knowledge and experience, was therefore imminent, and it may be inferred that he left with specific intent to avoid it (CM ETO 7339, Conklin, and authorities therein cited).

c. Specification, Charge II: Accused was found two and a half miles from his company, after being present with it as an aid man for two days. The company was then engaged with the enemy. He said he could not take it and refused to return. The evidence sustains the finding of guilty (CM ETO 5429, Cameron and Rawls).

6. The charge sheet shows that accused is 25 years of age and was inducted 27 June 1942 at Utica, New York, to serve for the duration of the war plus six months. He had no prior service.

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

8. The penalty for desertion in time of war and for misbehavior before the enemy is death or such other punishment as a court-martial may direct (AW 58,75). The designation of the Loire Disciplinary Training Center is proper (Ltr. Hq. European Theater of Operations, AG 252 Op. TPM, 19 Dec. 1944, par.3).

_____ Judge Advocate

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Branch Office of The Judge Advocate General
with the
European Theater of Operations
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BOARD OF REVIEW NO. 1 26 MAY 1945

CM ETO 6682

U N I T E D S T A T E S v. Private LEO E. FRAZIER (37119727), 370th Replacement Company, Detachment 99, 99th Replacement Battalion	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OEPRATIONS Trial by GCM, convened at APO 519, U.S. Army, 29,30 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

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 LEO E. FRAZIER, 370th Replacement Company, Detachment 99, Ground Force Replacement System, did, at Tidworth Barracks, Tidworth, Wiltshire, England, on or about 18 October 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill Private Leonard Rainey, Provisional Replacement Company "U", Detachment 54, Ground Force Replacement System, a human being, by shooting him with a pistol.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of

the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for six days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced tobe 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 showed that accused and deceased were in a barracks room, under the influence of liquor, andthere engaged in a quarrel resulting in slight batteries of each upon the other. In the course of the altercation, the deceased threatened accused and lifted up a bayonet against him but a bystander persuaded him to surrender it. Accused left the room upon solicitation by others and, at a time estimated at about five minutes thereafter, fired the fatal shot through an open window. Deceased had continued his threats against accused after his departure.

These are facts from which the court could reasonably infer that the accused acted with malice, and the record is therefore legally sufficient to support the findings. It is not the function of the Board of Review sitting in the European Theater of Operations to weigh evidence in any case. The record of trial is examined only to determine whether the findings are supported in all essentials by substantial evidence. The findings are treated as presumptively correct and they are legally sufficient if the ultimate facts drawn by the court could legally have been inferred from the evidence introduced (CM ETO 1631, Pepper; CM 192609 Hulme, 2 B.R. 9, Dig.Op.JAG 1912-1940, sec.408 (2),p.259). It was the function and duty of the court and the reviewing authority to weigh the evidence, and determine whether passion under adequate provocation not cooled by the passing of time, or drunkenness, reduced the crime from murder to manslaughter. Its finding of either the greater or the lesser offense, on the facts herein, would be legal and appropriate (Stevenson v. United States, 162, U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896); CM ETO 292, Mickles). While the Board of Review in a proper case will not be hesitant in holding there is no substantial evidence of malice (CM ETO 82, McKenzie; CM ETO 10338, Lamb), the deliberateness of this crime after the quarrel had been broken off precludes disturbing the findings upon appellate review (MCM, 1928, par.148a, p.164, and par.126a, p.136; CM ETO 2007, Harris; CM ETO 3042, Guy; CM ETO 3180, Porter; CM ETO 5765, Mack).

4. The charge sheet shows that accused is 23 years and seven months of age (corrected by accused at trial to 24 years and seven months (R63)), and was inducted 27 October 1941 to serve for one year. His service period is governed by the Selective Service Extension Act of 1941. No prior service is shown.

5. The court was legally constituted and had jurisdcition 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 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

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

BOARD OF REVIEW NO. 1 13 FEB 1945

CM ETO 6684

U N I T E D S T A T E S	)	83D INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Luxembourg, Luxembourg, 25 November 1944. Sentence: To be dismissed the service.
	)	
Lieutenant Colonel JOHN O. MURTAUGH (O-15844), 32nd Cavalry Reconnaissance Squadron, Mechanized	)	

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

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

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

CHARGE: Violation of the 85th Article of War.

Specification 1: In that Lieutenant Colonel John O. Murtaugh, 32nd Cavalry Reconnaissance Squadron, was, in the vicinity of Mondorf, Luxembourg, on or about 24 October 1944, found drunk while on duty as Commanding Officer, 32nd Cavalry Reconnaissance Squadron.

Specification 2: In that * * * was in the vicinity of Mondorf, Luxembourg, on or about 25 October 1944, found drunk while on duty as Commanding Officer, 32nd Cavalry Reconnaissance Squadron.

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He pleaded not guilty to and was found guilty of the Charge and both specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, 83d 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, although characterizing it as deplorably inadequate punishment for the grave military offenses of which accused was found guilty and stating that the meager punishment awarded in the case reflected no credit upon the court's conception of its own responsibility, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution's evidence, which was not controverted, was substantially as follows:

On 24 and 25 October 1944 accused was present with and on duty as Commanding Officer of the 32nd Cavalry Reconnaissance Squadron, Mechanized (R6-7,17,26,33,43-44), bivouacked just north of the city of Luxembourg, Luxembourg (R7,17,26). (All witnesses at the trial were officers of said squadron).

Specification 1 (24 October 1944): Pursuant to a division order requiring the squadron to move to another sector in order to relieve elements of the 330th Infantry, accused on 23 October had caused a reconnaissance to be made of the new sector and of a route around the city of Luxembourg to Mondorf, Luxembourg, and a march order was prepared (R17,26-27). Accused's reason for directing that Luxembourg City be by-passed was thus explained by the Squadron S-3:

> "We have a large number of vehicles in a cavalry reconnaissance squadron and for measures of control and security measures, it was a sound tactical idea to move the squadron around the outskirts of the city, rather than through the city of Luxembourg, itself, to reduce the possibility of traffic accidents and to reduce the number of guides necessary to conduct the squadron on its march" (R17).

About 0730 hours on 24 October accused informed the Squadron S-2 and S-3 that he had decided to change the route to a better and shorter one through Luxembourg City, that guides would be posted and that the squadron would be marched over the newly determined route. In the opinion of the S-2, accused was drunk and unable to perform his duty as Commanding Officer at this time, and the S-3 believed that the degree of accused's intoxication was sufficient to prevent him operating

at his full efficiency (R18,27). His face was flushed and his speech was thick and so incoherent that neither the S-2, S-3 nor executive officer of the squadron was able to understand the new route which he attempted to explain to them - "two or three things were discussed along with the matter of the route" (R7,18,26,27). In the S-3's opinion, if accused were thinking as he normally did, he would not have changed the plans at the last moment (R18).

After the squadron arrived at Mondorf, the executive officer, in accordance with orders previously issued by accused, arranged and reconnoitered three guard posts around the squadron command post at the Palace Hotel, Mondorf. In the afternoon, as that officer was posting the initial guards on these posts, accused instructed him to dismiss all the guards except the one posted at the gateway of the hotel. He testified that, in his opinion, accused was drunk at the time, as manifested by this most unusual order, which violated his previous order (R7), the fact that he walked unsteadily and his incoherent speech (R8).

At this time the command post of Troop C of the squadron was in Gandren, about one or one and one-half kilometers from the enemy, from whom it was separated by the Moselle River. The troop's misssion, which was its first, was to relieve elements of the 330th Infantry and occupy observation posts at certain predesignated points (R33-34,40). About 1830 hours accused, who was driving a quarter-ton jeep, arrived at the outside of the troop mess hall and asked the troop commander "what we had". The latter offered him coffee, but accused said that was not what he meant. The troop commander then told him they "would be glad to have him for supper", but accused asked him "if that was all I had to offer him". In the troop commander's opinion, accused was drunk. The basis of his opinion, he testified, was as follows:

> "Initially, from the condition of his eyes, his manner of speech was incoherent, his speech was thick, his face was very flushed and he had difficulty in getting out of the one-quarter ton. * * * It seemed to me that he lacked co-ordination between his mind and limbs in getting out" (R34).

Witness could smell alcohol on accused's breath. After remaining a few minutes, accused stated he was going to the command post of Troop A of the squadron, and witness gave him directions. Accused left but returned about ten minutes later and stated he had lost his way (R34). Witness next saw him sitting on the hood of the jeep talking to about 25 or 35 men of the troop who were about to march to their command post preparatory to executing the troop's mission (R34,35, 42,43). He was smoking, his helmet was off and his vehicle was in the midst of them.

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"He was telling my men that he wanted them to go down there and get their teeth into the thing and that very soon he would have them sending patrols into Germany and giving them a dose of their own medicine".

He talked disconnectedly on many subjects (R35). Witness walked among the men, talked with them and, although it was dusk, concluded from their facial expressions and actions that they were "disgusted", not with what accused said but with the manner in which he said it (R35,41,42). Because of this episode the men did not move out when planned (R34). Accused, in witness' opinion, was drunk and was unable to fulfill his duties as squadron commander (R35).

Between 1930 and 2100 hours, the S-2 testified, he saw accused at the squadron command post at Mondorf. In witness' opinion, accused was drunk and appeared to be much more under the influence of intoxicants than in the morning. His speech was thick and labored, his face was flushed, he appeared to be unsteady and, in witness' opinion, he was not capable of performing his duties. The S-2 testified:

"When he came to the command post he walked immediately towards me -- I was on duty in the CP at the time -- and he appeared vary disturbed and stated, his words as I recall them were, 'What the hell is going on around here'? I said, I am sorry, sir, I don't understand what you mean. His reply again was, 'I want to know what's going on around here'. I said, I don't understand. He said, 'This guard, there's no security around the CP'. I said it was my belief that the guard was functioning properly and that I had contacted the guard only a few minutes before. He stated that he had driven up to the rear of the CP and it was dark and he could not find the guard and had pounded on the door, but that no one had appeared and he instructed me to get the squadron executive officer to report the him" (R28).

The executive officer reported as directed and, after accused complained about the absence of guards around the command post, immediately sent for the balance of the guards to occupy the posts from which accused had earlier ordered them relieved. In the executive officer's opinion, accused was drunk. He smelled liquor on accused's breath, the latter's statements were irrational and rambling, his face was flushed, his eyes were bloodshot, he walked unsteadily

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and he had difficulty in maintaining his balance while standing (R8). His drunkenness, in witness belief, was such that he could not properly perform his duties (R9).

About 2300 hours accused visited the command post of Company F at Altwies. The commander of that company testified that accused was drunk (R43-44) and that

> "The Colonel could not perform his duties as commanding officer. He came into my bedroom — I was sleeping in part of the CP — and the Colonel sat down on the bed and sort of leaned over on his right elbow and his speech was thick and it took him a considerable length of time to either get a thought expressed or to speak at all" (R44).

Specification 2 (25 October 1944): The squadron S-3 testified that in his opinion accused was still drunk when he saw him at the squadron command post about 1030 hours 25 October. His condition was about the about the same as before, except that his speech was even thicker (R18-19). The S-2 saw him about 1700 hours, when "he appeared to have been drinking"(R29). The S-3 was at the command post of Troop A of the squadron at Burmerange, Luxembourg, when accused arrived about 1745 hours. In the S-3's opinion, accused was drunk (R19). He had difficulty getting out of the "bantam", his gait was slightly unsteady and he talked incoherently (R20).

About 2000 hours, when the commanding officer of Troop C saw him at the troop command post at Gandren, accused was drunk. He "could tell by his expression, his manner of walking and the way in which he spoke" (R36). Present at the command post with witness were three lieutenants (R41), one of whom, in command of the second platoon of Troop C, had been sent to stand by in order to render assistance to other members of the troop who were under enemy fire. The commander of the second platoon and witness were formulating a plan for sending men to assist the others. When accused first entered the post, he asked witness what the situation was and witness explained to him the situation "in both the towns and on the hill" (R36,37), referring to a situation map on a table, which was illuminated by two searchlights (R42). On the table was a telephone by means of which direct communication was maintained with the observation post and the situation map was thus kept current. Although no changes came over this wire, accused persisted in asking witness seven or eight times what the situation was (R43). The only change in the situation during the hour accused was at this command post was the

falling of Schneisser fire near the post and accused had as full an opportunity as witness to deduce this fact from the "high pitch of the weapons going off" (R36-37,43).

Trucks which had transported men from Mondorf to Gandren en route to forward positions, were left in Gandren. Accused first expressed the desire that these trucks be moved to Beyren and then that they be moved back to Troop B at Mondorf. Witness endeavored to explain the tactical reason for leaving the vehicles in Gandren, i.e. the danger of fire from a German patrol operating near the command post (R37,41). Accused, however, insisted that he desired the move (R37) "for security reasons" because "he was afraid a shell would hit them and wipe them all out" (R41). He stated, in the presence of witness and his first sergeant, that "the men were expendable, but the vehicles weren't and he was responsible for an enormous amount of property". The officers reminded accused of the predicament of troops under fire and pointed out that the discussion concerning the vehicles was impeding the progress of their plans. When accused persisted in his suggestion as to moving the vehicles, witness, who did not wish to assume responsibility for such disposition of them, "finally asked the Colonel if that was a direct order". After witness explained his position in the matter, accused said "'Go ahead, it's your show, run it any way you want it'" (R37,39).

During the course of his visit, accused asked for coffee on several occasions notwithstanding the fact that small-arms fire made it impossible to go to the mess hall at the other end of the town. As a result of this fire outside the command post, he became "very excited" and expressed a desire to leave. He insisted that he wanted a weapon and that somebody had his (R38), notwithstanding the fact that he was then holding his own .45 caliber pistol in his hand (R38,41-42). Witness testified unequivocally that accused was drunk, that he could smell alcohol on accused's breath and that he believed his condition was worse than on the preceding day. He was physically and mentally incapable of performing his duty as squadron commander (R38,43).

About 2100 hours accused returned to the squadron command post at Mondorf, where were present the executive officer, S-2, S-3 and two other officers. His face was flushed, his eyes "watery", his gait unsteady, his speech thick, "blurred" and incoherent and his thoughts "rambling" (R10,16,20,29). His recital of events was "irrational", "unusualy" and in conflict with reports and messages received at the command post from troops (R10). He reported that the commanding officer and executive officer of Troop C were working under very dim lights, that he instructed them to have more light for him to see, that they were scared and whispering, that he told them to speak up and "as an example to show them they had no reason

to be scared", went out to the street and urinated (R15). He seemed more excited than normal (R29) and whiskey could be smelled on his breath. In the opinion of the executive officer, S-2 and S-3, he was drunk and incapable of properly commanding his squadron (R10,20, 29).

At the close of its case the prosecution offered in evidence a map of the locality involved, on a scale of 1:25,000, which was admitted without objection by the defense (R46; Pros.Ex.1).

4. a. After his rights were fully explained to him (R46), accused stated that he wished to remain silent (R47).

b. The only evidence introduced by the defense was a stipulation between accused, defense and prosecution that if Lieutenant Colonel Lloyd R. Fredendall were present in court and sworn as a witness, he would testify as follows:

> "I cannot definitely recall what days I had contact with Lieutenant Colonel Murtaugh, but during the period when his squadron took over part of my battalion sector, during our relief, at no time when I saw him did he appear to be unfit to carry on his duties due to drunkenness" (R47).

5. a. Following the arraignment, the defense called to the court's attention the fact that the dates of the offenses charged in the specifications were originally 25 and 26 October, respectively, but were changed "the last minute" (the prosecution stated the changes were first made the day before the trial) to 24 and 25 October, respectively, and argued surprise. The president advised the defense that accused might request a continuance of the case if he thought he had not been given proper time to prepare. Thereafter the defense stated "The defense, at this time, after consulting with the accused, desires to continue the trial and to plead Not Guilty to all Charges and Specifications" (R6). No substantial rights of accused were injured by the changes in the dates in the specifications. Even if such changes had not been made, there would have been no variance between the times of the offenses as alleged and the proof that they occurred on 24 and 25 October, as the dates alleged were each preceded by the words "on or about" (CM ETO 1036, Harris). In any event a variance of a single day would not be fatal (CM 173620 (1926), Dig. Op. JAG, sec.451(39), p.325). Moreover accused waived any objection by electing to proceed with the trial and pleading to the general issue (MCM, 1928, par.64a, p.51).

b. On the direct examination of the squadron executive officer, witness was asked to describe the degree of accused's drunkenness "with respect to accused's ability to perform his duties

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as commanding officer". The defense objected on the ground that the witness was not an expert and that the question was leading. The law member overruled the objection and witness answered to the effect that accused was so drunk that he could not properly perform his duties as commanding officer of the squadron (R9). Similar questions were asked each of the other four witnesses and similar replies were made thereto (R18,20,28,29,35,38,44). The Manual for Courts-Martial, 1928, specifically provides that

> "On an issue of drunkenness, admissible testimony is not confined to a description of the conduct and demeanor of the accused, and the testimony of a witness that the accused was drunk or was sober is not inadmissible on the ground that it is an expression of opinion" (par.145, p.160).

The Manual provides similarly that "on matters within the common observation and experience of men, a witness may express an opinion; e.g., * * * as to whether or not a certain person was drunk at a certain time" (par.112b, p.111). The testimony called for by the questions and contained in the answers thereto related primarily to the degree of accused's drunkenness. Certainly this was a legitimate field of inquiry, as the prosecution had the burden of proving that accused's intoxication was "sufficient sensibly to impair the rational and full exercise of the mental and physical faculties" at the times in question (MCM, 1928, par.145, p.160). If accused were incapable of properly performing his duties as squadron commander, such fact certainly was probative of impairment of "the rational and full exercise of his mental and physical faculties". The reasons which render admissible opinion testimony of nonexpert witnesses as to the factum of drunkenness apply with equal force to their testimony as to the degree of drunkenness. In each case the witness "gives a composite statement or shorthand rendering of collective facts", which facts he cannot adequately reproduce, describe and detail to the jury or court-martial (see 16 CJ, sec.1532, pp.747-749, and authorities cited in CM ETO 3200, Price). It does not appear improper for the prosecution to direct the witnesses' attention specifically to the question of accused's ability to perform his duties as Commanding Officer as one means of delimiting their testimony as to the degree of his drunkenness.

c. On the direct examination of the Troop Commander of Troop C the following colloquy occurred:

> "Q. Did you observe the enlisted men during the time that accused was talking with them?
> A. Yes, sir.
>
> Q. Did you notice their facial expressions and

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their actions?
A. Yes, sir.

Q. From those things were you able to arrive at what their reactions were?
A. Yes.

Q. What were they?
A. They were disgusted" (R35).

No objection was made to the drawing of the conclusion by this witness that the men were disgusted. Nor was objection made to further testimony given by this witness upon examination by the court that thedisgust was not with what accused said but with the way he said it (R41). In the opinion of the Board of Review, such testimony was not hearsay and was admissible in evidence for such value as the court might choose to attach to it. The underlying principles are as follows:

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

> "Whenever the opinion of the witness upon such a question, or on one coming under the same rule, is the direct result of observation through his senses, the evidence is admitted. * * * And although opinions, as derived, may sometimes be erroneous, yet they are not generally so, and when carefully weighed are sufficiently reliable for practical use in the ordinary affairs of life. The witness does not unnecessarily substitute his judgment for that of the tribunal" (25 AIR, 1378, State v. Williams, 67 N.C. 12). (Quoted with approval in CM ETO 3200, Price, pp.15-16).

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6. a. Extended discussion is not required to demonstrate that the evidence herein clearly establishes that accused, while on duty as Commanding Officer, 32nd Cavalry Reconnaissance Squadron, in the vicinity of Mondorf, Luxembourg, on 24 and 25 October 1944 was found in a state of intoxication which manifestly amounted to drunkenness within the meaning of Article of War 85 (MCM, 1928, par.145, p.160, supra, par 5b). To such effect was the unanimous testimony of each of the five officers of his squadron, all of whom were eye witnesses. The multiple manifestations of his condition, as shown in their consistent and clear version of accused's conduct, rendered unreasonable any findings other than guilty as charged. The Board of Review is of the opinion that the evidence amply supports the findings of guilty (CM ETO 970, Mc Cartney; CM ETO 1065, Stratton; CM ETO 1267, Bailes; CM ETO 3301, Stohlman; CM ETO 3302, Pyle; CM ETO 3304, DeMott; CM ETO 3577, Teufel; CM ETO 3714, Whalen; CM ETO 3725, Cox; CM ETO 3966, Buck; CM ETO 4184, Heil; CM ETO 4339, Kizinski; CM ETO 4619, Traub; CM ETO 4808, Jackson; CM ETO 5010, Glover; CM ETO 5453, Day; CM ETO 5767, Palmer).

b. A letter dated 17 November 1944, signed by Major Allen W. Byrnes, Medical Corps, Division Psychiatrist, and included in the record of trial, states that accused was examined on 13 and 15 November 1944. Major Byrnes concluded as follows:

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

The report attached to the letter contains the following:

> "Hallucinations and delusions were denied, as were ideas of reference. The nature of his statements cannot be characterized as indicative of a persecutory trend. Orientation was normal in all spheres. There are no positive findings present, indicative of organic neurological disease".

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In view of the foregoing, the following concluding paragraph of the report is insignificant (Cf: CM ETO 5747, Harrison, and authorities therein cited):

> "The diagnosis of alcoholism, chronic, is made on the basis of the examination completed, and information obtained from those who have known the officer for a period of years, or served with him".

7. Attached to the record of trial is a letter dated 13 December 1944 addressed to the Commanding General, European Theater of Operations (Attention: Theater Judge Advocate) and signed by accused. The letter represents that accused, due to circumstances beyond his control, was afforded insufficient opportunity for proper preparation of his defense on the following grounds:

> a. The regularly appointed defense counsel (who contacted accused five days before trial) had no civilian law experience and practiced only before Division Courts.

Whatever legitimate objections accused might have had to the qualifications of defense counsel were waived by his statement at the trial that he desired to be defended by "Regularly appointed defense counsel" (R3). There is no indication in the record that accused was not adequately defended at the trial. Cross-examination of prosecution witnesses was pertinent and vigorous and counsel demonstrated alertness throughout the trial.

> b. Accused applied for the services of two more experienced officers, but approximately one day before trial was informed that they were declared unavailable. Defense counsel and accused had little or no time to prepare the case because of awaiting advice of requested officers. Defense counsel was busy with other duties during this time.

See comments under "a" supra. Accused had ample opportunity during the five days preceding trial to prepare his defense and the fact that he chose not to avail himself of the opportunity cannot help him.

> c. The Investigating Officer completed the investigation without contacting certain witnesses named by accused.

Such objection is without merit in view of the established rule that the investigation required by the 70th Article of War is an administrative proceeding intended primarily for the benefit of the

appointing and referring authority. Irregularities therein neither affect the jurisdiction of the court nor do they ordinarily prejudice the rights of accused at the trial (CM 229477, Floyd, 17 B.R. 149; CM ETO 106, Orbon; CM ETO 4570, Hawkins). (See paragraph 8 infra with respect to the immateriality of the statements of the two witnesses received after the trial. One of the requested witnesses was evidently the squadron executive officer, whom defense counsel cross-examined at length).

d. If reply had been obtained from two witnesses requested by accused, it is indicated, the following could have been established:

(1) The tactical and administrative employment of the squadron was found correct by the new commanding officer (accused's successor).

Such fact could have no bearing upon accused's offenses of drunkenness on duty at the times and places alleged.

(2) The witnesses, upon whose testimony (entirely opinion) the case was based, were members of a group who had much cause to resent accused's command position, and who might misinterpret accused's actions, as he was in action before, but this was their first experience.

With respect to the above imputations, it is highly significant that accused offered no evidence whatever upon the issue of his drunkenness. The record shows that the witnesses' testimony was not confined to opinions but gave abundant factual details as to accused's gait, speech, mental reactions and physical appearance, which were consistent only with drunkenness. Nothing in the letter indicates that accused was denied sufficient opportunity to prepare his defense or that there were any facts which he could have presented material thereto.

e. (The matter of the change of dates in the specifications has been discussed, par.5a, supra).

8. Also attached to the record of trial are the following:

a. Affidavit of the squadron executive officer, verified 19 November 1944, to the effect that the mental attitude of the personnel of accused's squadron from July to September 1944 was one of confusion, and listing factors contributing to this attitude; and

b. Affidavit of accused's successor as Commanding Officer of the squadron, verified 17 November 1944, that, in his opinion, the combat efficiency of the squadron on or about 28 October

1944 and when affiant took command was satisfactory, but that such rating could have been higher had certain personnel and administrative matters been given proper supervision and attention.

That the above affiants were the officers requested by accused as witnesses is indicated in his letter of 13 December 1944. The utter immateriality of their affidavits to the issue of accused's guilt as charged confirms the conclusion that accused's substantial rights were not injured by the failure to contact them prior to trial. Moreover, defense counsel elicited from the executive officer on cross-examination that, in his opinion, confusion existed in the squadron at the time accused assumed command (R14).

9. The charge sheet shows that accused is 42 years of age and the following as to his service:

"Commissioned 2nd Lt, A.S. RA, 12 June 1924; trfd to Inf. 18 Dec 25; trfd to Cav 23 Apr 27; 1st Lt 20 Dec 29; Capt 1 Aug 35; F.A. 8 Feb 36 to 14 Feb 38; Maj 12 Jun 41; Maj AUS 31 Jan 21; accepted 6 Feb 41; Lt Col AUS 1 Feb 42; terminated Lt Col AUS 25 May 43; Lt Col AUS 16 Oct 44".

10. 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.

11. A sentence of dismissal from the service is mandatory upon conviction of a violation of Article of War 85.

_____ Judge Advocate

Malcolm C. Sherman Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 13 FEB 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Lieutenant Colonel JOHN O. MURTAUGH (O-15844), 32nd Cavalry Reconnaissance Squadron, Mechanized, 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 6684. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 6684).

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

(Sentence ordered executed. GCMO 47, ETO, 18 Feb 1945.)

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

BOARD OF REVIEW NO. 2

10 MAR 1945

CM ETO 6685

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private CURTISS E. BURTON (34741034), Company C, 1310th Engineer General Service Regiment	Trial by GCM, convened near St. Marie Du Mont, (France), 27 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board of Review submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater 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 Curtiss E. Burton, Company C, 1310th Engineer General Service Regiment, did, at St Nicholas de Pierre Pont, Manche, France, on or about 29 August 1944, forcibly and feloniously, against her will, have carnal knowledge of one Mlle. Clemence Basneville.

CHARGE II: (Disapproved by reviewing authority)

Specification: (Disapproved by reviewing authority)

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

Specification: In that * * * did, at St. Nicholas de Pierre Pont, Manche, France, on or about 29 August 1944, in the nighttime, feloniously and burglariously break and enter the dwelling house of M. Francois Noel, with intent to commit a felony, viz: rape therein.

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 III, except the words "rape therein" substituting therefor the words, "assault with intent to do bodily harm", of the excepted words, not guilty, of the substituted words, guilty, and guilty of the remaining charges and specifications. Evidence was introduced of one previous conviction by special court-martial for unlawfully carrying a concealed weapon and drunk and disorderly conduct in violation of Article of War 96. All of the members 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, disapproved the findings as to Charge II and its Specification, 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, approved only so much of the findings of guilty of the Specification of Charge III and Charge III as involved a finding that accused did at the time and place alleged wrongfully break and enter the dwelling house of M. Francois Noel, in violation of Article of War 96, confirmed the sentence, but owing to special circumstances in this case commuted the sentence to dishonorable discharge, total forfeitures, and confinement at hard labor for life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

At about 1900 hours on 28 August 1944, accused and Private Arthur L. Ellis, a member of his company left their bivouac area, secured some calvados a portion of which they consumed during the course of the evening, and returned to the area some time between 0100 and 0200 hours on 29 August (R7). Ellis testified that, although he knew the location of the village of St. Nicholas de Pierre Pont, (France), he and accused had not been there during the time they were away from

their company area (R8). The geographical location of St. Nicholas de Pierre Pont with relation to accused's bivouac area is not disclosed by the record. Shortly after the two men returned to their camp, accused again left the area in a jeep (R10,11). He was wearing his helmet liner at the time of his departure (R8,12).

Early in the morning of 29 August, a soldier knocked at the back door of the house of M. Francois Noel in the village of St. Nicholas de Pierre Pont, who told the soldier to leave but, although the record is not clear on the point due in part to the difficulties attendant upon testifying through an interpreter, it appears that despite M. Noel's admonition the soldier nonetheless entered the house by breaking through a window. He was armed with a club some two and one half feet long with which he struck M. Noel on the head. The soldier blew out a lamp but made no search throughout the house and departed some five minutes after he entered. M. Noel was not able to identify the soldier involved. At about 0200 hours, a soldier again entered the house. This time he went into a room of the house where M. Noel's daughter, Marie, had hidden herself (R13-15), but finding no one, came out of the room and left the house (R16). Another daughter, Barnadette, 12 years of age, testified that two lights were burning in the house at this time by the light of which she was able to see the soldier in question. This soldier, who had been at the Noel home on four or five previous occasions, was identified by Bernadette both at a pre-trial identification parade and in court as the accused (R16,17).

At about 0230 hours on 29 August 1944, a soldier broke into the house of M. Ernest Basneville, who lived in the village of St. Nicholas de Pierre Pont some 200 meters from the Noel house. The soldier was already in the house when M. Basneville awoke but, when he "came * * * with a candle", the soldier departed. M. Basneville then went to the door to see if the soldier had departed permanently, whereupon the soldier, who had been hiding behind the door, struck him with a stick or club some two and one-half feet in length. M. Basneville then "went into the house and held the door" (R18,19). The soldier pushed the door open whereupon M. Basneville went into the bedchamber, again "held the door", and told his family and his 68 year old aunt, Mlle. Clemence Basneville, to leave the house (R18,26). His wife and children made their escape through a window and went to the home of a neighbor but his aunt, who was either the last or next to last to leave, stayed in the garden near the house (R18,22,26). She was clad only in her nightgown at the time (R19,26). She was found in the garden by the soldier who then "took her by the head, hit her with the stick and then dragged her in back of the house" (R19). M. Basneville attempted to go to her aid but as he "received a hit from the piece of wood on my shoulder", he went to seek assistance of the

the name Eward Curtis Burton and the number 131314336 was identified by M. Basneville as the helmet which he found on the night in question (R20). This helmet was also identified by Ellis as a helmet belonging to accused and worn by him at the time they left camp together the night of 28 August (R32).

Accused was examined by Captain Robert S. Ginsberg, Medical Corps, on the morning of 29 August 1944. He was found to have two minor lacerations about two inches in length on his scalp and also a number of linear scratches extending along the left side of his lower jaw which were "just superficial scratches like fingernails" (R28,30). Captain Ginsberg also examined Mlle. Basneville, apparently on the same morning, and his examination revealed that

> "she had a number of bruises on her body. She had a hemorrhage on her left eye apparently caused by a blow and some scratches on the lateral portion of her face, forehead, also some scratches, marks and bruises on her left thigh. In addition, she had some clotted blood around the orifice of her vagina and a small laceration of the posterior portion of the vagina * * * Laceration existed on the inside of the labia majora, which are the outer lips of the vagina. They were between the labia minora and the labia majora" (R28,29,31).

5. It was shown by stipulation that accused made and signed a pre-trial statement, and the prosecution offered such statement in evidence pursuant to such stipulation (R32). The defense objected to its introduction apparently on the ground that it was a confession and that, although the statement embodying the confession contained a preliminary recital that accused was advised that he had the right to remain silent and that anything he might say could be used against him, his intelligence was not sufficiently high to enable him fully to understand the significance of signing the statement with the result that, under the circumstances, the confession was not voluntarily made. In support of his assertion that accused was of low intelligence, the defense counsel introduced into evidence a report of examination into the mental status of the accused dated 4 September 1944 and signed by Major Brandt F. Steele, Medical Corps, which recites that accused's intellectual power was "well below par, and determination of his mental age by Kent Test and vocabulary gives a mental age of approximately 8 years (moron level)". The report also recited that accused was sane and responsible for his acts within the limits of his low intelligence. However, despite the objections of the defense counsel, the accused's pre-trial statement was admitted into evidence. In view of the low intelligence of the accused and the fact that no witnesses were called to testify with respect to the manner in which the statement was secured, this matter being left to stipulation, some question may exist whether the statement was properly admitted. However, as will

neighbors (R18). Mlle. Basneville testified that the soldier then forced her to walk to a field some 200 meters from the house and "It is there that he raped me" (R27). She did not attempt to push him away (R27). Her testimony, as translated, is somewhat vague concerning the specific acts of the soldier at this time. At one time she replied in the negative to the question "Did he enter you with his penis". However, she later testified that the soldier had sexual intercourse withher and also replied in the affirmative when asked whether the soldier had "come inside" her. She "hollered" at least once during this time. Then the curé came and "delivered me" (R27).

In the meantime, M. Basneville had gone some 200 meters distant to a neighbor, M. Charles Scelles, where he enlisted his aid and that of the curé, and together the three returned to M. Basneville's house (R18,22,24). When they could not find Mlle. Basneville there, they began to search for her "along the small road" (R22). After proceeding up the road some 200 meters they came upon the soldier and Mlle. Basneville and, as M. Basneville testified, "my aunt was in her nightgown and I could see very well that the soldier was on top of her and she, my aunt, was hollering" (R20). M. Scelles testified that as they approached the scene he saw the soldier, whose pants were down and whose "back" was exposed, atop Mlle. Basneville "in the act of raping her" (R22,23). The soldier arose whereupon the curé struck him on the head with a club. The soldier then seized the curé by the throat at which M. Scelles gave the soldier "a few hits on the head" with a pitchfork handle. The soldier then engaged M. Scelles but, with the curé's aid, he was beaten off. Altogether the soldier was struck "perhaps a dozen times" on the head and shoulders and ultimately he fell to the ground. He was left there and Mlle. Basneville then was taken to the house (R22,23). At or about this time M. Scelles heard her say, "I think that he killed me" (R25). She was "dizzy" and "was not very much herself" since "she had been knocked about before" (R18,25).

M. Scelles testified that the incidents concerning which he had testified took place shortly before dawn and that it was not light enough at the time to enable him later to recognize or identify the soldier in question (R24). M. Basneville also testified that, due to the darkness, he had not been able to see the soldier well enough to permit subsequent recognition (R19). Nor was Mlle. Basneville able to identify the soldier in question (R27).

After the soldier had been beaten to the ground and immediately prior to the time Mlle. Basneville was escorted back to the house, M. Basneville found at the scene of the attack a helmet liner which he retained and later turned over to the military authorities (R18,19). A helmet liner marked with a star and bearing

hereinafter more fully be developed, the Board of Review is of the opinion that the record contains compelling evidence of accused's guilt aside from and without reference to accused's statement. In this view of the case, even if the statement was erroneously admitted and cannot be considered, the substantial rights of the accused were not injuriously affected by its admission and the record is nonetheless legally sufficient to support the findings and sentence. Under this analysis, it becomes unnecessary to pass upon the question above mentioned. Rather, it will be assumed for present purposes that the statement was a confession and was involuntary, and the matters contained the rein will be excluded in passing upon the legal sufficiency of the record of trial. The matters set forth in such statement will therefore not be recited here. It should be pointed out that this treatment of the case does not necessarily constitute an expression of the Board as to the admissibility of the statement.

5. After having been advised of his rights as a witness, accused elected to remain silent, and no evidence was introduced in his behalf.

6. Accused was found guilty of the offense of rape in violation of Article of War 92 and of the offense of wrongfully breaking and entering a dwelling house in violation of Article of War 96.

Rape is the unlawful carnal knowledge of a woman by force and without her consent. In order to sustain a conviction for this offense it must be shown (a) that the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent (MCM, 1928, par.148b, p. 165). The evidence is clear that a colored soldier had carnal knowledge of the prosecutrix on the night alleged. Penetration was sufficiently shown (CM 236464, Bull. JAG, Vol.II, No.8, sec.450, p.310). However, neither the victim nor the two witnesses who most strongly corroborated her story were able to identify accused as the soldier in question. Nonetheless, accused was shown to have been in the general neighborhood shortly before the offense occurred, on the morning following the events described he was found to have scratches on his face and lacerations on his head consistent with those which normally would have resulted from the blows dealt the unidentified soldier on the previous evening, and his helmet liner was found at the scene of the incident. Under these circumstances, there can be little doubt that accused was the perpetrator of the act alleged and his identity as the actor in the crime is satisfactorily established.

With respect to the questions whether the act was done by force and without the consent of the victim it will be noted that the victim did not expressly testify that she resisted accused to

the best of her ability, that her resistance was overcome by force or fear, or that she did not consent to the intercourse. However, the following circumstances were shown. The victim, who was 68 years of age, was aroused in the early hours of the morning and told by her nephew, who was then holding the door of the bedchamber in an attempt to prevent the entrance of an intruder, to flee from the house. Clad only in her nightgown, she took refuge in the garden. She was there seized by her assailant and struck on the head with a club. When her nephew attempted to come to her aid he was forcibly beaten off. One of the witnesses testified that the victim was "hollering" at the time he appeared at the scene of the attack and found the soldier atop her. During her testimony, she stated that accused "raped" her and the use of this word, although of course not conclusive upon the court, nevertheless may be taken as one indication of lack of consent. She also referred to her rescue as an act of deliverance. She was "dizzy" and "not very much herself" after the incident. A medical examination subsequent to the attack revealed that she had numerous bruises on her body, a hermorrhage on her left eye, scratches on her face and horehead, scratches and bruises on her left thigh, a small laceration of the posterior portion of the vagina and lacerations between the labia minora and the labia majora. In view of all these circumstances, force and lack of consent were amply shown (Cf: CM 227809, Bull.JAG, Vol.I, No.7, sec.450(9), p.363). The record thus contains compelling evidence to prove all elements of the offense alleged.

There is also compelling evidence of record to establish the commission of the offense alleged in the Specification, Charge III, as approved by the confirming authority.

A mere showing that an accused is of low intelligence does not relieve him from legal responsibility for his offense unless such mental deficiencies are so pronounced to render him unable to distinguish right from wrong and to adhere to the right (MCM, 1928, par.78a, p.63; CM ETO 739, Maxwell; Cf: CM 221640, Loper, 1942, 13 B.R.195). There was here no showing that accused was not legally responsible for the offenses committed.

7. The charge sheet shows that accused is 21 years of age and was inducted, without prior service, on 16 February 1943.

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 punishment for the offense of rape is death or life imprisonment (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

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 10 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private CURTISS E. BURTON (34741034), Company C, 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 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 6685. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 6685).

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

(Sentence as commuted ordered executed. GCMO 79, ETO, 19 Mar 1945)

6685

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

BOARD OF REVIEW NO. 1

10 MAR 1945

CM ETO 6694

U N I T E D S T A T E S	5TH INFANTRY DIVISION
v.	Trial by GCM, convened at Metz, France, 30 November 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
First Lieutenant HOWARD S. WARNOCK (O-1306499), 11th Infantry	

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

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

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

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

Specification 1: In that 1st Lieutenant Howard S. Warnock, 11th Infantry, did, in the vicinity of Arry, France, on or about 4 November 1944, while before the enemy, by his disobedience endanger the safety of Company C, 11th Infantry Regiment, which it was his duty to defend, in that he did refuse to obey an order given him by Captain Forrest P. Raley, Company C, 11th Infantry, to send a patrol to regain contact with an outpost of his, the said Lieutenant Warnock's platoon.

Specification 2: In that * * * did, in the vicinity of Arry, France, on or about 4 November 1944, while before the enemy, by his neglect endanger the safety of Company C, 11th Infantry Regiment, which it was his duty to defend, in that he failed and neglected to send a patrol to regain contact with an outpost of his, the said, Lieutenant Warnock's platoon after wire communication with said outpost had been broken.

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

Specification: In that * * * having received a lawful command from Captain Forrest P. Raley, his superior officer, to send a patrol to regain contact with an outpost of his, the said Lieutenant Warnock's platoon, did, in the vicinity of Arry, France, on or about 4 November 1944, wilfully disobey the same.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and their respective specifications. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority, the Commanding General, 5th 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, 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. Prosecution's evidence proved the following facts:

On 1 November 1944 Company C, 11th Infantry, with other units of the 5th Infantry Division relieved the 95th Infantry Division from combat duty and assumed a defensive position about 3500 yards northeast of Arry, France (R6,31). The town of Vezon, occupied by the enemy, was on the right flank of the company (R8,25). The Bois de Gaumont, on the left of the company and the woods on the company's front were held by detachments of the 38th SS (German) Regiment (R8). There were no forts facing the company, but the Verdun fortifications were active and it was believed that fire from them fell on the division's position (R10).

Its first platoon was on the right flank of Company C, and on the left of the first platoon were its other platoons (R25). The

position of the first platoon was in the shape of a horseshoe. The first squad of the platoon was on the extreme right of the company with a heavy machine gun section on its left between it and the second squad (R30). The company was the forward company of the battalion and occupied the crest and forward slope of a hill. The nearest friendly troops were 1,000 yards to its rear (R25).

The battalion maintained four outposts, two of which were manned and operated by the first platoon of Company C. The company numbered the outposts from right to left (R7,8). They were under the direct control of the platoon commander (R7,12,13,34). Outpost #1 was located 250 or 300 yards in front of the first squad and the heavy machine gun section (R30-31). It was on the edge of a wooded area with open ground sloping from it for several hundred yards before other growth and trees were encountered. The distance between the first platoon's command post and the company command post was about 400 yards (R12). The outposts were the only protective force between the company's main position and the enemy (R10,11).

> "The outpost was out in front of the lines there to delay the enemy. They were more or less our eyes and ears. They had no orders to withdraw at any time. * * * they would never withdraw unless they were ordered to" (R43).

An intercommunicating sound power telephonic network existed between the battalion command post, the company command post, the platoon command posts, the four outposts, the light and heavy machine gun sections and the mortar section (R7,31). The system permitted each installation not only to communicate with battalion headquarters but also to communicate among themselves. Any conversation between two installations could be heard by listeners at all installations (R14,26). In the event telephonic communications failed, runners were used as message carriers (R13). Between the first platoon command post and outpost #1 there was a trail which was the only effective means of passage between the same. Barbed wire entanglements had been laid through the woods in the proximity of the outpost and these prevented the use of routes of travel to and from the outpost other than the trail (R17,43).

Captain Forrest P. Raley was the commanding officer of Company C on 1 November 1944 and he continued in such command until 27 November 1944. Accused was commander of the first platoon of Company C on 1-5 November 1944 and had been in command of the same since 12 August 1944 (R5). First Lieutenant Gordon V. Gorski on 4-5 November was executive officer of the company (R44,45). Technical Sergeant Malloy M. Swindle was the second in command of the first platoon and on the night of 4-5 November operated the telephone apparatus at the platoon command post. He was charged with the duty of communicating with each platoon outpost at intervals of 30 minutes (R30) and at equivalent intervals he was required to notify

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the company commander by telephone of their status and condition (R14). Staff Sergeant Roy W. Hughes was at that time platoon guide (R38,50).

Early in the morning of 2 November 1944 after the relief of the 95th Division had been effected and outpost #1 had been manned by personnel from the first platoon, the enemy attacked the outpost with an estimated force of 50 men. The outpost was then located in the exact position it occupied on the night of 4-5 November. As a result of this attack all of the outpost personnel were captured by the enemy (R11,12, 39). Accused reported this attack and loss promptly to Captain Raley. On the morning after the raid the company commander and accused made an inspection of the outposts. In the course of the inspection discussion was had as to the removal of outpost #1 to a location where it would be better concealed. The two officers also considered the idea of placing "booby traps" in the numerous forest trails which led to the outpost and which were used by the enemy in attacking it.

> "If it took relocation [of the outpost] to improve the camouflage then it would have to be moved, if it couldn't be done otherwise, yes, sir" (R13).

On 1 November the first platoon when it moved into the defensive position numbered 32 men. It lost four men as a result of the capture of the outpost and two men were wounded. On the night of 4-5 November its total membership was therefore 26 men. These included six men from the third platoon and four men from the second platoon, who had been assigned to strengthen the first platoon. At the time the company reached the defensive position on 1 November, each of its three platoons was of about equal strength. The headquarters detachment consisted of twenty men (R13).

The platoon's defensive position was at a "dug in area". It did not consist of foxholes but a series of connecting trenches for each squad (R14).

> "The procedure was to have about half the men alert and half resting at all times. During the day it was only required in each squad area that a couple of men be alert and in the positions and the rest would rest--during daylight" (R14).

During the forepart of the night of 4-5 November the accused, acting by and through Technical Sergeant Swindle, made the half-hourly telephone calls to the outposts to ascertain their situation and condition (R31). Accused likewise made the same periodic reports to the company commander (R15). Four men from the first platoon were stationed at outpost #1 (R31). Shortly after midnight on 4-5 November

1944 the discharge of shots was heard in the vicinity of outpost #1 (R9, 15).

> "It was sporadic firing from their machine gun, the German machine gun. By that I mean a short burst, very long interval between bursts and not lasting over an hour to the best of my knowledge (R15).

Swindle immediately attempted to communicate with the outpost by telephone, but failed to secure an answer to his call. He then called outpost #2 and received information that it experienced no enemy activity. He then resumed his effort to communicate with outpost #1. Finally a faint "OP one" came over the wire, and that was the only reply received by Swindle. Thereafter silence greeted his efforts to establish communication with the outpost. He called the company command post and informed Captain Raley that he could not establish contact with outpost #1. He thereupon handed the telephone apparatus to accused (R31,32), who reported to Captain Raley that "the wire was out between his CP and the #1 outpost". The company commander repeated the information to the battalion commander with the statement "that we are sending a patrol to make contact with the outpost because the wire communication was out" (R9,16). The battalion commander ordered Captain Raley on three or four occasions that night to send out patrols in order to establish contact with outpost #1 (R18). As a result of his conversation with the battalion commander, Captain Raley spoke to accused over the telephone and informed him that

> "A patrol must be sent to the outpost to make contact" (R9).

Accused replied that the patrol would be started (R9).

Consequential upon the loss of the personnel at outpost #1 on the night of 1-2 November, a regimental order was issued prior to 4 November to the effect that whenever communication was lost with an outpost, a patrol should be immediately dispatched to reestablish communication with it. It was the duty of accused to send a patrol to outpost #1 when wire communication with it ceased, without any order from the company commander. It was also good military practice for accused to send a patrol under such circumstances even in the absence of either a regimental order or a special order from the company commander to that effect (R18,27).

Sometime after the accused was ordered to send a patrol, the battalion commander by telephone asked Captain Raley if a patrol had been organized and dispatched to outpost #1, and the latter made inquiry of accused whether a patrol had departed. Accused assured the company commander that such was the case. The company commander informed the battalion commander accordingly (R39). About thirty minutes after

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telephonic communication with outpost #1 ceased (R36) and pursuant to the order of the company commander, Sergeants Swindle and Hughes were selected by accused as a patrol and he sent them to establish communication with outpost #1. The patrol proceeded along the lone trail leading to the outpost. When it reached a point 75 or 100 yards from the outpost it was fired upon. The shots seemed to come from the direction of the front and flanks of the outpost and sprayed the whole area over which the patrol passed. In particular, shots were directed at the trail or pathway. The shots came from enemy machine guns. The patrol could not proceed on its mission and was forced to withdraw to the platoon command post (R32,38,42).

An hour after questioning accused the second time, or at about 0230 hours, Captain Raley telephoned accused and asked him if he had heard from his patrol. The accused replied that he had sent Sergeants Swindle and Hughes to make contact with the outpost; that when they attempted to proceed over the trail or pathway from the platoon command post to the outpost they were "pinned" to the ground by German machine gun fire and were compelled to return. Thereupon the company commander ordered him to send out another patrol to which accused replied, "I am sorry, Captain, but I can't". Captain Raley repeated his order, "You must send one immediately", and accused responded:

> "I will have to refuse. I can't afford to lose two more good men.
>
> * * *
>
> If the OP is all right, we will find it out at dawn. If the OP has been knocked out or captured or taken prisoners, it is just risking two more men's lives to send them down there under the fire that they have been receiving down there" (R10,33).

Accused further indicated to Captain Raley

> "that [since] the two men couldn't make it that he was asking to wait until things died down" (R20).

The company commander clearly understood from his conversation with accused that because of the experience of the Swindle-Hughes patrol, he (accused) was asking to delay sending another patrol for a short time until enemy fire lessened so that a patrol would have a better opportunity to complete its mission (R20). Captain Raley repeated his order:

> "You will have to send somebody out there. There is even yourself if you don't have anyone else" (R10).

However, accused was not ordered to perform the mission himself. The following colloquy then occurred between the two men:

> Accused: "I am sorry, but I will have to refuse".
>
> Raley : "Do you mean to say that you are refusing?"
>
> Accused: "Yes" (R10).

Captain Raley asked accused the second time if he were refusing the order and again accused replied in the affirmative. Thereupon the former reported the situation to the battalion commander, who directed that accused report to the battalion command post immediately (R10).

The company commander transmitted the order of the battalion commander to accused, who responded in effect:

> "Jesus Christ, is that what they are going to do now?" (R21).

Accused reported to the battalion commander. Upon orders of Captain Raley, Lieutenant Gorski assumed command of the first platoon at about 0400 hours on 5 November (R25,44). The new platoon commander organized a patrol consisting of Sergeant Gordon and Private Mathew A. Carey and at about 0530 hours (estimated time) sent it forward to contact outpost #1 (R45,46,48). The patrol met with no enemy resistance (R26,47). It discovered that the telephone wire to the outpost had been torn up at a point beginning 25 yards from it (R48), that one of the members of the outpost had been killed and that the other three members had disappeared (R47). The patrol completed its mission, returned to the platoon command post and reported to Lieutenant Gorski within thirty minutes (R45). Four hours elapsed between the time Captain Raley gave the first order to dispatch the patrol and the time the Gordon-Carey patrol departed (R26,27).

At approximately 0500 hours on the morning of 5 November (estimated time), Captain Raley received report of the loss of the outpost for the second time. During the day the location of the outpost was moved about fifty yards nearer the main battle position of the company (R25).

4. The defense presented the following evidence:

a. The following named witnesses for the prosecution, with consent of the court and prosecution, testified upon cross-examination as follows:

Captain Forrest P. Raley, the commander of Company C, was of the opinion that the company's safety, security, and mission were not

impeded or endangered in the event a patrol was not dispatched immediately (R22,28)

> "because I had contact with my main battle positions, and they hadn't been touched or penetrated or shot at" (R22).

With respect to accused's character or reputation, Captain Raley testified:

> "The accused was an excellent platoon leader while under my command which was all during our combat. He demonstrated good judgment, knowledge of men, and proved himself to be disciplined" (R24).

The witness was willing to have accused again under his command as a junior officer because he felt he was competent to perform his duties (R25).

First Lieutenant Gordon V. Gorski, as executive officer of the company, considered accused as a valuable "asset to the company" (R46). With respect to his reliability the witness testified that accused was

> "Reliable enough for me that if he said something I would take his word for it. * * * I would want him as an officer if I had a company" (R46).

Private First Class Mathew A. Carey, Company C, 11th Infantry, had been a messenger for the first platoon since accused was assigned to the company and had the opportunity to observe accused's conduct and activities as a platoon leader in combat. His conduct was excellent.

> "He wouldn't have his men do anything he wouldn't do. * * * He required that they all respect him. * * * They [his orders] were all followed out" (R49).

b. The defense presented the following witnesses who testified in substance as follows:

Staff Sergeant Roy W. Hughes, Company C, 11th Infantry, the guide of the first platoon, was on the night of 4-5 November 1944 in a foxhole about ten feet from accused (R50). At about 0230 or 0300 hours on 5 November, witness and Sergeant Swindle were ordered by accused to go on a patrol to contact outpost #1 (R51). The patrol proceeded on its mission and when it reached about 75 yards from the outpost it received heavy automatic fire from the enemy. Hughes and Swindle followed

the trail to the outpost because there were barbed wire entanglements between the platoon command post and the outpost, and they contained but one opening through which the trail passed. The fire came from the direction of the outpost and was directed at the patrol (R52,53). Because of the fire it was impossible for the patrol to continue to the outpost. Hughes and Swindle were "pinned" to the ground and were compelled to crawl part of the way in returning to the platoon command post (R52).

The enemy fire had commenced prior to the time the patrol departed, continued during the period it was on its attempted mission and for about 30 minutes after its return. Fire had ceased by the time Carey left on the patrol at daybreak (R53).

Witness left the United States with the first platoon and had been in Company C about thirty months. He testified as to accused's attitude toward the enlisted men of his platoon, as follows:

> "It seemed to me that Lieutenant Warnock was all the time wanting to take care of his men and do the best by them he could. Wanted to see that every man was treated alike" (R52).

First Lieutenant Thomas P. Sheridan, Company D, 11th Infantry, was on the night of 4-5 November commanding a platoon of Company D which was attached to Company C in support of Hill #361. He had his platoon command post to the right of Company C (R54). At about 0200 hours on 5 November the witness was awakened by small-arms fire. He went to the heavy machine gun section which had sound power telephonic connections with the platoons of Company C and also with that company's command post. He ordered fire from the 81 millimeter mortar in the direction from which the fire seemed to be coming. It was enemy machine gun and rifle fire and was apparently directed from behind outpost #1 and to the right flank. When he called over the telephone line to order mortar fire he heard a conversation between Captain Raley and accused. Captain Raley asked accused if he had contact with outpost #1 and he replied in the negative. Accused whistled through the telephone in order to establish communication with the outpost. He was unsuccessful (R55). Thirty or forty-five minutes later Captain Raley, by telephone, directed the accused to send a patrol to contact the outpost. There was then spasmodic enemy machine gun and rifle fire. Accused asked if he could wait awhile until the firing cleared up but the company commander directed accused to send a patrol and then informed witness that accused was dispatching the patrol. Witness issued orders to his machine gunners not to fire at any figures passing before them because it might be the patrol. Twenty minutes later there was small-arms fire from the flank. Listening on the telephone, the witness heard accused inform Captain Raley that the patrol had been compelled to return because of this small-arms fire. In the meantime accused was attempting to establish telephonic communication with the outpost (R56).

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About an hour later while the interchange of fire between witness' machine guns and the enemy small arms continued, witness heard the company commander over the telephone direct accused to dispatch another patrol. Accused asked his commander whether he could have more time before he sent another patrol to the outpost (Captain Raley was at this time also speaking to the battalion commander). In response to accused's request for more time, Captain Raley informed

> "Lieutenant Warnock that another patrol would have to be sent out right away" (R56).

There then followed the following interchange between the company commander and the accused:

> Warnock: "I am sorry, Captain, I can't send one down now".
>
> Raley : "Sure enought do you mean that?"
>
> Warnock: "While the firing is still going on we can't send another patrol out" (R56).

Over the telephone witness heard Captain Raley order accused to report to the company command post immediately. Witness showed accused a route via a trench to return to the company command post. This was between 0300 and 0330 hours (R57).

In the conversation with accused Captain Raley displayed some impatience. He insisted that a patrol be dispatched immediately "and he kept repeating this; that a patrol be sent out to contact the outpost immediately" (R57). Accused repeated several times

> "that he would send a patrol out as soon as the firing ceased. That he didn't think a patrol could reach the outpost with the small arms fire going on" (R58).

About an hour after accused had reported to the company command post two Germans were captured by witness' men at the far end of the platoon's trench "between us and the outpost" (R57).

First Lieutenant Morris W. Stanley, Company C, 11th Infantry, was on the night of 4-5 November 1944 leader of the second platoon of Company C. The positions of the platoons of the company on said night were as follows: second on the left, third in the center and the first on the right (R58,59). The second platoon was connected with the intercommunicating telephonic network. He overheard a telephonic conversation between Captain Raley and accused on the above-mentioned night.

Accused informed the company commander that Sergeants Swindle and Hughes had returned from a patrol. Asked if they reached the outpost, accused replied, "No, they got stopped by enemy fire" (R59).

> "And Captain Raley then said, 'You will have to send another patrol out and make contact with that outpost.' Lieutenant Warnock said it was silly to send--these aren't his exact words. I can't remember the exact words. * * * He gave his reasons that if the outpost was there with all the men safe they wouldn't accomplish anything by sending a patrol out. And if they weren't they still couldn't accomplish anything. They could find out just as well at dawn. He said the patrol of Germans that came in three or four nights previously had picked out a certain time before daylight and he thought it was around 4:30 or 5:00 o'clock. And he stated that he would wait until then and send a patrol out then; that they could get down to the outpost. And the Captain said that a patrol would have to go right down then. He said, 'You have to get a patrol out there.' I don't remember if he said 'right then'. There was a pause at different times in the conversations. They were firing. Ten or fifteen minutes pauses. * * * And the Captain did say that he would have to send a patrol out, and Lieutenant Warnock said, 'I can't do it.' And finally the Captain said, 'Is that it?' And Lieutenant Warnock said, 'I am afraid it is, Captain'" (R59, 60).

Captain Forrest P. Raley was recalled as a witness for the defense. The examination of the witness was based on certain facts disclosed by papers and documents accompanying the record of trial. In order that the issues raised during the course of the examination of the witness may be understood, it is necessary to summarize these facts as they appear de hors the trial record.

(1) The charge sheet is dated 8 November 1944. Captain Raley signed the same as accuser and verified the same on 14 November 1944, before Elbert L. Cooper, Captain, 11th Infantry, Adjutant. The original charge preferred by Captain Raley and which appeared above his signature was as follows:

> "CHARGE I: Violation of the 75th Article of War.
> Specification: In that First Lieutenant Howard S. Warnock, 11th Infantry, did, in the vicinity of Arry, France, on or about the

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night of 4-5 November 1944, misbehave himself before the enemy, by refusing to obey an order from Captain Forrest P. Raley, 11th Infantry, then his company commander, to send a patrol to contact an outpost in position between his platoon and the enemy".

(2) On 15 November 1944 the charge was referred by the commanding officer, 11th Infantry, to Major John N. Acuff, 11th Infantry, for investigation under the 70th Article of War. On 24 November 1944 the investigating officer returned his report of investigation to the commanding officer, 11th Infantry, with recommendation that accused be tried by general court-martial. The only statement of expected testimony of witnesses which accompanied the report was a written signed statement of Captain Raley which had been forwarded by Captain Raley at the time he forwarded the charges to the commanding officer, 11th Infantry (8 November). Captain Raley's statement was as follows:

"'On the night of 4-5 November 1944, 1st Lt Warnock was the platoon leader of the 1st Platoon, Company "C" 11th Infantry. His platoon had two outposts and had wire communication to them. Shortly after midnight the wire communication went out and I instructed 1st Lt Warnock to send a patrol to regain contact with his right outpost. In the meantime I notified the Battalion Commander that the wire was out and that a patrol was being sent. After a lapse of about a half hour time I checked with 1st Lt Warnock to see if he had made contact. He said that he hadn't but was sending the platoon sergeant and platoon guide. During this time a burst of machine gun fire was heard from our guns. About an hour later I asked 1st Lt Warnock again if he had made contact. He said that the two men he had sent got up the trail a little way, had met enemy fire and had returned back to their platoon CP. I instructed him that contact must be made and he said that he was afraid he would have to refuse. I repeated my orders and he again refused, saying that he couldn't lose two good men by sending them out. I asked him if he understood the situation and if he insisted on refusing. He refused. I then notified the Battalion Commander and he told me to send 1st Lt Warnock back to the Battalion CP immediately. 1st Lt Warnock was sent back. 1st Lt Gorski assumed command of the first platoon, sent a patrol out and found that the outpost had been captured by the enemy'".

(3) On 27 November 1944 the Staff Judge Advocate, 5th Infantry Division, forwarded his written report and recommendation to the Commanding General, 5th Infantry Division. In paragraph 5 thereof, after summarizing Captain Raley's expected testimony, the Staff Judge Advocate continued in part:

> "A preposterous state of affairs is shown and one which could not be allowed to continue. It is imperative that the accused be brought to trial. The original specification under Article of War 75 has been rewritten, and another one added. Also a charge under Article of War 64 has been added. It is not customary to make one act the subject of several charges and specifications. But here a prima facie case of a very serious nature has been made out, and it is not known just what the evidence may show in detail. The same act may constitute misbehavior before the enemy as well as violation of another Article of War (CM 130018 (1919), Digest of Opinions JAG, par 428 (5)). A conviction under both articles of war would not place the accused twice in jeopardy for the same offense. The offense should, however, be considered as a single offense in fixing the appropriate punishment (CM 230222, (1943) Bull JAG, March 1943, page 96; CM 252773, Bull JAG, August 1944, page 344-5)".

(4) The charge sheet in its corrected form showed that the original charge was by use of red ink lined out and initialed "UHR". The charges and specifications as appear in paragraph 2 thereof were substituted and they bear the initials in red ink of "UHR". The affidavit was altered by cancelling in red ink the phrase "of the Charge and the Charge" which originally followed the clause "that he has personal knowledge of the matters set forth in specification" and in lieu thereof the phrase "1 and 2 of Charge I and Charge I and the specification of Charge II, and Charge II" was substituted. These alterations were initialed in red ink by "UHR".

(5) Included in the accompanying papers is the following document:

> "HEADQUARTERS 5TH INFANTRY DIVISION
> MEMORANDUM CARRIER SHEET
>
> 27 Nov 1944
>
> Subject: Court-martial charges in the case of 1st Lieutenant Howard S. Warnock, 01 306 499, 11th Infantry.
>
> JA to C of S.
>
> For approval of recommendations in par 5, attached memo. E. S. H.

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C of S to CG.

General approval
/longhand/

/init/ POF
P. O. F.

CG to JA.

General /longhand/.

/signed/ S LeRoy Irwin
S. LEROY IRWIN,
Major General, U. S. Army,
Commanding"

(6) The amended charges were referred for trial for the Commanding General, 5th Infantry Division, by indorsement on 28 November 1944 and were served on accused on the same date. (At the trial the defense affirmatively indicated it had had time to prepare its defense and was ready to proceed to trial (R1-2)).

- - - - - - - - - - - - - - - - - -

Upon direct examination after Captain Raley had stated he was the accuser, the following colloquy occurred:

"Q. I want to show you the charges and specifications under which the accused is presently being tried and ask you if those are the charges and specifications of which you accused the defendant?
A. These are not the charges I signed. When I signed the charge sheet it had this specification, the one that has been crossed out with red ink.

Q. Of what did you accuse Lieutenant Warnock?
A. Of refusing to obey an order.

Q. Did you at any time accuse Lieutenant Warnock of endangering the safety of the company by his disobedience or neglect?
A. No, I did not accuse him of that" (R61).

Upon cross-examination, Captain Raley stated:

"The purpose of the outpost was to give warning to the main battle position in case of attack and to fight as long as they could and then to withdraw to the main battle position" (R62).

He further asserted that the company would have been better defended had the outpost been maintained (R61).

Upon re-direct examination of Captain Raley, defense counsel asked him:

> "Q. In accusing Lieutenant Warnock did you accuse him that his disobedience or neglect to send a patrol out to establish contact endangered the company and do you accuse him of that?" (R62).

Upon objection by the prosecution, the President and Law Member observed:

> "I am at a loss to understand your intent at this time. I do not understand whether it is your intent now to in effect make a plea in bar of trial on the score that the charges are not properly drawn or whether it is your intent to bring it out in evidence that the charges are not justified by the facts. I am not clear about your intent at all. I'd like to have that made clear to the court before you go ahead" (R62).

Argument ensued between the trial judge advocate and defense counsel as to the propriety and legality of the question propounded the witness during the course of which defense counsel asserted:

> "I wish to bring before the court the fact that he was not accused initially as is set forth at the present time" (R63).

Thereupon the Law Member asked for the charge sheet and inspected same (R63). Further argument ensued during the course of which defense counsel asserted:

> "I am not challenging the validity of the specifications. It is charged in there * * * that he endangered the safety of the company * * * which to my mind goes to the gist of the offenses--as charged there" (R64).

The Law Member responded:

> "I believe I have it straight in my own mind based largely upon the statement of the counsel for defense: It is apparently not his intention

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> to challenge the validity of the charges but to question the evidence supporting certain words, namely the word 'endanger' being in the specifications, is that correct?" (R64),

to which defense counselresponded, "That is correct" (R64). Upon receiving permission of the court to proceed, defense counsel then propounded this question:

> "Q. Being company commander at this time and knowing the facts--the enemy action which apparently was developing and being charged with the mission of holding that line you were on and developing it, what was your opinion as to whether or not the safety of your company was endangered by the accused's alleged disobedience or neglect to send out a patrol to regain contact with that outpost?" (R64).

Again the trial judge advocate objected because

> "We do not have to be bound by the decision of the company commander as to what his opinion or what his thoughts or what his feelings are on the subject" (R65).

The Law Member overruled the objection with the comment:

> "There is probably considerable substance in your argument. Nevertheless it is desired to give the defense all latitude in conducting its case. And this company commander was on the ground and he is an experienced officer, and his opinion may have value to the court" (R65).

Captain Raley's answer was:

> "The safety of the company was not endangered by the enemy by his actions, <u>but the safety of the company in so far as discipline goes</u>, his actions did endanger the company" (Underscoring supplied) (R65).

On re-cross examination of Captain Raley, the following interchange occurred between him and the trial judge advocate:

"Q. And why was it necessary for the patrol to maintain contact with that outpost? Do you want this court to believe that you would send men out there just to be shot at without any purpose?

A. The purpose of my desiring to send a patrol is because my orders were that a patrol would be sent. Having communication with all other elements of the company I knew the situation well enough to know that the company was not endangered by the firing going on, on the right front.

Q. Was the outpost that you had out there doing any good as a defensive means for protecting your organization?

A. Yes, it was to give warning of enemy approaching" (R65,66).

c. After an explanation of his rights, accused elected to remain silent (R66-67).

5. Notwithstanding the fact that defense counsel particularly disavowed his intention to question the legality of the charges and specifications upon which accused was arraigned and tried, the Board of Review believes it desirable to comment upon the pre-trial practice in this case. There is no question as to the legality of the action of the Staff Judge Advocate in eliminating the original charge and substituting in lieu thereof the charges and specifications of which accused was found guilty. Neither was there any necessity for a further investigation of the substituted charges and specifications. Captain Raley's statement (prepared by him at the time he forwarded the charges to his regimental commander) was before the Staff Judge Advocate. It briefly and cogently stated the facts of this unfortunate episode in which accused and the company commander were the principal actors. It is exceedingly doubtful if a further investigation would have revealed any additional facts material or relevant to the controversy except as may have been corroborative of Captain Raley's assertions. Under such circumstances, a supplemental investigation would have been an idle gesture. The legality of the practice followed by the Staff Judge Advocate in this instance is supported by CM 172002, Nickerson; CM 206697, Brown; CM 229477, Floyd, 17 B.R. 149; CM ETO 106, Orbon; CM ETO 4570, Hawkins; CM ETO 5155, Carroll and D'Elia.

The foregoing holdings support the conclusion that violations of the provisions of the 70th Article of War do not affect the jurisdiction of the court, and except under extraordinary or unusual circumstances do not constitute error prejudicial to the substantial rights of accused. This conception of the 70th Article of War views the requirements thereof

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as administrative in nature and of immediate concern to the authority holding general court-martial jurisdiction. Many of the provisions are intended for his benefit in order to enable him to act fairly and intelligently upon the charges. Other requirements of the Article are for the benefit of the accused and are intended to protect him against unwarranted or malicious prosecution of unfounded charges. It is the duty and function of the authority referring the charges for trial to insist that there be reasonable compliance in good faith with this Article of War in preparing and investigating the charges. Usually the requirements of the 70th Article of War do not concern the court after reference of the charges to it for trial. The action of the appointing and referring authority is binding upon the court in respect to such matters (CM ETO 4570, Hawkins, supra; CM ETO 5155, Carroll and D'Elia, supra).

Although compliance with the requirements of the 70th Article of War under the foregoing interpretation of the Article is a matter of primary responsibility of the officer empowered to appoint general courts-martial, the Board of Review believes that it may with propriety express its apprehension and concern over the practice by staff judge advocates of inserting new charges on a charge sheet without affording opportunity to the accuser of either confirming or disaffirming his signature and oath to the original charge sheet. While the practice was legally permissible under the circumstances of the instant case, Captain Raley's reaction when his attention was attracted to the alterations of and additions to the charge sheet is fairly indicative of the attitude of most men when written matter has been placed over their signatures without their knowledge and consent. In the Army, where an officer's signature is given the greatest of credence and faith, it is particularly desirable that an accuser be fully informed as to substantial changes in the charge which he has supported by his signature and oath, and be afforded the opportunity of withdrawing his name as accuser or of confirming the alterations and changes made in the charges.

The following comment of the Board of Review in the Floyd case, supra, is quoted with approval:

> "It may be noted that the appellate jurisdiction granted to the Board of Review by Article of War 50½ relates entirely to the 'record of trial' and on its face is not concerned with extraneous matters of procedure. However, the conclusions of the Board are not based on this ground" (17 B.R. 149,156).

6. The 75th Article of War in pertinent part reads as follows:

> "Any officer or soldier who, before the enemy, misbehaves himself, runs away, or shamefully abandons or delivers up or by any misconduct,

disobedience, or neglect endangers the safety of any fort, post, camp, guard, or other command which it is his duty to defend * * * shall suffer death or such other punishment as a court-martial may direct".

The legislative history of the Article is set forth in CM ETO 1226, Muir. By reference to said holding, it will be seen that the Article in its present form is the result of various legislative changes effected by Congress from time to time. Several of the phrases contained therein are of ancient origin and have become words of legal art. The word "misbehavior" in particular has attained a particularized meaning. Winthrop's comments are relevant:

"This offence may consist in:--
1. Such acts by a commanding officer, as--
* * * refusing, when directed by a competent superior * * * to execute a movement or perform a service adverse, or with relation to, the enemy when in his front or neighborhood.
* * *
Misbehaviour before the enemy is often charged as 'Cowardice;' but cowardice is simply one form of the offence, which, though not unfrequently the result of pusillanimity or fear, may also be induced by a treasonable, disloyal, or insubordinate spirit, or may be the result of negligence or inefficiency. An officer or soldier who culpably fails to do his whole duty before the enemy will be equally chargeable with the offence as if he had deliberately proved recreant.
* * *
The act or acts, in the doing, not doing, or allowing of which consists the offence, must be conscious and voluntary on the part of the offender" (Winthrop's Military Law and Precedents - Reprint, pp.622-623).

Specification 1, Charge I

A comparison of the allegations of Specification 1 with the Article makes it manifest that the pleader intended that the allegations of the former should allege an offense under the following portion of the latter:

"Any officer * * * who, before the enemy * * * by any * * * disobedience * * * endangers the safety of any * * * command which it is his duty to defend".

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Does such intention of the draftsman confine the prosecution to proof of an offense under said clause of the Article if the Specification contains allegations of fact which constitute offenses under some other clause or provision of the statute? The principle governing such situation is announced thus:

> "We must look to the indictment itself, and if it properly charges an offense under the laws of the United States that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute" (Williams v. United States, 168 U.S. 382, 42 L.Ed., 509,512).

> "* * * the statute on which an indictment is found is determinable, as a matter of law, from the facts charged, and they may bring the offense charged within an existing statute, although the same is not mentioned, and the indictment is brought under another statute" (Vedin v. United States, 257 Fed. 550,551).

As further upholding this principle see United States v. Nixon, 235 U.S. 231, 59 L.Ed., 207,209; Wechsler v. United States, 158 Fed. 579,583; Farley v. United States, 269 Fed. 721,722.

As a corollary to the above doctrine it is firmly established that:

> "If the pleader omits an essential element, the case fails because the pleader cannot shorten the law. If he includes all the essential elements and more, again the pleader cannot enlarge the law, and the case will be sustained and the law vindicated by ignoring the unessential allegations" (Meyer v. United States, 258 Fed. 212,215).

(See also Fall v. United States, 209 Fed. 547,551; 31 C.J., sec.306, p.748).

The rule above set forth was adopted and applied by the Board of Review in CM ETO 1109, Armstrong; CM ETO 1249, Marchetti; CM ETO 2005, Williams and Wilkins.

The Board of Review in its appellate function has heretofore exercised the power to construe and interpret specifications (CM ETO 1109, Armstrong, supra; CM ETO 1249, Marchetti, supra; CM ETO 2608, Hughes; CM ETO 3740, Sanders et al; CM ETO 3803, Gaddis et al).

The Specification in the instant case alleged certain specific facts with reference to accused's conduct:

> "In that * * * Warnock * * * did * * * while before the enemy * * * refuse to obey an order given him by Captain Forrest P. Raley * * * to send a patrol to regain contact with an outpost of * * * Warnock's platoon".

It will be noted that such arrangement of the factual allegations eliminates the following clause of the Specification:

> "* * * by his disobedience endanger the safety of Company C * * * which it was his duty to defend".

If this latter clause is entirely rejected as surplusage, as may be done (CM ETO 1249, Marchetti, supra; CM ETO 1109, Armstrong, supra), allegations of fact remain in the Specification that clearly and positively aver that accused refused to obey Captain Raley's order "to execute a movement or perform a service adverse, or with relation to, the enemy when in his front or neighborhood". The order required accused "to send a patrol to regain contact with an outpost" of his platoon. Telephone connection with the outpost had ceased; firing was heard in its direction, and the enemy was known to be in its proximity. The order was therefore obviously one to perform a service with relation to the enemy which was known to be in the platoon's neighborhood. Accused, as platoon commander, was under duty to obey the same regardless of its wisdom or necessity and his refusal to obey it constituted a species of misbehavior denounced by the 75th Article of War without proof of the consequences of his disobedience. It was his duty to obey and "not to reason why". The evidence established beyond all doubt that accused's misconduct occurred before the enemy (CM ETO 1109, Armstrong, supra; CM ETO 1249, Marchetti, supra; CM ETO 3301, Stohlmann; CM ETO 4783, Duff). The record of trial is therefore legally sufficient to support the findings of guilty of Specification 1, Charge I.

The Board of Review has elected to consider the question of accused's guilt of Specification 1 on the foregoing basis rather than on the premise that his disobedience did "endanger the safety of Company C * * * which it was his duty to defend". In the state of the evidence as revealed by the record of trial, reasonable minds may well differ on the question whether there exists therein substantial evidence that the company was in danger or, if endangerment did exist, there was any causal connection between the same and accused's disobedience. Under the theory of the present holding, such highly debatable questions are eliminated inasmuch as the order which accused disobeyed had a direct tactical relationship with the enemy which was active in the neighborhood of accused's platoon. Under such circumstances the refusal to

obey the same constituted misbehavior irrespective of the consequences resultant upon such disobedience. Therefore all evidence pertaining to the imperilment of the company, including Captain Raley's assertion that the company had not been imperiled by accused's disobedience, should have been excluded as irrelevant. Had accused been arraigned and tried upon the Specification which Captain Raley originally verified (and which was eliminated without his knowledge), the questions here considered would not have arisen.

Specification 2, Charge I

The evidence is clear and decisive that Lieutenant Warnock willfully and knowingly disobeyed Captain Raley's order. The patrol was not dispatched by him for the reason he made a deliberate affirmative choice not to comply with the order. The element of willfulness characterized his entire conduct. The findings of guilty of Specification 1 therefore absorbed the elements of failure and neglect (CM 223336 (1942), I Bull.JAG, pp.159-163) which form the gravamen of Specification 2. The record is legally insufficient to support the findings of guilty of Specification 2, Charge I.

7. The evidence is uncontradicted, clear, and decisive that accused willfully, knowingly, and deliberately disobeyed the lawful order of Captain Raley, his superior officer

> "to send a patrol to regain contact with /outpost #1/".

Such conduct is clearly an offense under the 64th Article of War (CM ETO 2469, Tibi; CM ETO 3078, Bonds et al; CM ETO 3147, Gayles et al).

Congress by Articles of War 64 and 75 denounced accused's conduct as constituting two separate and distinct offenses. The charge under the 75th Article of War required proof of an element not required in the proof of the charge under the 64th Article of War; hence accused was guilty of committing two offenses and may be convicted of both (CM ETO 4570, Hawkins, supra; CM ETO 5155, Carroll and D'Elia, supra). The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge II and its Specification.

8. The charge sheet shows that accused is 26 years three months of age. He entered on active duty 1 January 1943. He had no prior commissioned service.

9. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the

trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 2, Charge I, and legally sufficient to support the findings of guilty of Specification 1, Charge I, Charge I, Charge II and its Specification, and the sentence.

10. Dismissal, total forfeitures, and confinement at hard labor are authorized punishments upon conviction of an officer of an offense under the 64th or 75th Article of War. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 10 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of First Lieutenant HOWARD S. WARNOCK (O-1306499), 11th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 2, Charge I, and legally sufficient to support the findings of guilty of Specification 1, Charge I, Charge I, Charge II and its Specification, and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The conduct of accused in refusing obedience to the company commander's order to dispatch a patrol for the purpose of establishing contact with the platoon outpost is, as a matter of military discipline, indefensible. However, in the light of subsequent events, reasonably-minded persons may well conclude that accused's judgment under the circumstances was sounder than that of his superiors. There exists a definite inference that his disobedience in all probability saved the lives of some of his soldiers without impairing or affecting the tactical position of his company. On this basis, the sentence is difficult to defend. I cannot believe that accused or his family will accept the punishment imposed without a strenuous effort either to relieve him of it entirely or to mitigate it, and I further believe it likely that the sentence will be the subject of immediate attack, both in the civil courts and in Congress, upon the arrival of the accused in the United States.

The record is replete with proof that accused was a diligent, competent platoon commander whose ability was recognized alike by his fellow officers and the enlisted personnel. The company commander asserted that accused

> "was an excellent platoon leader while under my command which was all during our combat. He demonstrated good judgment, knowledge of men, and proved himself to be disciplined" (R24).

Captain Raley further declared that he would be glad to have accused again under his command as a junior officer, and that he preferred charges against him as a matter of company discipline and not because he considered him a coward or because accused's refusal to obey the order actually endangered his company. All evidence indicates that accused is a brave, intelligent, and experienced officer whose services are of value to the Army.

Accused's conduct exhibits none of the weaknesses as that of Second Lieutenant John C. Rooney (O-1016120), 33rd Armored Regiment (CM ETO 8078), whose sentence of dismissal (based also on an offense under the 75th Article of War) was suspended (GCMO 60, 25 February 1945, European Theater of Operations). I refer also to the case of Captain Richard E. Stover (O-440621), Company B, 702nd Tank Battalion (CM ETO 5476), whose sentence of dismissal, total forfeitures, and confinement at hard labor for ten years was suspended (GCMO 142, 16 December 1944, European Theater of Operations). A comparison of the conduct of Lieutenant Warnock and Captain Stover reveals a close verisimilitude. Both officers deliberately violated orders of superior authority, with knowledge of the import of their acts and of the penalty therefor because they conscientiously believed such violation would result in the saving of lives of American soldiers without in any respect frustrating or impairing the military activity of their commands. In neither case did the officer consider his own convenience or safety and there is no element of cowardice in the conduct of either of them. Rather the disobedience of each officer indicates he possessed more than the usual amount of moral courage in assuming the risk of his conduct. The Rooney and Stover cases demonstrate that a precedent exists for the exercise of clemency in such cases.

For the reasons above set forth, I suggest that further consideration be given to the desirability of suspending the execution of accused's sentence.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 6694. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 6694).

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

(Sentence ordered executed. GCMO 75, ETO, 18 March 1945.)

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

BOARD OF REVIEW NO. 2

17 FEB 1945

CM ETO 6706

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private EDWARD SESLER, Sr. (34797132), 596th Port Company, Transportation Corps.	Trial by GCM, convened at 7th Port Headquarters (England), 29 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. Housebreaking is unlawfully entering another's building with intent to commit a criminal offense therein. The intent alleged in the Specification, Charge II, and established by the evidence with reference thereto, was to commit the criminal offense of misapplication of Government property, denounced by Article of War 94. Penitentiary confinement is authorized for the offense of housebreaking (AW 42; District of Columbia Code, sec.22-1801(6;55)). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, is proper (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

6706

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

BOARD OF REVIEW NO. 2

9 MAR 1945

CM ETO 6745

U N I T E D S T A T E S	)	79TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Pfaffenhofen, Bas-Rhin, France, 30 December 1944.
Private First Class ROBERT E. ATCHISON (35227315), Headquarters Company, Third Battalion, 313th 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 SLEEPER, Judge Advocates

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

2. Accused tried upon the following Charge and Specification:

CHARGE: Violation of the 75th Article of War.

Specification: In that Private First Class Robert E. Atchison, Headquarters Company, Third Battalion, 313th Infantry, did at St Martin La Garenne, Seine-et-Oise, France, on or about 28 August 1944 while before the enemy, by his misconduct endanger the safety of his command, which it was his duty to defend, in that while on outpost duty, he did shamefully abandon his post.

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

3. The evidence for the prosecution shows that on 28 August 1944 accused was attached to Headquarters Company, Third Battalion, 313th Infantry Regiment, and that, together with two other soldiers of this organization, he was detailed as a member of an outpost security guard while his organization was stationed in the vicinity of St. Martin La Garenne, Seine-et-Oise, France (R6,7,9,10,12). He was taken tohis post, instructed in his duties and told not to leave it until he was properly relieved. One of the men was directed to stand guard while the other two were permitted to sleep or otherwise rest at the outpost. They were permitted to leave the outpost only to eat or to go to the latrine. In case of an alert, the guard "was to release one of the others who in turn alerted the battalion" (R7). Accused was informed of reports of enemy infiltration across the Seine River and by reason of this fact the guard was instructed to be especially alert and watchful (R7,8,9,10). At this time the Battalion Headquarters was located on the outskirts of St. Martin about three or four miles north of the Seine and accused's guard was situated on the right flank of the command post (R7,9). The enemy line was approximately three-quarters of a mile away, and the enemy was shelling the positions occupied and held by the 3rd Battalion. Artillery fire was coming over on both the left and right flanks and they were in a "bad spot" as the enemy was in the front and the Seine River was in the rear of the division's position (R10,11,12). On the evening of 28 August 1944, the sergeant of the guard checked the guard and inspected the outpost. Accused was missing and the post deserted. A search was made of the immediate vicinity and surrounding territory but accused and the other soldiers who had been stationed with him at the deserted outpost could not be found. On the following morning a more extensive search was made by the sergeant of the guard and accused's first sergeant but neither were able to locate accused anywhere at or near his post or throughout the company area (R8,10). He was next seen sometime during the month of October following, when he was brought back to his company together with a number of stragglers and replacements (R9,11).

4. After an explanation of his rights as a witness, accused elected to remain silent. The Defense offered no evidence (R13,14).

5. The Specification upon which accused was arraigned and tried alleges that:

> "while before the enemy, by his misconduct /Atchison/ endanger /ed/ the safety of his command, which it was his duty to defend, in that while on outpost duty, he did shamefully abandon his post".

Article of War 75 provides in pertinent part:

> "Any * * * soldier who, before the enemy * * * shamefully abandons * * * or by any * * * disobedience * * * endangers the safety of any fort, post, camp, guard or other command which it is his duty to defend * * * shall suffer death or such other punishment as a court-martial may direct" (AW75).

The evidence shows that accused's duties were similar to or in the nature of those of a sentinel and that he was posted as an outpost guard; and the specification, as drawn, properly alleges an offense of misbehavior before the enemy in violation of Article of War 75 (MCM, 1928, appendix 4, p.245; AW 75).

Winthrop's comments concerning this specific form of misbehavior before the enemy as follows:

> "The term 'post' * * * has reference to some point or position, whether fortified or not which a detachment may be ordered to occupy or * * * to defend. The term 'guard' is general but would appear to contemplate an advance guard, or other outer or special guard, rather than the ordinary interior guard of a camp or station. The abandonment of /such/ a post * * * would be a marked instance of the offense of abandoning a 'post or guard' specified in the article" (Winthrop's Military Law and Precedents, Reprint, 1920, p.625) (Underscoring supplied).

A brief recapitulation of the prosecution's evidence, which is not contradicted, shows that on 28 August 1944 accused, a combat infantryman, was on duty as a member of an outpost security guard, located in the vicinity of St. Martin La Garenne, France. He had been instructed not to leave his post until relieved and to

be especially alert and watchful because of the precarious position occupied by his organization and by reason of reports of enemy infiltrations across the Siene River behind the battalion lines. His instructions further incorporated a direction to report to battalion headquarters any enemy activity observed. The enemy was located about 1200 yards forward and was subjecting them to artillery fire at the time. On the evening of the 28th and the morning of the 29th of August, the sergeant of the guard made a check of the posts and on each occasion discovered accused missing and his post deserted. Accused returned to his company sometime in October, after an absence of approximately two months. The evidence clearly shows that accused abandoned the outpost, which it was his duty to defend, which conduct constituted an act of misbehavior before the enemy of a most grave and serious character (Winthrop's Military Law and Precedents, Reprint, 1920, supra, p.622; CM ETO 4093, Folse; CM ETO 5114, Acers). He culpably failed to guard his post in the face of the enemy and proved himself recreant in the performance of important duty and the court was fully justified in finding the accused guilty, as charged (CM ETO 4820, Skovan; CM ETO 5475, Wappes and authorities cited therein).

6. The charge sheet shows that accused is 19 years of age and that he was inducted at Toledo, Ohio, without prior service, on 25 August 1943.

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

8. The offense of misbehavior before the enemy is punishable by 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 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

9 MAY 1945

BOARD OF REVIEW NO. 1

CM ETO 6751

U N I T E D S T A T E S	4TH ARMORED DIVISION
v.	Trial by GCM, convened at Morfontaine, France, 8 January 1945. Sentence as to each accused: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for six years. Loire Disciplinary Training Center, Le Mans, France.
Privates JOE BURNS (7040140), Headquarters 8th Tank Battalion and CHARLES A. MAKAY (32207061), Company B, 8th Tank Battalion	

OPINION 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 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 arraigned separately and tried together, with their consent, upon the following charges and specifications:

BURNS

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Joe Burns, Headquarters 8th Tank Battalion, did, at Serres, France, on or about 20 November 1944, desert the service of

the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and important service, to wit, action against the enemy, and did remain absent in desertion until he surrendered himself at Lostroff, France, on or about 2 December 1944.

MAKAY

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Charles A. Makay, Company "B", 8th Tank Battalion, did, at Serres, France, on or about 20 November 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and important service, to wit, action against the enemy, and did remain absent in desertion until he surrendered himself at Lostroff, France, on or about 2 December 1944.

Each accused pleaded guilty to the Specification preferred against him except the words "desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and important service, to wit, action against the enemy," and "in desertion," substituting therefor, respectively, the words "absent himself without proper leave from his organization" and "without leave," of the excepted words not guilty, of the substituted words guilty, and not guilty to the Charge, but guilty of a violation of the 61st Article of War. All of the members of the court present at the time the votes were taken concurring, each accused was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions was introduced against Burns. Evidence was introduced of one previous conviction against Makay by summary court for absence without leave for one and one-half hours in violation of Article of War 61. Three-fourths of the members of

the court present at the time the votes were taken concurring, each 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 a period of six years. The reviewing authority, as to each accused, 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 by General Court-Martial Orders Number 5 (Burns), and 6 (Makay), Headquarters 4th Armored Division, APO 254, U. S. Army, 20 January 1945.

3. Evidence for the prosecution was as follows:

First Sergeant John B. McNair, Company B, 8th Tank Battalion (R6), testified that on 20 November 1944 the company, of which he was then acting first sergeant, was located in the vicinity of Serres, France. On that day accused Makay was a loader or canoneer in the company, and accused Burns was a "bog" (bow gunner), attached to the company for duty (R7). (The charge sheet, dated 13 December 1944, shows that Burns was a member of Headquarters 8th Tank Battalion).

On the morning of 19 November witness and the platoon leaders were notified by the company commander

> "to the effect that we were definitely not in a rest area and that the company could expect to be called upon at any moment as we were in a state of corps reserve" (R7).

The unit was to be ready to move on two hours' notice (R7). Asked whether the platoon leader informed each man of the two-hour alert, witness stated "I can't testify to that. It was assumed that they would be told. I can't really say" (R8). It was the general understanding, however, that the company was on the alert (R9).

The alert was in effect on 20 November (R7). On the morning of that day, although witness did not give either accused permission to leave the bivouac area, both

accused were reported absent by the car commander (R8). It was necessary to substitute other men in their places (R7). Accused were absent without leave from 20 November to 2 December 1944, on which date they reported to the Battalion Service Company at Lostroff, France (R5-7; Pros. Exs.A,B,C).

On 21 November, the company was ordered on one hour's notice to move out and thereafter proceeded to Torcheville, Mittersheim and some six other places (R8). It was engaged in combat throughout the period of accuseds' absence (R6,8).

4. After the defense stated it had fully explained their rights to accused, Makay elected to remain silent and Burns elected to take the stand on his own behalf (R9). He testified that on 20 November 1944, "the same day I went over the hill", members of his company had permission to go to the moving picture show in Serres (R9) but had no permission to go beyond that town (R10). About 3 or 4 pm he and Makay were taken by Technician Fifth Grade Burns from the bivouac area to Haraucourt (R9). The driver informed them he would return and meet them on the corner in an hour and a half. In Haraucourt they went to the shop of a blacksmith whom they knew, where they became drunk on cognac and wine. They were five or ten minutes late for the meeting with Burns, missed him and did not return to the company that night because it was too dark. The next day (21 November) they contacted the 126th Ordnance and were told their organization had moved. After searching for it on foot unsuccessfully, they surrendered at Dieuze, whence they were returned to the Service Company (R9-10).

No other evidence was introduced by the defense.

5. Both accused stand convicted of desertion on or about 20 November 1944 by absenting themselves without proper leave from their organization with intent to avoid hazardous duty and important service, to wit, action against the enemy. Each pleaded guilty to absence without leave, and this is corroborated by the testimony of the acting first sergeant and by relevant morning report entries, as well as by Burns' testimony. The only question for determination is whether the record contains substantial evidence of the other essential elements of the offense charged against each accused.

The evidence shows that on the morning of the day before accused absented themselves without authority, the first sergeant and platoon leaders of accuseds' company, located near Serres, France, were notified by the company commander that the company was not in a rest area but was in corps reserve and could expect to be called forward at any moment. It was the general understanding that the company was on the alert. The day after accused absented themselves without authority the company moved out and was engaged in combat throughout their absence. There is not the slightest evidence in the record as to the activity of the company, tactical or otherwise, or of either accused on 19 November or prior thereto, or that either of accused knew of the alert. There is no evidence, for example, that either of them knew that they had no authority to go to moving pictures in Serres. In order to support the findings of guilty of the offense charged, the record must contain either direct evidence of the notification to each accused of imminent hazardous duty or important service, or evidence of circumstances from which knowledge thereof may be inferred. The evidence that they went to Haraucourt with another member of their company without authority and of their continued unauthorized absence for 13 days is not alone probative of such notification or of an intent to avoid action against the enemy. Nor is such intent to be inferred from their knowledge that they were absent without authority (CM ETO 5234, Stubinski; CM ETO 5593, Jarvis; CM ETO 6093, Clayton Brown; CM ETO 8300, Paxson). There is no other evidence bearing upon the requisite intent than that adverted to above. It does not follow that because a soldier absents himself without leave at the front he is ipso facto guilty of desertion of the type herein alleged. The uncontroverted testimony of accused Burns was tothe effect that commencing on the day after their departure they attempted to locate their organization, but that its movement prevented their success. Their absence was terminated by surrender. Such explanation is inconsistent with the alleged intent and supports the conclusion that accused were merely absent without leave. The Board of Review is of the opinion that the record is legally insufficient to support the finding of the intent alleged in the Specification against each accused, but that the evidence clearly establishes accuseds' absence without leave for the period and at the place alleged.

6. The record shows (R2) that the trial took place only three days after the charges were served on each

accused . No objection to trial at such time or motion for continuance was made. The record of trial does not indicate that the substantial rights of either accused were prejudiced in any degree. Due process of law was duly observed (CM ETO 5958, Perry and Allen, and authorities therein cited).

7. The charge sheets show the following: Burns is 23 years of age and enlisted 30 May 1940 at Fort Knox, Kentucky. His service period is governed by the Service Extension Act of 1941. Makay is also 23 years of age and was inducted 5 February 1942 at Fort Dix, New Jersey, to serve for the duration of the war plus six months. No prior service is shown for either accused.

8. The court was legally constituted and had jurisdiction of the persons and offenses. Except as indicated herein, 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 as involves findings that each accused did, for the period and at the place alleged, absent himself without leave from his organization in violation of Article of War 61, and legally sufficient to support the sentences.

9. The designation of the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement is proper (Ltr. Hq. European Theater of Operations, AG 252, Op. TPM, 19 Dec. 1944, par.3).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with theEuropean Theater of Operations. 9 MAY 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 U.S.C. 1522) and as further amended by Act 1 August 1942 (56 Stat. 732; 10 U.S.C. 1522), is the record of trial in the case of Privates JOE BURNS (7040140), Headquarters 8th Tank Battalion and CHARLES A. MAKAY (32207061), Company B, 8th Tank Battalion.

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 they have been deprived by virtue of that portion of the findings, viz: conviction of desertion in time of war, so vacated, be restored.

3. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made. Also inclosed is a draft GCMO for use in promulgating the proposed action. Please return the record of trial with required copies of GCMO. 6751

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

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

(As to both accused, findings vacated in part, in accordance with recommendation of The Assistant Judge Advocate General. GCMO 207 (Makay), ETO,29 May 1945, and GCMO 208 (Burns), ETO, 7 June 1945).

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

BOARD OF REVIEW NO. 2 14 MAR 1945

CM ETO 6766

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Walferdang, Luxembourg, 11 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class VINCENT ANNINO (39119242), Company K, 8th Infantry Regiment	

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

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

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

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

Specification: In that Private First Class Vincent Annino, Company "K", 8th Infantry, did, without proper leave, absent himself from his organization near Zweifall, Germany, from about 19 November 1944 to about 24 November 1944.

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

Specification: In that * * * did, near Zweifall, Germany, on or about 24 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: an engagement with the enemy, and did remain absent in desertion

until he surrendered himself near Luxembourg City, Luxembourg, on or about 9 December 1944.

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 specifications of Charges I and II except the word "Zweifall", substituting therefore in each specification respectively the word "Schevenhutte", of the excepted words not guilty, of the substituted words guilty, and guilty of Charges I and II. 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 Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 19 November 1944, accused was a rifleman of the 3rd platoon, K Company, 8th Infantry Regiment, which was located in the Hurtgen Forrest near Schevenhutte, Germany (R5,6). On 19-20 November the company was engaged in attacking the enemy; it moved across woody and hilly terrain which was mined and otherwise made difficult of passage by the use of barbed wire and other improvised obstacles. This particular operation lasted two days, after which the company was withdrawn and directed in another attack against the enemy from a different location (R7,9). Between 19 November and 10 December 1944, accused's company was subjected to small arms, mortar and artillery fire. The actual organization was in visual contact with the enemy and, during the period indicated, suffered a total of 113 casualties (R7).

The evidence further shows that on 19 November 1944, during the initial assault, accused was missing from his platoon. The first Sergeant of K Company made a check at the aid station and elsewhere to determine whether accused had been injured and evacuated as either a battle or non-battle casualty. He learned that accused had not been treated for injuries or evacuated (R7,8). Accused was not seen by members of his organization until the evening of 23 November 1944 when he appeared at the battalion command post located at Schevenhutte, Germany (R8). At this time he was ordered to report to his company. The following day a check was made and accused was not present with his organization. He had no authorization or permission to be absent at any time between 19 November and 9 December 1944 (R7,8,9,10). On the latter date accused voluntarily surrendered himself to the military police at Luxembourg City, about 50 miles to the rear of his company in the front lines (R5,6).

He was sent to report to his first sergeant at which time he stated that he had been "hiding out" (R9). Accused appeared in "good health" and showed no evidence of injury or illness (R6,9). The first sergeant, upon direction of the company commander, ordered accused to report to his platoon, located on an outpost east of Mompach, Luxembourg (R10), which he did and remained there until 16 December 1944, when he was placed in confinement to await trial (R10).

The prosecution further offered and there was received in evidence, without objection by the defense, an extract copy of the morning report of K Company, 8th Infantry, showing accused absent without authority from his organization on the dates alleged (R9,10; Pros.Ex.A).

4. After an explanation of his rights as a witness, accused elected to remain silent (R10,11). The defense introduced in evidence, report of psychiatric examination by Major Meyer H. Maskin, Medical Corps, Division Psychiatrist, which contains the following remarks:

> "This EM is of borderline intelligence and barely literate. However, he is not mentally defective or insane" (R10; Def.Ex.1).

5. a. Concerning Charge I, the evidence conclusively shows that accused absented himself without authority from his organization on 19 November and that he remained in unauthorized absence until he voluntarily returned to military control on 23 November 1944. At the time of his initial absence, accused's organization was stationed near Schevenhutte and not Zweifall, Germany, as alleged. The court made this substitution which was proper, accused was therefore properly found guilty of absence without leave in violation of Article of War 61, as charged.

b. Concerning Charge II, the evidence shows that following accused's return to military control on 23 November 1944 he was ordered to report to his company which, at that time, was engaged in actual visual combat with the enemy. He did not comply with this command, but, instead, again absented himself without authority and remained in unauthorized absence until 9 December 1944 when he surrendered to the military police at Luxembourg, Luxembourg, about 50 miles to the rear of his company. During his absence, the company engaged in hard fighting with the enemy, received heavy small arms, mortar and artillery fire and suffered a considerable number of casualties. Upon return to his unit, accused admitted that he had been hiding out. The evidence of accused's two absences without leave at this time shows that he had no illusions regarding the mission and activities of his organization but to the contrary that he had full knowledge of the fact that his company was engaged in combat with the enemy. Accused consciously and deliberately avoided the perils and hazards of combat. Under such circumstances the court was fully justified and warranted in finding accused guilty of desertion, as

such offense is denounced and defined by Articles of War 58,28 (CM ETO 2473, Cantwell; CM ETO 5114, Acers; CM ETO 5555 Slovik; CM ETO 6177, Transeau and authorities cited therein).

c. The evidence shows that following accused's return to military control on 9 December 1944 he was ordered by his company commander to be sent to his platoon which he did. The Manual for Courts-Martial provides that an unconditional restoration to duty without trial by an authority competent to order trial may be pleaded in bar of trial for the desertion to which such restoration relates (MCM, 1928, par.69b, p.54) (Underscoring supplied). Although the facts herein tend to show a restoration to duty the evidence does not conclusively establish that condition nor was accused ordered to rejoin his unit by any person with authority competent to order trial. He remained with his until only 3 days and was then placed in confinement awaiting trial. Army Regulation 615-300, par.16(b), provides that "The authority to remove an administrative charge of desertion * * * is specifically delegated to all officers exercising general or special court-martial jurisdiction". There is no showing herein that any administrative action was taken by any person competent to remove the charge and accordingly there is no condonation of the offense (CM NATO 2139, Grabowski; Dig.Op. JAG, 1912, p.415 IX N; CM ETO 4489, Ward; CM ETO 6524, Torgerson and authorities cited therein).

6. The charge sheet shows that accused is 20 years of age and that he was inducted without prior service at San Jose, California, 6 January 1943.

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

8. The offense of desertion, in time of war, is punishable by 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).

Judge Advocate

Judge Advocate

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. 2

14 MAR 1945

CM ETO 6767

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Walferdang, Luxembourg, 11 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ARTHUR REIMILLER (33609959), Company G, 8th Infantry	

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

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

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

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

Specification: In that Private Arthur Reimiller, Company "G", 8th Infantry, being present with his company while it was engaged with the enemy, did, near Colbet, Luxembourg, on or about 19 December 1944, shamefully abandon the said company and seek safety in the rear.

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

Specification: In that * * * having received a lawful order from First Sergeant Ray A. Mann, Company "G", 8th Infantry, a noncom-

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missioned officer who was then in the execution of his office, to report to his organization, Company "G", 8th Infantry, for duty, did, near Colbet, Luxembourg, on or about 23 December 1944, 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 of the Specification, Charge I, guilty, except the word "Colbet" substituting therefor the word "Waldwillig", of the excepted word not guilty, of the substituted word guilty, and guilty of Charge I and of Charge II and its 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. The evidence for the prosecution may be summarized as follows:

On or about 17 December 1944, Company G, 2nd Battalion, 8th Infantry, of which company accused was a member, proceeded as part of a task force to the vicinity of Waldwillig, Luxembourg, to take up a defensive position "for the German counterattack" (R5,7,10,12). Thereafter the company was engaged in a holding action under enemy artillery fire until 1500 hours on 18 December at which time it attacked (R5,6,7,10). During the attack, the company was subjected to small arms, mortar and artillery fire and light casualties were suffered. The attack continued until it became dark at which time the company dug in for the night (R5). At the cessation of the attack that evening, the forward elements of the company were separated from the enemy by a distance of approximately 150 yards (R6,7). On the following morning, 19 December 1944, the company commander "made a check with all the platoons" and accused was found to be absent (R5). For approximately a week subsequent to 19 December the situation remained more or less static with the company dug in in a defensive position some 150 yards from the enemy. During this period the unit was subjected to sniper and mortar fire as well as occasional artillery fire (R6,7).

On 20 December 1944, accused reported to Captain John C. Von Kaenel, Commanding Officer of Service Company, 8th Infantry, and "custodian of the men of the regiment in confinement", at the Service Company orderly room. Captain Von Kaenel testified that at this time accused's battalion was at least "six,seven or eight miles further towards the enemy than I was". Upon reporting, accused stated that he wanted to go to the stockade because "he just couldn't take it any more". He appeared to be in average physical condition and did not complain of nor appear to be suffering from any illness, injuries or wounds. He was depressed mentally but otherwise appeared to be "mentally sound and sober". Captain Von Kaenel notified regimental headquarters of accused's presence and requested instructions as to what disposition should be made of him (R11-13).

On or about 23 December 1944 accused was brought from Service Company to the command post of the 2nd Battalion, 8th Infantry, then located at Betsdorf (probably in Luxembourg). There he talked with the Battalion S-1, Captain Robert C. Fellers (R8,10). During this conversation accused stated that he had been away from his company for "several days" and that he "wasn't able to go back to his company". He appeared to be in good physical condition and did not complain of nor appear to be suffering from any illness, injuries or wounds (R10,11). Captain Fellers accordingly turned him over to First Sergeant Ray A. Mann, Company G, 8th Infantry, then at the battalion command post with instructions that he be taken back to his company (R9,11).

Sergeant Mann questioned him as to where he had been and accused replied that he spent the "first night" at the battalion aid station and that thereafter he was at Service Company. He was told by Mann to wait at the battalion message center pending the arrival of transportation at which time they would return to the company. When transportation arrived approximately one hour and a half later, Mann told accused several times to prepare for departure and that he was to take him to the company. Accused refused to accompany him. Mann thus recapitulated the orders which he gave accused and accused's reply thereto:

> "The order that I gave him was, first of all I said for him to get his things ready and he was going with me. The second time I asked him he said he wouldn't go and the third time I asked him I said, 'I will give you one more chance - if you don't go with me you are going to see Captain Fellers' and he said, 'I am not going'" (R9).

In explanation of his refusal to return, accused told Sergeant Mann

> "'I have been around here a long time and I just can't take it any more. If I go up there this time I will just do the same thing over again". * * * and I said 'the company is just holding' and he said 'sooner or later the company will shove off and I will just have to go back again because I just can't stand it'. He said his nerves were shot and he couldn't stand it" (R9).

He did not return to the company but remained at the battalion command post. Mann testified that accused "knew I was 1st Sergeant" and appeared to be sober and to be suffering from no physical disabilities at the time he refused to obey the order to return (R9,10).

4. For the defense, Lieutenant Wayne A. Forcade, platoon leader, first platoon, Company L, 8th Infantry, testified that accused had been a member of his platoon from 28 July 1944 to approximately 20 November 1944 and that during this period accused "always exercised his duties in a very efficient manner - I would say in a grade of superior, for his efforts as a combat soldier" (R14).

A report of a psychiatric examination of accused, dated 27 December 1944 and signed by Major Meyer H. Maskin, Medical Corps, Division Psychiatrist, was introduced into evidence and reads as follows:

> "This soldier has been in combat since 10 July 1944 and had been previously wounded and evacuated for about two weeks. He stated that since returning from the hospital he has been anxious and apprehensive and unable to tolerate combat.
>
> However he is not insane and court-martial procedure is not precluded" (R14, Def.Ex.1).

Accused, after having been advised of his rights as a witness, elected to remain silent.

5. a. The evidence adduced in support of Charge I and its Specification shows that on 17 December 1944 the company of which accused was a member moved to the vicinity of Waldwillig, Luxembourg, where it engaged in a holding action under enemy artillery fire until 18 December on that afternoon, it participated in an attack which continued until the hours of darkness. At the cessation of the attack, during which small arms, mortar and artillery fire was encountered and casualties were suffered, the forward elements of the company were within 150 yards of the forward elements of the enemy. The situation thereupon became comparatively static and remained so for about a week but the same relative position was maintained and the company continued to be subjected to sniper, mortar and artillery fire. Although the exact time when accused absented himself from his company is not shown in the record other than by hearsay, he was shown to be missing on 19 December. In addition, it was shown that on 20 December 1944 he reported to the officer who had custody of regimental prisoners, approximately seven miles to the rear of his battalion, and requested that he be placed in the stockade because "he just couldn't take it any more". When he was returned to his battalion on 23 December he informed the Battalion S-1 that he had been away from his company for "several days". He also told his first sergeant that he had been at the battalion aid station and at the Service Company area during the period of his absence from his unit. When ordered by the first sergeant to return to the company, accused stated in effect that even though the company was then in a defensive position it was useless for him to return because "sooner or later the company will shove off and I will just have to go back again because I just can't stand it" (Underscoring supplied). From the facts shown, together with accused's admissions, the court was warranted in finding that accused, being present with his company while it was engaged with the enemy, shamefully abandoned it and sought safety in the rear, as alleged. Such conduct constitutes misbehavior before the enemy in violation of Article of War 75 (CM ETO 4004, Best).

The evidence indicates that accused had been in combat for approximately five months prior to the date of the offenses here alleged, that he previously had been wounded and returned to duty and that, since returning to duty, he felt himself unable to continue in combat. However, there also was evidence that shortly after his departure from his unit he did not appear to be suffering from physical or mental disabilities. A psychiatrist pronounced him "not insane" on 27 December. Whether or not, at the time of his alleged dere-

liction, accused was suffering under a genuine or extreme illness or other disability which would constitute a defense (Winthrop's Military Law and Precedents, Reprint, 1920, p.624), was essentially a question of fact for the court. Under the evidence here of record, the court did not abuse its discretion by resolving this question adversely to the accused (CM ETO 5346, Hannigan; CM ETO 4095, Delre).

The court was therefore warranted in finding accused guilty of Charge I and its Specification.

b. The evidence fully supports the court's finding that accused was guilty of Charge II and its Specification.

c. It will be noted that the specifications of both Charge I and Charge II allege that the offense therein described were committed at or near Colbet, Luxembourg. The proof showed that the offense under Charge I took place at or near Waldwillig, Luxembourg, and the court so found by exception and substitution. Also, the proof shows that the offense alleged under Charge II was committed at "Betsdorf". Reference to the map shows that the towns of Colbette, Waldbillig and Betzdorf are all located in Luxembourg within ten miles of each other and these are probably the towns referred to in the record. The specifications therefore are sufficiently accurate to apprise the accused of the offenses with which he was charged.

6. The charge sheet shows that accused is 23 years of age and was inducted at Luzerne, Pennsylvania, on 17 August 1943. No prior service is shown.

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

8. Misbehavior before the enemy is punishable by death or such other punishment as a court-martial may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2

14 MAR 1945

CM ETO 6809

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, 16 December 1944.
Private THOMAS E. REED (32679810), Medical Detachment, 28th Infantry	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that Private (then Private First Class) Thomas E. Reed, Medical Detachment, 28th Infantry, did, at or near Le Haye de Puits, France, on or about July 11, 1944 desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty and to shirk important service, to wit: avoid duty as an aid man during active combat with the enemy by his organization, and did remain absent in desertion until he was apprehended by the military authority at or near Creances, France on or about August 13, 1944.

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

Specification: In that * * * having received a lawful command from Captain Samuel Horowitz, 28th Infantry, his superior officer, to report to the Commanding Officer, Company F, 28th Infantry, as a company aid man, did, at or near Le Haye de Puits, France, on or about July 11, 1944, willfully disobey the same.

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 of Charge I except the words "was apprehended by the military authority", substituting therefor "returned to military control", of the excepted words, not guilty, of the substituted words, guilty, guilty of Charge I and of Charge II and its 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 by musketry. The reviewing authority, the Commanding General, 8th Infantry Division, approved the sentence and directed that"pursuant to Article of War 50½, the order directing execution of the sentence is withheld". The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but, owing to unusual circumstances in this case, commuted the sentence to dishonorable discharge, total forfeitures, and confinement at hard labor for 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 showed that on 11 July 1944 accused was a litter bearer, Medical Detachment, 28th Infantry. On that day the battalion to which his section was attached was engaged in an attack against the enemy near La Haye du Puits, France (R6,11). During the attack, the battalion aid station was located some four or five hundred yards behind the front lines in an area in the vicinity of which artillery fire was falling and from which the sound of small-arms fire could be heard (R6,9,14). Although no small-arms fire was being received in the area of the aid station, accused had been "up in the area where the shooting was going on" with the litter teams (R7,15). Early in the afternoon of 11 July, a request was received from Company F of the 48th Infantry engaged in the attack, for a replacement for their company aid man and accused was ordered to report to them in that capacity (R6,13). Upon being so informed, accused told his section leader that he had never before performed and did not feel himself capable of performing the duties of an aid man and that he "did not want to go up" (R13). He then went to Captain Horowitz and expressed to him his unwillingness to serve as an aid man. He seemed "very much upset about going on that job", and during the course of his conversa-

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tion with Captain Horowitz remarked, "it is murder up there". Captain Horowitz "explained to him that he must go as ordered and the seriousness of refusing to go as ordered". Although accused did not definitely indicate that he would or would not comply with the order, at the close of the conversation Captain Horowitz felt that he had "convinced him" of the necessity for compliance (R8). Captain Horowitz then informed accused's section leader that accused had "agreed to report and for me to get him ready, so then I got him ready to go up as aid man" (R14). He was thereafter seen leaving the aid station in the general direction of Company F (R10,14). However, he did not report to that company for duty and was not thereafter seen by the first sergeant of Company F, the battalion surgeon, or his section leader until shortly before trial (R8,12,14). It was stipulated that accused was returned to military control at Creances, France, on or about 13 August 1944 (R18).

4. Accused, after having been advised of his rights as a witness, elected to remain silent and no evidence was introduced on his behalf.

5. a. The action of the reviewing authority in directing that "pursuant to Article of War 50½, the order directing the execution of the sentence is withheld" did not follow the prescribed formula with respect to sentences which must be confirmed by the Commanding General, European Theater of Operations. The reviewing authority's action should simply have directed that the record of trial be forwarded for action under the provisions of Article of War 48. It is obvious, however, that the action did in fact comply with the substance of the statutory requirements (AW 50½) and that the sentence was confirmed by the Commanding General, European Theater of Operations. The failure to use the prescribed formula was therefore a harmless discrepancy which in no respect affected or impaired the substantial rights of the accused (CM ETO 5155, Carroll and D'Elia).

b. Under Charge I and its Specification accused was charged with deserting the service of the United States by absenting himself without leave with intent (1) to avoid hazardous duty and (2) to shirk important service, to wit, the avoidance of duty as an aid man during active combat with the enemy by his organization. The pleading of both specific intents was not improper and permitted the prosecution to prove either or both of the intents alleged (CM ETO 2432, Durie; CM ETO 5555, Slovik). The testimony of the battalion surgeon, accused's section leader, and the first sergeant of Company F clearly shows that accused absented himself from his organization and, under the circumstances shown, it is clear that such absence was without leave. It was shown that the battalion to which accused's section was attached was, at the

time, actively engaged in combat and that the company to which he was ordered to report for duty as aid man was one of the forward companies in the attack. It was further shown that the company was "in need of medical men" and that accused was to report there for duty as a replacement. These circumstances having been shown, it is evident that the duty which accused was ordered to perform constituted both hazardous duty and important service. Prior to the time he absented himself he had made trips to the forward area with the litter teams. When informed that he was to be detailed as company aid man he was "very much upset about going on that job" and his unwillingness so to be detailed was apparently based at least in part upon his stated conviction that "it is murder up there". After absenting himself from the organization he remained absent for approximately one month. From these facts, the court was clearly warranted in finding that his absence was motivated by the intent both to avoid hazardous duty and to shirk important service. Thus, the commission by the accused of the offense charged was clearly shown.

c. The evidence adduced in support of Charge II and its Specification shows that accused received a lawful command from his superior officer to report to Company F for duty as a company aid man. The slight variance between the order as alleged and as proved is not substantial (Cf CM 233780, Bentley, 20 B.R.127 at 135). Although accused did not verbally refuse to obey the order given, the willful disobedience contemplated by Article of War 64 may consist not only in "an open and express refusal to do what is ordered" but also in "a simple not doing it, or in a doing of the opposite" (Winthrop's Military Law and Precedents, Reprint, 1920, p.573). It is clear that accused did not report as ordered but instead absented himself without leave. Thus, the evidence substantially supports the court's finding of guilty of Charge II and its Specification.

6. The charge sheet shows that accused is 35 years of age and was inducted, without prior service, on 9 December 1942.

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

8. The penalty for both desertion in time of war and willful disobedience of the lawful command of a superior officer is death or such other punishment as the 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 authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

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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 THOMAS E. REED (32679810), Medical Detachment, 28th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed and commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 6809. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 6809).

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

(Sentence as commuted ordered executed. GCMO 83, ETO, 22 Mar 1945.)

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

BOARD OF REVIEW NO. 1

26 FEB 1945

CM ETO 6810

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Molsheim, France, 3 December 1944. Sentence: To be shot to death with musketry.
Private CALVIN L. SHAMBAUGH (35750636), Company H, 30th Infantry	

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

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review, 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 CALVIN L. SHAMBAUGH, Company "H", 30th Infantry, did, at or near LeFerriere, Italy, on or about 27 January 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended at or near Anzio, Italy, on or about 12 September 1944.

He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 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, confirmed the sentence and withheld the order directing the execution thereof pursuant to Article of War 50½.

3. Prosecution's evidence was substantially as follows:

On 27 January 1944, accused, a member of the second squad of his platoon, was present with his unit, Company H, 30th Infantry, at the Anzio Beachhead, near Le Ferriere, Italy (R8,9,11). The company was in reserve, but enemy shells, aimed at nearby American tanks, were falling in the company area and there was enemy small-arms fire overhead (R7,8,9,11).

Staff Sergeant Luther B. Estes, squad leader of the third squad of accused's platoon, testified that the platoon "had orders to move out on the road in preparation to moving to another sector * * * to set up our mortars" and "to go into action" (R7). The platoon was instructed to form at a point on the road about 100 yards from its then position preparatory to its movement (R11). Estes did not tell accused the company was preparing to return to the lines, nor was he aware except through hearsay that accused knew this (R8). Although no announcement of the reason for leaving was made to the company (R9), "Everyone in the company knew it". The last time witness saw accused in the area was "just before dark" (R9). After dark, about 30 minutes after receiving the movement order, the platoon moved out to the road. Shells and small-arms fire were still being received at this time. Following a check of personnel, the squad leader reported the absence of accused to the platoon sergeant (R9,11). The latter thereupon ordered a search of the immediate vicinity as well as of the area just vacated. The search disclosed accused's absence (R7,11), and Estes did not see him again until the time of trial (R7). Estes and another squad leader of accused's platoon testified that they did not give accused (not a member of the squad of either) permission to be absent and that if anyone had done so they would have known about it (R8,11). Evidently no one gave accused such permission (R11). After the discovery of his absence, the platoon left the area and thereafter "set up in another location" (R7,9).

It was stipulated by accused, defense counsel and prosecution that First Lieutenant Louis A. Tritico, 30th Infantry, if present in court and sworn as a witness, would testify that on or about 15 November 1944, as investigating officer, he took a statement from accused. Prior to taking the statement he advised accused of his rights under Article of War 24 and accused indicated he understood them. Without promises or threats, accused voluntarily made a statement under oath to the officer and signed the same after the latter read it to him (R12; Pros.Ex.A). The stipulation (Pros.Ex.A), dated 29 November 1944, bears the signatures of accused, defense counsel and the trial judge advocate. Defense counsel asked accused at the trial if he would so stipulate and then stated "The accused agrees" (R12). The prosecution thereupon read the stipulation. The statement was then admitted in evidence, the defense stating there was no objection, and read by the prosecution (R13;Pros.Ex.B). It reads in pertinent part as follows:

> "On or about January 27, 1944 I decided I couldnt take any more so I took off. I got on an L.S.T leaving Anzio and went to Naples. In Naples I ate in the Replacement Depot. Several times I thought of turning myself in but I was running around with fellows, I just never did. There were M.P.s in Naples but I did not want to get sent back up to the lines so I did not turn myself in. When I heard the outfit had moved out of Anzio, I went up there. Stayed around there until I was picked up by the M.Ps on the 12th of September 1944. I just cant take it, I do not want to go back up to the outfit.
>
> I cannot read or write.... This statment was read to me by Lt. Tritico before I swore to it and signed it".

4. After a full explanation of his rights to testify, make an unsworn statement or remain silent, accused elected to remain silent (R13-14). No evidence was introduced by the defense.

5. Accused is charged with absenting himself without proper leave from his organization with intent to avoid the hazardous duty of combat with the enemy. In order to sustain the charge the record must contain substantial competent evidence of each of the following four elements:

(a) that accused absented himself without leave, as alleged;
(b) that his unit was under orders or anticipated orders involving hazardous duty;

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(c) that notice of such orders and of imminent hazardous duty was actually brought home to him; and

(d) that at the time he absented himself he entertained the specific intent to avoid hazardous duty (CM ETO 5555, Slovik, and authorities therein cited; CM ETO 5565, Fendorak; CM ETO 5958, Perry and Allen).

(a) Accused's unauthorized absence at the time and place alleged is established by the testimony of the two witnesses, squad leaders of his platoon, and his own confession, which shows the termination of the absence at the time and place and in the manner alleged.

(b) Estes testified that accused's platoon "had orders to move out" in preparation to another sector where they would set up mortars and "go into action". The other witness testified that the platoon members were told they were going to move into another position. This was substantial evidence that the unit was under orders involving the hazardous duty of combat with the enemy (CM ETO 5555, Slovik; CM ETO 5565, Fendorak).

(c) Immediately prior to his absence, accused's company was located at the Anzio Beachhead. It was in a reserve position but enemy shells, directed at friendly tanks, were falling in the area and enemy small-arm fire was overhead. The company was in such proximity to the enemy that its very presence in the area was hazardous and the situation was such that it might evolve at any moment into active combat with the enemy. It is thus immaterial that the record lacks evidence that accused was specifically notified of the orders requiring movement of his unit to another position where it was to "go into action". The situation here is the antithesis of that in CM ETO 5958, Perry and Allen, wherein the Board of Review held that the record of trial was legally insufficient to support findings of guilty of desertion, partly on the ground that the evidence was insufficient to show notification to accused of orders and of imminent hazardous duty. In that case, accused's unit was in a rest area and in a rest period awaiting the arrival of other units of the division. No member of the unit knew when or precisely where it was to move. Men were permitted to leave the area to visit friends in neighboring units. There was no evidence of any contact with the enemy, present or imminent. The instant case, on the other hand, is in the category of the numerous "battle line" cases, which the Board in the Perry and Allen case specifically distinguished in the following language:

"In those cases the units of the accused involved were actually engaged in combat or in highly important tactical missions either at or shortly after the commencement of his unauthorized absence" (p.9).

Accused's confession, however, indicates that he was aware of imminent combat duty:

"I couldnt take any more so I took off. * * * There were M.P.s in Naples but I did not want to get sent back up to the lines so I did not turn myself in. When I heard the outfit had moved out of Anzio, I went up there. * * * I just cant take it, I do not want to go back up to the outfit".

Notification to accused was adequately established (cases cited in CM ETO 5958, Perry and Allen, CM ETO 4138, Urban; CM ETO 4686, Lorek and Heiman; CM ETO 5079, Bowers; CM ETO 5293, Killen, CM ETO 6079, Marchetti).

(d) Accused was seen by Estes "just before dark". The platoon, which was under or close to enemy fire, moved out to the road after dark and it was then discovered that accused was absent. The unit moved out without him and was installed in another location. Its further activities do not appear in the record, but it was obviously pressing forward towards the enemy. The portion of his confession quoted above confirms the inference that accused so timed his absence as to be reasonably sure of missing combat duty with his unit. His failure to surrender to military police was prompted by fear of being sent to the front lines. This is indicated by the fact that over seven months after the inception ofhis absence, when he heard his unit had moved and believed there was no further danger of meeting and rejoining it, he returned to Anzio and was apprehended. At the trial he offered no explanation of his absence. His intent, at the time of leaving his unit, to avoid the hazardous duty of combat with the enemy was convincingly established (cases cited in subpar.(c) supra; CM ETO 5555, Slovik; CM ETO 5565, Fendorak).

6. a. First Lieutenant R. H. Lewis, as personnel officer, 30th Infantry, certified an extract copy of a morning report of accused's company containing entries showing his absence for the period alleged. Lieutenant Lewis also signed a letter, dated 18 November 1944, to his regimental commander reciting such absence together with other information shown on accused's locator card. Both the extract copy and the letter are part of the accompanying papers and neither is a part of the record of trial. First Lieutenant Ruel H. Lewis, 30th Infantry, evidently the same officer, was appointed and sat as a member of the court (R3). When the prosecution requested the members to state

any facts believed to be a ground of challenge by either side against any member, he remained silent. The defense did not challenge him (R4). There is no indication that he was not competent or eligible to serve on the court-martial. He was not the accuser, did not investigate the case and was not called as a witness at the trial. His only connection with the case was the fact that he had in the course of his duties seen prima facie evidence of accused's absence without leave. The acts of signing the extract copy and letter, however, were purely administrative and, in the absence of indication of injury to any of accused's substantial rights, any irregularity involved in Lieutenant Lewis' sitting as a member of the court may be regarded as harmless (CM ETO 2471, McDermott; CM ETO 4967, Junior G. Jones).

b. The record does not expressly state that accused assented to the stipulation as to the testimony of Lieutenant Tritico (Pros.Ex.A) concerning the taking of accused's statement (Pros. Ex.B), which, it will be assumed by the Board of Review, amounts to a confession. It does, however, show that defense counsel expressly asked accused if he would stipulate that if the officer were present and sworn he would testify as shown in the stipulation and that immediately thereafter defense counsel stated "The accused agrees". After its admission in evidence the stipulation was read in open court. It is signed by accused as well as by the defense counsel and the trial judge advocate.

> "A stipulation need not be accepted by the court, and should not be accepted where any doubt exists as to the accused's understanding of what is involved" (MCM, 1928, par. 126b, p.136).

It is not essential that the record show accused's verbal assent to the stipulation (CM ETO 364, Howe), and the assertions of defense counsel in accused's presence, coupled with the facts that the subject matter of the stipulation and statement were uncontroverted and that accused signed both, warranted the court in concluding that there was no doubt "as to the accused's understanding of what is involved" in the stipulation (MCM, 1928, par.126b, p.136, CM ETO 4564, Woods, Jr.).

Defense counsel specifically stated there was no objection to the admission in evidence of the statement so made by accused. There is no indication that it was otherwise than

voluntarily made. The corpus delicti of the offense, absence without leave (CM 143744, 145555 (1921), Dig.Op.JAG, 1912-1940, sec.416(7a), p.267),was established (par.5(a), supra). Under date of 15 November 1944 the statement was signed by accused and verified before Lieutenant Tritico (Pros.Ex.B). It was read in open court after its admission in evidence.

> "A stipulation which practically amounts to a confession where the accused had pleaded not guilty and such plea still stands * * * should not ordinarily be accepted by the court. In a capital case and in other important cases a stipulation should be closely scrutinized before acceptance.
>
> * * * the court may be more liberal in accepting stipulations as to testimony" (Ibid., pp. 136-137).

The stipulation above referred to concerned testimony as to the taking of accused's confession, which was a separate document, signed and verified by him. Such stipulation is to be distinguished from one which in itself "practically amounts to a confession". But, although it was far from a stipulation of ultimate guilt, it merited close scrutiny by the court before acceptance in this highly serious case. Likewise, the Board of Review upon appellate review should carefully scrutinize stipulations. Upon doing so in this case, it finds no indication of any irregularity which could injuriously affect any of accused's substantial rights. It affirmatively appears, on the contrary, that those rights were fully protected.

c. A psychiatric report, dated 17 November 1944, and signed by J. Robert Campbell, Major, Medical Corps, Division Psychiatrist, is part of the accompanying papers and reads in part as follows:

> "2. INFORMATION FURNISHED BY THE SOLDIER:
>
> * * *
>
> Claims head injury in 1942 with thirteen weeks hospitalization. Infected scalp and amnesia for a week.
>
> 3. MENTAL EXAMINATION:
>
> Soldier examined 17 November 1944 at Company 'D' 3rd Medical Battalion.
>
> Literacy may be better than claimed. He is able to write his name and words such as 'cat' (made up of letters used in his name) spelling

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the short words without assistance.

Mental Age, by Kent Test, is 10 years. Arithmetical calculations better than M.A. and education expectations justify (e.g. 1.00 - .37=.63). Geographical, chronological and current knowledge as well as narrative ability are also better than formal test and education expectations. His nine months AWOL also suggests shrewdness beyond expectations for a mental defective. Hence, despite relative illiteracy, I find intelligence to be within normal limits.

There is no evidence of mental disease or defect and specifically no evidence of organic damage of brain or intellectual functions of nature attributable to old civilian head injury.

Combat reactions confined to physiological fear responses.

4. CONCLUSIONS:

a. At the present time, is this soldier able to understand the nature of the courts-martial proceedings and to assist his defense counsel in the preparation and trial of his case? Yes

* * *

c. At the time of the alleged offence, was this soldier suffering from a mental defect, disease or derangement? No"

There is no indication that accused was not sane or responsible for his acts both at the time of his offense and at the time of trial (CM ETO 5555, Slovik; CM ETO 5565, Fendorak; CM ETO 5765, Mack, and authorities therein cited).

d. The record of trial reveals that accused was fully accorded due process of law as provided by the Articles of War and fails to disclose any action or ruling by the court which prejudiced his substantial rights (CM ETO 5555, Slovik; CM ETO 5565, Fendorak).

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

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

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

F. Franklin Ritz _____ Judge Advocate

Malcolm C. Sherman _____ Judge Advocate

Edward L. Stevens, Jr. _____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 26 FEB 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private CALVIN L. SHAMBAUGH (35750636), Company H, 30th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Of the legal sufficiency of the record of trial to support the sentence of death in this case there can be no doubt. The accused is 21 years of age. He had practically no education and is virtually illiterate. He was inducted in March 1943 and joined the 3rd Infantry Division on 26 September 1943. He was hospitalized in line of duty on 28 October 1943, returned to his former organization on 11 January 1944, and the absence for which he was charged commenced on 27 January. His present company commander has no knowledge of his character or efficiency but he has had no previous convictions or bad time. Although accused's absence endured over seven months, the evidence in this case fails to show a deliberate design to secure incarceration in order to avoid the perils and hazards of combat, (as in CM ETO 5555, Slovik and CM ETO 5565, Fendorak), and points to cowardice on accused's part rather than criminality.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement, and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 6810. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 6810).

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

(Sentence confirmed but after reconsideration commuted to dishonorable discharge, total forfeitures and confinement for life. GCMO 65, ETO, 4 March 1945).

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

BOARD OF REVIEW NO. 1 — 8 FEB 1945

CM ETO 6823

U N I T E D S T A T E S v. Private First Class WALTER JOHNSON, JR. (35651419), Company A, 10th Infantry	5TH INFANTRY DIVISION Trial by GCM, convened at Fels, Luxembourg, 6 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. Federal Reformatory, Chillicothe, Ohio.

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 found legally sufficient to support the sentence.

2. Confinement in a penitentiary is authorized upon conviction of involuntary manslaughter by Article of War 42 and section 275, Federal Criminal Code (18 USCA 454). Prisoners, however, 25 years of age and younger and with sentences of not more than ten years, will be confined in a Federal correctional institution or reformatory. The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is, therefore, proper (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1) and 3a, as amended by Cir.25, WD, 22 Jan 1945).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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Branch Office of The Judge Advocate General
with the
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BOARD OF REVIEW NO. 2

19 MAR 1945

CM ETO 6840

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, 21 January 1945. Sentence:
Private CHARLES R. STOLTE (32568132), Company B, 377th Infantry	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 EVINS, 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 Charles R Stolte, Company 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 intent to avoid hazardous duty, to wit: combat against an armed enemy, and did remain absent in desertion until he surrendered himself at Reims, France, on or about 2 December 1944.

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

3. The evidence for the prosecution shows that on 9 November 1944, accused was a member of the first squad, second platoon, Company B, 377th Infantry, which was bivouacked near Uckange, France (R6,7,9). On the early morning of this date, accused's company was ordered to cross the Moselle River with an assigned mission of occupying and holding a hilly and woody area about one mile east of the river (R7,9). The crossing was made in assault boats, as scheduled, before dawn, and the high ground and woods taken, as ordered. During the crossing the company was subjected to small arms fire and before they were able to "dig in", the enemy sent over a heavy artillery barrage resulting in one member of the company being killed and four others wounded (R7). Before proceeding to take the objective, accused's company was regrouped and reorganized, at which time it was discovered that the assault boat, in which accused and the members of his squad were loaded had not reached the east shore. Due to a swift current this barge drifted some distance downstream and the squad leader therein ordered the boat returned to the west side of the river from which it was launched (R7,9).

The squad returned to the headquarters of the First Battalion, which had remained behind, joined up with this organization and crossed the river with it four days later. Accused was present when they arrived at the Battalion Command, but was not present with the First Battalion on the west bank the following day or at the time it crossed the river on 13 November 1944 (R7,9,12). Under heavy artillery and mortar fire, and some small arms fire, accused's company together with certain elements of A and D Companies and the First Battalion, continued to attack the German held positions during which losses were suffered. Accused was returned to his organization after voluntarily surrendering himself to the military police at Rheims, France on 2 December 1944 (R10,12).

An extract copy of the morning report of Company B, 377th Infantry, received in evidence without objection by the defense, showed

accused's absence from and return to military duty on the dates alleged (R10; Pros.Ex.A). The Prosecution also submitted, and the court received in evidence without objection by the defense, a voluntary statement made by accused during the investigation, which is, in part, as follows:

> "On 9 November 1944, I * * * left my organization in the vicinity of Ukrange, France. /I/ went into Belgium and stayed there awhile with some civilians * * * /I/ went down into the vicinity of Rheims, France. Here I * * * gave * * * up to the M.P. Headquarters and they put me in the replacement pool and * * * returned /me/ to /my/ organization.
>
> While in Ukrange we were subjected to heavy enemy fire and I was very scared, my nerves went to pieces and I left. I know now that I did the wrong thing and would like to go back to my company and I would try my best to be a man and stay there no matter what happened. I have always been a good soldier and always carried out all my orders. I cannot express in words how ashamed I am that I let myself get out of hand and commit such a wrong offence. * * *
>
> In the course of the events at Ukrange Pvt. Fiorentino /who left with accused/ said that he had gone AWOL before on a river crossing and had only gotten a summary court and was sentenced to 10 or 15 days and then returned to his organization" (R12; Pros.Ex.B).

4. After an explanation of his rights as a witness accused elected to remain silent. The defense introduced only one witness, namely, Captain Joseph C. Tedesco, Medical Corps, acting Division Neuropsychiatrist, who testified that he examined accused on 10 January 1945 and found him to be "mentally much below par" or average. He determined that accused had a mental age of 15 years and stated that although accused "looks 45" he is "actually only 31". He completed the 4th grade in school. Witness considered accused "a mental defective" but "capable of distinguishing right from wrong" and of being able to assist in the preparation of his defense. In the opinion of the witness, accused's mental condition was such that he could easily be influenced by others (R13,14).

5. a. Competent uncontradicted evidence established that on 9 November 1944 accused was a member of a combat organization which was ordered to cross the Moselle River in the face of heavy enemy fire, and to participate in an attack upon the heights beyond, which were held by the enemy. When his platoon embarked in assault boats, the boat containing accused's squad was forced by the swift current downstream some distance and did not make the crossing. He then

after absented himself from his squad and deliberately remained away for more than three weeks, His company was under enemy fire at the time he absented himself and it suffered a considerable number of casualties. The evidence indicates that accused had full knowledge of the hazards and perils of this operation and his own statement (Pros.Ex.B) corroborates this conclusion. All the elements of the offense of desertion with intent to avoid hazardous duty are proven beyond a reasonable doubt (CM ETO 2473, Cantwell; CM ETO 3380, Silberschmidt; CM ETO 4570, Hawkins and authorities therein cited).

b. The question of the mental responsibility of accused was essentially an issue of fact for the determination of the court. The defense offered evidence in this connection, contained in the testimony of a medical officer, an expert psychiatrist, who stated, that in his opinion, accused was below the average in intelligence and a mental defective but that he was capable of distinguishing right from wrong. Opposed to this testimony there is contained in the record of trial substantial evidence, including his own admission, that he acted deliberately and with full consciousness that he was guilty of cowardly conduct. Under such circumstances the findings of the court will be accepted and not disturbed by the Board of Review (CM ETO 4570, Hawkins, supra; CM ETO 5747, Harrison and authorities cited therein).

6. The charge sheet shows that accused is 31 years of age and that he was inducted 23 October 1942. 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 offense of desertion, in time of war, is punishable by 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).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 3

24 MAR 1945

CM ETO 6842

UNITED STATES	)	95TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 95, U.S. Army, 17 January 1945. Sentence: dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private EUGENE W. CLIFTON (38320203), Company K, 378th 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 58th Article of War.

Specification: In that Private Eugene W. Clifton, Company "K", 378th Infantry, did, at or near Lisdorf, Germany, on or about 5 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 Coume, France on or about 23 December 1944.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, he was found of the Specification of the Charge, guilty, except the word "organization" substituting therefor the words "place of duty", of the ex-

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cepted word, not guilty, of the substituted words, guilty, of the Charge, guilty. Evidence was introduced of one previous conviction by special court-martial for absence without leave for about 18 days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution showed that accused was a rifleman, Company K, 378th Infantry (R6,20). On 3 December 1944, that company "fought its way" into Lisdorf, Germany, located near the west bank of the Saar River. Upon reaching Lisdorf, it established headquarters and remained there until the morning of 5 December at which time it crossed the Saar and moved into Ensdorf, Germany, some 1000 yards east of the river (R9,10,19,24). Although the crossing proved not particularly hazardous, severe opposition was encountered in Ensdorf and fatal casualties were there suffered (R7, 10). The company remained "on the other side of the river" actively engaged with the enemy in severe fighting under extremely adverse combat conditions until the night of 22 December when it withdrew across the Saar. Immediately thereafter, early in the morning of 23 December, it moved back to a rest area in Coume, France, some nine or ten miles behind the lines (R8,9,11). Accused, was not seen by his first sergeant at any time during the above period (R8,11).

An unsworn statement voluntarily made by the accused to an investigating officer was introduced in evidence without object and reads in part as follows:

> "I was with the kitchen truck on the 5th of December 1944 when my company crossed the Saar River. I remained behind to take treatment for piles. I told the Supply Sergeant that I was taking treatment and he said he would let the company know. I had the permission of the Captain in the Medics. I do not know who the Captain was. Went AWOL from the kitchen about five (5) days later" (R24,25; Pros.Ex.B).

It is fairly inferable from the record that on 3,4 and 5 December the regimental aid station was located at Alt-Forweiler (R21). Although the location of this town is not disclosed by the evidence, reference to the map shows it to be west of the Saar some four or five miles southwest of Lisdorf. The records of the aid station showed that accused was there treated for diarrhea

on 3 and 4 December after which he was marked "returned to duty" (R20,21). There was no indication in the aid station records that he received treatment on 5 December (R21). However, Captain George W. Heintzelman, the regimental surgeon, testified that he remembered treating accused for diarrhea, which he characterized as moderately severe but not incapacitating, on or about that date. He further testified that it was quite possible that he might have told the accused at that time that he need not rejoin his company for "a day or two". However, he was certain that the maximum period during which he specified that accused might "stay away" did not exceed two days (R22).

The mess sergeant of accused's company testified that "I believe it was on the 8th or 9th, the dates I get mixed up", accused reported to him at the kitchen, then in storage at Coume, and stated that he had been to the "medics", had been treated for piles, and was to take a few days rest (R13,14). Some days later the kitchen was moved to Holzmuhle, approximately 1000 yards west of Lisdorf. Accused remained with the mess sergeant during the time the kitchen was in Coume and aided him in making the move to Holzmuhle (R14,16,18). On or about 10 December 1944, First Lieutenant Charles C. Walsh, Service Company, 378th Infantry, who was maintaining an ammunition dump, gas point and ration point at Holzmuhle, learned of accused's presence at the kitchen. He then "contacted" accused, told him to report to his supply sergeant at Lisdorf, cross the river there and return to his company. At or about the same time he instructed accused's supply sergeant to "pick up" the accused and have him join his company carrying party(R19). Two days later, he saw accused at the crossing point near Lisdorf with his supply sergeant, who "accompanied him to the river * * * and they crossed the river to the eastern bank" (R19,20). However, accused did not rejoin his company but returned to the kitchen area, secured his equipment, and disappeared (R8,11,15,16). Although the date upon which this disappearance took place is not clear from the testimony of Lieutenant Walsh and the mess sergeant, who were unsure of the date in question and whose testimony on the point is conflicting (R15,16,18,19,20), the accused's statement to the investigating officer recites that he was with the kitchen truck on 5 December when his company crossed the Saar and that he "Went AWOL from the kitchen about five (5) days later" (R24,25; Pros.Ex.B). It thusappears that he left the kitchen area on or about 10 December 1944.

On 23 December, after the company had moved back to Coume, accused "came into the orderly room and said that he was back" (R8). When asked by his first sergeant where he had been, he replied that he had been sick and that he had been unable to rejoin the company (R9,10). He appeared "perfectly normal" to the sergeant. At the close of this conversation, accused was placed under guard (R8,9).

4. For the defense, Staff Sergeant Rudolph T. Simek, Company K, 378th Infantry, testified that he was platoon guide in accused's platoon on 5 December and that early in the morning of that day accused came to him, complained of diarrhea, and requested permission to go on sick call. He referred accused to the platoon leader (later killed in action), who granted such permission. Accused was not thereafterseen by witness until approximately 22 December after "we moved back to a rest area and the accused came to our room". At that time he made inquiry of accused concerning his health and accused replied that his "nerves were shot". He asked accused why he had not returned to the company to which accused replied that he had been taking "some kind of treatments". He thereupon told accused to report to the orderly room. On cross-examination, upon being asked whether his unit was engaged in combat from 5 to 23 December, this witness stated "Just one platoon, sir. We encountered a few German patrols and drove them off". Upon being asked whether the "whole company" was engaged in combat during this period he replied in the affirmative (R26,27).

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

5. a. The evidence adduced showed that accused's organization was engaged in almost continuous combat from 3 December 1944 to 22 December 1944. On 3 December it fought its way into Lisdorf, Germany, located near the west bank of the Saar River. On 5 December it crossed the Saar. Thereafter it was engaged with the enemy on the east side of the river until the night of 22 December when it withdrew to a rest area at Coume, France. Early in the morning on 5 December, accused, who on 3 and 4 December had been treated for diarrhea at the regimental aid station, again secured permission to go on sick call. While the company crossed the Saar, he reported to the aid station and there received treatment for his ailment, which was moderately severe but not incapacitating. Although he was marked "returned to duty" after receiving treatment on 3 and 4 December, the regimental surgeon testified that he may have told him that he need not rejoin his company for "a day or two". However, the surgeon was positive that if he did so inform the accused he did not grant him permission to "stay away" for more than two days. Thus, at the latest, accused was under a duty to return to his assigned duty as rifleman at the expiration of the two day period. He did not do so but remained west of the Saar with the kitchen personnel and, on or about 10 December, when discovered at the kitchen and ordered to rejoin his company east of the Saar, disappeared from the kitchen area and did not return until 23 December after his company had withdrawn to the rest area at Coume.

In passing upon the question whether this conduct constitutes "AW 58-28 desertion", the case of CM ETO 4702, Petruso, is of interest. In that case, accused was wounded while advancing with his company during an attack whereupon he left the line of advance and reported to the battalion aid station. The medical

officer in charge of the aid station treated his wounds, which he pronounced non-disabling, and directed him to return to his company for duty. Accused instead went to a battalion headquarters where he remained for three days after which he reported to his unit. In the interim the company engaged in severe fighting. In passing upon the record of trial the Board of Review said:

> "The evidence presents a perfect pattern of the offense of absence without leave with intent to avoid hazardous duty. The accused suffered superficial minor wounds which were pronounced nondisabling. He legitimately appeared at the aid station for treatment. With full knowledge that his unit was engaged in an attack on the enemy, he availed himself of the opportunity thus afforded him to avoid further hazards of battle. For three days he remained in comparative safety while his fellow soldiers faced the greatest of battle dangers. When the attack was over he conveniently returned to his command. The charge against him was fully sustained".

The instant case presents the same general pattern as that presented by the above case, with two exceptions. There accused was directed to return to his company immediately upon receiving treatment and instead went to battalion headquarters. Here the accused probably was told after receiving treatment that he need not rejoin his unit for "a day or two" and, although he did not return to that portion of his company which was engaged in combat across the river, he did return to a rear echelon detachment of his own company. These differences in the factual situation do not affect the application of the principle involved. Although accused may have been told he need not rejoin his company for a day or two, he was under a duty to return at the expiration of this period and, since he was a rifleman, this duty involved returning to his platoon, not to the kitchen. Instead, he took advantage of the opportunity afforded him by his legitmate presence at the aid station and the limited grant of authority given him by the regimental surgeon to avoid further hazards of battle. As in the case to which reference was above made, he remained in comparative safety for a period of approximately two weeks while other rifleman in his company were facing battle dangers and returned to his unit only after it withdrew to a rest area. By failing to return to his proper place of duty at least by the evening of 7 December he absented himself without leave from that place of duty and, under the circumstances here shown, the court was fully warranted in finding that such absence was motivated by the intent to avoid hazardous duty. The Board of Review accordingly

concludes that the conduct of which accused was found guilty constitutes desertion in violation of Article of War 58 (See CM ETO 4702, Petruso, supra; CM ETO 4165, Fecica; CM ETO 5341, Hicks; CM ETO 6468, Pancake; CM ETO 6997, Jennings; et al; and Cf CM ETO 6198, Bean; CM ETO 4093, Folse; CM ETO 1404, Stack).

b. Even though it has been concluded that accused's conduct on the 7th constituted a violation of Article of War 58, there remains for consideration the question whether there was in this case a fatal variance between the specification and the proof. Accused was charged with having deserted the service of the United States by absenting himself without leave from his organization on or about 5 December 1944 with intent to avoid hazardous duty, "to wit, engage in combat with the enemy in his capacity as a rifleman". The proof showed that he initially absented himself from his place of duty rather than his organization (and the court so found by exception and substitution) and that such initial absence took place on 7 December rather than 5 December. However, the words of the Specification "absenting himself* * * from his organization with intent to avoid * * * [engaging] * * * in combat with the enemy in his capacity as rifleman" were designed to reach and are broad enough to cover the specific kind of conduct here shown, i.e. failure to return to his place of duty after receiving treatment at the aid station. The words of the Specification "on or about 5 December 1944" were sufficiently broad to permit proof of the occurrence of this offense on 7 December 1944 (Cf: CM ETO 5953, Myers). It thus appears that the specification sufficiently alleges the offense for which accused was tried and of which he was found guilty and that there was no real or substantial variance between specification and proof.

6. The charge sheet shows that accused is 25 years of age and was inducted at Tulsa, Oklahoma, on 22 October 1942. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offens . 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).

Benjamin R Sleeper Judge Advocate

(SICK IN QUARTERS) Judge Advocate

Judge Advocate

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 1

8 FEB 1945

CM ETO 6851

U N I T E D S T A T E S v. Private JACK A. COMPTON (18018042), 375th Company, 101st Battalion, 12th Replacement Depot	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at London, England, 16 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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 found legally sufficient to support the sentence.

2. 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). However, prisoners 25 years of age and younger and with sentences of not more than ten years will be confined in a Federal correctional institution or reformatory. The place of confinement herein designated is therefore proper (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1), 3a, as amended by Cir.25, WD, 22 Jan. 1945).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 1

24 FEB 1945

CM ETO 6857

U N I T E D S T A T E S	30TH INFANTRY DIVISION
v.	Trial by GCM, convened at Kerkrade, Holland, 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 ROBERT B. DOUGAN (20724026), Company C, 117th Infantry	

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

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

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

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

Specification: In that Private Robert B. Dougan, Company "C", 117th Infantry, did, without proper leave absent himself from his organization at LaVerderie, France, from about 27 July 1944, to about 31 July 1944.

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

Specification: In that * * * did, at Les Brouillets, France, on or about 20 August 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Brussells, Belgium, on or about 8 November 1944.

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He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and specifications. Evidence was introduced of two previous convictions by special court-martial and two by summary court for absence without leave for 28, two, two, and 27 days, respectively, in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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 summarizes as follows:

On 27 July 1944 accused was a member of Company C, 117th Infantry. He absented himself from his company on that date without authority and remained absent until 31 July 1944 (R7; Pros.Ex.2).

On 20 August 1944 accused's company was located in Les Brouillets, France. The town was built around a crossroads. The company area was a triangular section of the town of about 500 square yards. Only one building of the town remained standing. It was not easy for a man to become lost in the vicinity. The company was then under orders to proceed at 0900 hours on a long motor march. In the early morning, accused's absence without leave was reported to Captain Morris A. Stoffer, the company commander. He made a personal search of the area and accused was not found. Accused was not with the company until it reached a point in Germany preparatory to the attack on Mariadorf on 14 or 15 November 1944 (R7-9).

Accused was arrested by military police on 8 November 1944 at a hotel in Brussells, Belgium. The military policeman who arrested him testified:

> "When I went after him at the hotel, he was in bed asleep. I had a Canadian M. P: with me and we went to his room and went through his pockets and found his American dog tags. * * * he was very drunk. * * * I asked him whether he was an American or Canadian and he said he was an American but in the Canadian Army. I asked him what he was doing with American dog tags and he said I would find out later" (R10).

The policeman did not find an American Army uniform in the room, but accused did have a Canadian blue uniform in which he dressed upon being taken into custody (R10).

In a voluntary extra-judicial statement made during the pre-trial investigation, accused stated:

> "I admit being away from my organization at La Verderie, France from 27 July 1944 to 31 July 1944 without authority'.
>
> I further admit that I was away from my organization without authority at Les Brouillets, France on 20 August 1944 and remained so until I was apprehened at Brussells, Belgium on or about 14 Nov. 1944.
>
> During the above periods of time I was trying to find my organization after becoming lost from it" (R7; Pros.Ex.1).

4. After his rights were explained to him, accused elected to make an unsworn statement. He asserted that he had been in the military service since September 1940 - first in the National Guard and then in the 137th Infantry of the 35th Division, and that he saw service in the South Pacific from 2 February 1942 to 5 May 1942. When he returned to the continental United States, he was assigned to the 373rd Port Battalion as drillmaster and calisthenics instructor. Subsequently he was a member of a cadre at Camp Hathaway, Washington, until 4 October of a year not stated. He joined the 30th Division on 7 July 1944 immediately before it crossed the Vire Canal in Normandy, France (R11). He was in Brussels as a result of an inquiry he made of an unnamed soldier who stated his organization was "around Brussells someplace". He also made inquiry of two military policemen "on the other side of Paris" but they didn't know the location of the 30th Division. He did not know the location of the Division, but nevertheless endeavored to find it (R12). With respect to his possession of a Canadian uniform, accused stated:

> "I met up with a Canadian soldier and we met up with two girls. I don't know what gave him the idea to steal my uniform but he took mine and left his instead and it was all I had left to wear" (R11).

He rejoined his regiment on 13 November 1944 and that night he was placed on the "first" outpost. He was in the "jump off" with his battalion on 16 November from Alsdorf to Mariadorf as a "walkie-talkie" operator and ammunition bearer for a mortar section (R11,12). In conclusion he declared:

> "All I ask the court - I know I made a mistake and I want the chance to go back and prove myself a good soldier" (R12).

5. a. Charge I and Specification: Accused's guilt of absence without leave from 27 July 1944 to 31 July 1944 was not only proved but was also admitted by him.

b. Charge II and Specification: Accused was absent from his company without authority on 20 August 1944 to 8 November 1944 - a total of 80 days. During his absence his organization had participated in the liberation of France and pursued the enemy into Germany. He was apprehended in a drunken condition in Brussels, Belgium, on 8 November by the military police, at which time he had assumed the uniform of the Canadian Army. His statement that during his absence he made efforts to find his organization is entitled to little credence. The court was fully justified in finding him guilty of desertion (MCM, 1928, par.130a, p.143; CM ETO 6435, Noe and authorities therein cited).

6. The charge sheet shows that accused is 29 years nine months of age. He enlisted 12 June 1940 at Topeka, Kansas. Prior service is shown from 6 January 1938 to 8 July 1938 and from 12 July 1939 to 9 November 1939. His service period is governed by the Service Extension Act of 1941.

7. The court was legally constituted and had jursidiction 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 (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

_____ Judge Advocate

Malcolm C. Sherman 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. 2 26 MAR 1945

CM ETO 6881

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Captain HOWARD M. HEGE (O-1035120), and First Lieutenant EDGAR R. PARSONS (O-1037214), both of the 27th Chemical Smoke Generator Battalion	Trial by GCM, convened at Cherbourg, Manche, France, 28 November and 6 December 1944. Sentence as to each accused: To be dismissed the service.

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

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

2. The accused were tried upon the following charges and specifications:

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

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

Specification 3: In that Captain Howard M. Hege, Chemical Warfare Service and 1st Lieutenant Edgar R. Parsons, Chemical Warfare Service, both of 27th Chemical Smoke Generator Battalion, acting jointly and in pursuance of a common intent, did, at or near Pouppe-

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ville, France, on or about 6 November 1944, wrongfully apply to their own use a truck, one-fourth ton, USA No. 20509983, property of the United States, furnished for the Military Service, and of a value of more than Fifty Dollars ($50.00).

Specification 4: (Finding of not guilty)

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

Specification: In that * * * acting jointly and in pursuance of a common intent, did, at or near Pouppeville, France, on or about 6 November 1944, openly and publicly, peddle whiskey to enlisted men of the 490th Port Battalion, Transportation Corps, for one thousand francs per bottle, said whiskey having been furnished them for seventy-six and one-half (76½) francs per bottle.

Each accused pleaded not guilty to all charges and specifications and, three-fourths of the members of the court present when the vote was taken concurring, both accused were found not guilty of Specifications 1,2, and 4 of Charge I, guilty of Specification 3 thereof and guilty of the Specification of Charge II and Charges I and II. No evidence of previous convictions was introduced as to either accused. Three-fourths of the members of the court present when the vote was taken concurring, each accused was sentenced to be dismissed the service. 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 as to each accused, 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 6 November 1944, Captain Howard M. Hege and First Lieutenant Edgar R. Parsons were assigned to the 27th Chemical Smoke Generator Battalion, stationed near Valognes, France (R34,52). At about 1800 hours on this date both accused were observed seated in a ¼ ton reconnaissance car near the bivouac area of the 490th Port Battalion, located on the beach at Pouppeville, Manche, France (R10,13,19-21,50). Both were engaged in peddling and selling quart bottles of whiskey from a jeep to enlisted men who had gathered around in a crowd, the number thereof being variously estimated from 10 or 12 to 25 to 50 men (R11,14-16,18, 66). The price charged by accused for the whiskey was "a thousand francs" a bottle (R18). Three soldiers testified that they purchased

whiskey at this price (R19-22). One of these, Sergeant Thomas Miller, testified that "I disremember" to which officer he paid the money, whereas Privates Quinion Yarborough and Kenneth Burks each stated that they purchased scotch whiskey and respectively paid "the Captain" and "the Lieutenant" (R19,22,24; Pros.Exs. C and D). Warrant Officers Matthew Brandon and Nathaniel Wicks appeared at the scene of the sale, saw a number of soldiers milling around the jeep in which the accused officers were seated, and observed Lieutenant Parsons exchange with one of the soldiers a bottle of whiskey for some money (R66). A number of the soldiers were seen drinking in the area but they discontinued and dispersed upon the appearance of the warrant officers (R66). Accused were placed under arrest and ordered out of the jeep by Mr. Brandon. They refused to obey immediately but later complied with the command after Warrant Officer Brandon drew his pistol. He escorted accused to battalion headquarters, followed by Wicks who drove the jeep, which contained two open wooden boxes and seven bottles of Black and White Scotch Whiskey. The cases, bearing markings "EFI" and "USF" meaning respectively "Expeditionary Forces Institute" and "United States Forces", were turned over to the military police (R36,44,67-68). The bottles had no revenue stamps affixed. A box similar to the one herein described was identified in court and the seven bottles of whiskey in question were reveived in evidence as prosecution's exhibit G (R36,44,45,48; Pros.Ex.G). During the course of investigation of the case, accused Hege stated that about the first week of October 1944 he drew the liquor from a ration station at Bayeaux, France, for "an imaginary battalion" (R49). On 9 October 1944, both accused Hege and Parsons were seen, by three American officers, at a "NAFI" tent, near Bayeaux, where liquor rations were being drawn. The price charged for whiskey at this time was 85 francs less a 10% discount or a net price of 76½ francs per bottle (R40,49,63). It was shown that the command, of which accused were members, had issued a circular or directive prohibiting the purchase or sale of certain spirits and liquors (Pros.Ex.A). Sometime after the sale of the liquor, accused Hege delivered 8000 francs to Colonel Eugene M. Caffey, the Commanding Officer of Utah District, to be used to reimburse the soldiers as part of the "exorbitant" price paid by them for the bottles of scotch whiskey in question (R70,71).

The evidence for the prosecution further shows that on 6 November 1944, accused Parsons signed a driver's trip ticket, at the request of Captain Hege for the official use of army vehicle number 20509983. This vehicle, a jeep, was dispatched for the purpose of making a trip to battalion headquarters and both accused stated to the investigating officer that they had driven to a nearby finance office, "to take back a payroll" (R50). The dispatch ticket was received in evidence as prosecution's exhibit H (R50). The jeep, from which the liquor was being sold by accused, and which was located near the beach and not in the vicinity of the finance office, was marked with the identical number (R36). It was stipulated by and between counsel for the prosecution and the defense that this vehicle possessed a value in excess of $50.00 and was the property

of the United States (R36,37).

4. After an explanation of their rights as witnesses, each accused elected to make an unsworn statement (R79,80,83). Accused Hege's statement is limited to a lengthy recitation of his civilian and military careers and is summarized as follows: He was graduated with a B.S. degree in chemistry from Gettysburg College in 1933 and taught school in Pennsylvania for 8 years thereafter. He was inducted into the Army in June of 1941 and discharged in September of the same year, being placed in the enlisted reserve corps at the time. He was recalled into the Army, 14 January 1942, and was graduated from the Chemical Warfare Officer Candidate School during August 1942. He thereafter served in various capacities with numerous Smoke Generator and Chemical Companies at camps and training centers in Alabama, Arizona, California, Florida and Maryland. He assisted in conducting numerous experiments in smoke and gas warfare and was commended by a great number of ranking army officers for the expertness of his experiments and the quality of work performed by himself and units under his command. He served as Operations Officer and as Executive Officerof the 78th Chemical Smoke Generator Battalion, until the 169th Smoke Generator Company was activated, at which time he was made the commanding officer thereof. Concerning his company, Captain Hege stated:

> "I knew every man in the company, his every trait and problem. I was loved and respected by all. I had a very efficient company, every man in the company including the cooks, were qualified as a smoke generator operator. All * * * were qualified as truck drivers. In our thousands of miles of driving we never had a major accident. * * * Everyone was proud of that company. One man went AWOL during my 20 months command. I gave him a Summary Court. * * * During this period I had command of /about/ 200 men. * * * I owe to the officers and men of that company, this fine record /of praise and commendation/. Without their cooperation I could have done nothing. I would not have been a company commander very long without that cooperation" (R82).

Accused Parsons' unsworn statement confines itself to a recitation of the events of his military career. He neither made a denial of the offenses charged or offered any evidence in justification thereof. He pleaded for a chance to redeem himself, as follows:

> "My wife is * * * at home and I have a three months old son that I haven't seen yet and certainly I will do nothing intentionally to

disgrace them. I have never been in any trouble before, either civilian or military, and [I] feel that [I] will be a better officer because of this incident and want very much an opportunity to redeem [myself] and be of further service in winning the war" (R84).

It was stipulated by and between counsel for the prosecution and the defense that, if available as a witness, Major Robert H. Kennedy, the battalion commander, would testify that throughout their commissioned service, the efficiency rating of accused Hege and Parsons has been at least "Excellent"; that both officers are highly trained in a field that is tremendously specialized; that smoke generator units and technical officer personnel in this service are relatively few in number and that the need for experienced officers in connection with smoke generator companies has an augmented importance at the present time by reason of the expanded military operations in Germany proper (R84).

5. The offenses of which each accused were found guilty include misapplication of government property and conduct unbecoming an officer and a gentleman, in violation of Articles of War 96 and 95, respectively. The evidence shows that, acting upon the request of Captain Hege, Lieutenant Parsons authorized the use of a government vehicle for the purpose of making an official trip to the army finance office at battalion headquarters. After going there, accused departed from their route, loaded cases of liquor into the jeep and drove to a nearby beach, where they had no official business to transact, and engaged in the improper and illicit sale of such whiskey to enlisted men. The use of the army vehicle by both accused under such circumstances constitutes an act of "devoting to an unauthorized purpose" and a misapplication of government property to their "own use and benefit" as defined and denounced by Article of War 94 (MCM, 1928, par.150i, p.184). The evidence clearly shows that accused's conduct was service discrediting in nature and certainly prejudicial to good order and military discipline (CM ETO 3153, Van Breemen; CM ETO 3305, Nighelli; CM ETO 3686, Morgan).

Concerning the Specification of Charge II, the evidence shows that each accused did "openly and publicly, peddle whiskey to enlisted men", as alleged. To "peddle" means to sell in small quantities. Both officers participated jointly in the venture. They acquired the whiskey as a ration for "an imaginary battalion" and although no witness testified directly as to the amount the officers paid for the liquor, the net price quoted at the time at the ration station was 76½ francs. The accused sold the liquor for 1000 francs per bottle. This amount was paid by enlisted men to each accused. Later 8000 francs were turned over to the commanding officer of accused's base to be returned to the enlisted men as part of the

exorbitant price charged by the officers in the sale.

In this connection the court was asked to take judicial notice of Circular number 45, Normandy Base Section, Communications Zone, European Theater of Operations, dated 18 October 1944, Subject: "Discipline", paragraph 2 thereof providing:

> "The sale, gift or barter of strong spirits and liquors, such as calvados, cognac and hard cider, is prohibited. The purchase of these intoxicants by members of the military service is prohibited" (Underscoring supplied).

Although not specifically enumerated in the circular, the sale of scotch whiskey is certainly a strong spirit and liquor within the scope and meaning of this administrative directive. CM 241385, Fields is authority for the proposition that accused, as officers on duty with the military district herein indicated, were chargable with knowledge of the circulars and directives of such command.

Article of War 95 establishes a standard of discipline and behavior required of officers of the American Army and provides that:

> "Any officer * * * who is convicted of conduct unbecoming an officer and gentleman shall be dismissed from the service" (AW 95).

The conduct of accused in engaging in such activities constitutes acts of a disgraceful and dishonorable nature, which seriously compromises their character and standing as officers and gentlemen. Captain Hege was a ranking officer of his battalion and Lieutenant Parsons was the adjutant thereof. The fact that such officers would engage in the prohibited sale of liquor to enlisted men of their command, wholly apart from the question of the exorbitant price charged, shows that they fail to possess, or at least to exercise, that quality of moral probity required of an officer of the American Army.

In discussing offenses arising under Article of War 95, Winthrop states that:

> "It is no longer essential to expose an officer to dismissal that his conduct as charged should be infamous either in the legal or the colloquial sense; nor is it absolutely necessary * * * that it scandalize the military service * * *. It is only required that it should be 'unbecoming'" (Winthrop's Military Law and Precedents, Reprint, 1920, p.711).

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Accuseds' conduct certainly was unbecoming an officer and gentleman. In their unsworn statements, each accused made reference to the members of their family and both stated that they would, not 'intentionally'do anything to bring disgrace upon them. Such statements evidence the fact that accused failed to realize the impropriety of their conduct. This unawareness constitutes one of the strongest indictments against the accused and exhibits them as unworthy of remaining as members of the "honorable profession of arms" (Winthrop's Military Law and Precedents, Reprint, 1920, supra, p.713). Under the circumstances, the Board of Review is of the opinion that the court was fully justified in finding the accused guilty of conduct "unbecoming an officer and gentleman", within the meaning of the 95th Article of War, as charged (CM ETO,3303, Croucher; CM ETO 3335, Witmer; CM ETO 7553, Besding et al; see also: Bull. JAG, Jan 1943, sec.453(29); Bull JAG, June 1944, sec.453(5a)).

6. The charge sheet shows that accused Hege is 33 years and 3 months of age and that he was commissioned a second lieutenant, Chemical Warfare Service, Edgewood Arsenal, Maryland, 8 August 1942. He was promoted to first Lieutenant 5 February 1943 and promoted to captain 24 August 1943; accused Parsons is 24 years and 11 months of age. He was appointed second lieutenant, Chemical Warfare Service, Edgewood Arsenal, Maryland, 12 November 1942 and promoted to first lieutenant, 21 July 1943.

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

8. Dismissal is mandatory upon conviction of a violation of the 95th Article of War.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 27 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Captain HOWARD M. HEGE (O-1035120) and First Lieutenant EDGAR R. PARSONS (O-1037214), both of the 27th Chemical Smoke Generator Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. 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 6881. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 6881).

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

(As to accused Hege sentence ordered executed, GCMO 111,ETO, 8 April 1945.)
(As to accused Parsons sentence ordered executed. GCMO 113, ETO, 8 Apr 1945.)

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

BOARD OF REVIEW NO. 3

31 MAR 1945

CM ETO 6934

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, 21 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. (No place of confinement designated in action)
Private ROBERT O. CARLSON (17031592), Company K, 317th 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 58th Article of War.

Specification: In that Private Robert O. Carlson, Company "K", 317th Infantry, did, in the vicinity of Eschweiler, Luxembourg, on or about 21 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 or near Feulen, Luxembourg, on or about 29 December 1944.

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He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence of four previous convictions was introduced, two by summary court for absence without leave for two days in violation of Article of War 61 and for disobedience of a standing order in violation of Article of War 96, and two by special court-martial, one for wrongfully taking property without the permission of the owner in violation of Article of War 96 and one for disobedience of a lawful order, disrespect to a superior officer and absence from properly appointed place of duty in violation of Articles of War 96, 63 and 61. All 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 the sentence without designating the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

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

The morning report of Company K, 317th Infantry, of which company accused was a member, showed that he absented himself without leave from 21 to 29 December 1944 as alleged (R7; Pros.Ex.A,B).

The sole witness called by the prosecution was accused's first sergeant who testified that he joined the company on 1 December 1944 and that

> "Since I joined we were back in a rest area in St. Avold - from there we went south to Saar Union - from there we come up to Eschweiller, Luxembourg - from there to Walferdange, Luxembourg - then up to Feulen - then attacked Kehmen, Luxembourg - back to Feulen - then north again to various small towns just north of Feulen - and all this time we were getting ready to fight the Germans"(R6).

On the evening of 20 December the company, then located at Beidweiler, Luxembourg, moved to a new position some two miles "to the right side of the town". Accused "took off" during this move but was found "in the kitchen of a house" on the following morning at which time he was ordered to and did return to the company. During that day, 21 December, the company moved to Eschweiler and that evening prepared to move to Walferdange. At this time, the first sergeant received a report from accused's platoon leader as the result of which he searched the area for accused without success. Shortly thereafter, the company left for Walferdange without him. Accused was not there- 6934

after seen by the first sergeant until 29 December, "after we came back from attacking Kehmen - we came back for reorganization", on which date he reported to the company orderly room. The record does not clearly show the location of the company on this date (R6, 7).

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

5. The instant record of trial is unsatisfactory in that it fails to show with completeness and precision the facts and circumstances leading up to and surrounding the commission of the offense charged. Among other things the prosecution did not in all instances show the precise dates upon which accused's company effected the various movements concerning which the first sergeant testified and the evidence of record bearing upon the tactical and geographical relation of the company to the enemy on the day accused absented himself is extremely meager. The members of the court before whom this case was tried were undoubtedly generally familiar with these facts and for that reason it may have been thought unnecessary to bring them to their attention. Yet it should be remembered that those who review the record are not necessarily possessed of similar knowledge but must, in the main, gather their knowledge of the case from the record itself. Failure to develop fully all relevant facts is especially subject to valid criticism where, as here, it appears that such facts were readily and easily susceptible of proof. While it is the opinion of the Board of Review that the record of trial is legally sufficient despite these deficiencies, this is true only because the background of accused's actions in the instant case - von Rundstedt's winter offensive which started on 16 December 1944 and succeeded initially in cutting a wide salient through northern Luxembourg and eastern Belgium - was of sufficient importance, moment and notoriety that the Board of Review may take judicial notice thereof (CM ETO 7413, Gogol; CM ETO 7148, Giombetti and authorities therein cited).

When the testimony in this case is supplemented by reference to the map and read in the light of events which the Board judicially knows, the record of trial may fairly be said to show the following:

Some time after 1 December the company of which accused was a member was in a rest area in St. Avold, France, whence it moved southwest approximately 20 miles to Saar-Union. Thereafter, and prior to 20 December, it moved about 60 or 70 miles northwest to the vicinity of Beidweiler, Luxembourg. On 20 December, during a change of position near Beidweiler, accused was found to be missing but was located on the morning of the 21st and ordered to return to his company which he did. However, later that same day, he again absented himself without leave. On 21 December von Rundstedt's

offensive was in its fifth day and accused's company was only about ten miles from the southern flank of "the bulge". According to the first sergeant the company had been "getting ready to fight the Germans" during the northward movement and during accused's absence, his unit did in fact proceed farther north to attack Kehmen, some ten miles southeast of Bastogne. Accused did not return until 29 December after his company withdrew for reorganization. In view of the gravity of the situation existing at the time, the obvious and widely known necessity for prompt counter measures to stem the advance, the previous movement in the direction of the southern flank of the salient and the proximity of the company to the enemy, the court was justified in inferring that at the time accused absented himself he had knowledge of facts which would reasonably lead him to believe he would shortly be engaged in hazardous duty. Under the circumstances here shown, the court was also warranted in concluding that he absented himself to avoid such duty. The record is accordingly legally sufficient to support the findings of guilty (CM ETO 7413, Gogol, supra).

6. The charge sheet shows that accused is 24 years and eight months of age and enlisted 4 November 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 the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, may properly be designated as the place of confinement.

Benjamin R. Sleeper Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

[illegible] 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. 2 24 APR 1945

CM ETO 6937

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, 21 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. (No place of confinement designated)
	)	
Private ALFRED D. CRAFT (39910115), Company K, 317th Infantry	)	
	)	

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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Alfred D. Craft, Company "K", 317th Infantry, did, in the vicinity of Feulen, Luxembourg, on or about 24 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 or near Feulen, Luxembourg, on or about 2 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 Charge and Specification. No evidence of previous convictions was introduced. All the members of the court present at the time the vote was taken

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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 and, without designating the place of confinement, forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution introduced one witness, the first sergeant of Company K. Accused was a private, Company K, 317th Infantry. From the testimony of the first sergeant the company, from 1 December to the date of trial, was "preparing to fight the Germans and we were in actual combat with them." On 24 December 1944 the company left Feulen, Luxembourg, in the morning, and marched to some place near Kehmen, Luxembourg. Sometime during the day it went into attack in the latter town. In any event, in the afternoon an attack was made on a hill west of Kehmen. Accused's platoon was dug in about 200 yards short of the hill (R6,7). The sergeant testified:

> "And toward evening we weren't progressing very good and I had to come up behind Private Craft in a foxhole - I told him to get up with his platoon - the platoon wasn't much farther up the front - about fifty yards - and at that time someone started shouting 'Tanks' and the platoon started withdrawing - come running back to a ridge - at that time I was running down trying to help stop them from running back - and that was the last I saw of Private Craft" (R6).

After the incident above described, the evidence shows nothing except that sometime later, the company went back to Feulen for reorganization (R6). The next time this witness saw accused was when the latter reported into the orderly room at Feulen on 2 January 1945. On 28 December accused was entered on his morning report as missing in action on 24 December. This entry was corrected on 3 January 1945 to show accused absent without leave as of 24 December 1944. (R7; Pros.Exs. A,B).

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

5. From the evidence thus presented the court was justified in finding factually that accused's platoon while in combat with the enemy started withdrawing, on the run, back to a ridge; and that accused although present with his organization immediately prior to the withdrawal was not seen thereafter for nine days, at which time he rejoined his company at a town, about five miles back (as appears from official map) when it was reorganizing. From the evidence, the court had a right to believe that the platoon in question withdrew as a unit and took up a defensive position on a ridge not far to the rear. And in the absence of proof to the contrary, or

explanation by the accused, the court had every right to infer that during this withdrawal and the establishment of a new position accused abandoned his organization, and that his intent in so doing was to avoid further hazardous duty. The prosecution made out a prima facie case. The rule of law applicable is that while the ultimate burden is on the prosecution of proving guilt beyond a reasonable doubt, when there is sufficient evidence to raise a strong presumption of guilt, accused is required to go forward with the evidence- the "burden of explanation" - or risk a finding of guilty (Underhill's Criminal Evidence, 4th Ed., sec.514, p.1040; CM ETO 1629, O'Donnell; CM ETO 527, Astrella). Accused offered no proof by way of rebuttal and failed to explain his conduct. The conduct of accused as it stands on the record was that condemned by Article of War 28, desertion in violation of Article of War 58. (CM ETO 7153, Seitz; CM ETO 7230, Magnanti).

6. The charge sheet shows that accused is 22 years of age. He was inducted into the service at Pocatello, Idaho, on 19 February 1943.

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

8. The offense of desertion in violation of Article of War 58 is punishable during time of war by death or such other punishment as a court-martial may direct. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is proper (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

(ON LEAVE) 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 MAR 1945

CM ETO 6946

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, 30 December 1944.
Private First Class NATHAN O. PAYNE (33170642), 84th Chemical Smoke Generator Company	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

Specification: In that Private First Class Nathan O. Payne, 84th Chemical Smoke Generator Company, did, on or about 8 December, 1944, desert the service of the United States by quitting his organization at or near Bedersdorf, Germany, with intent to avoid hazardous duty, to wit: operating a smoke generator in an area subject to enemy fire, and did remain absent in desertion until he was apprehended at or near Bouzonville, France, on or about 13 December 1944.

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

Specification: In that * * * did, at or near Lisdorf, Germany, on or about 7 December 1944, lift up a weapon, to wit: a .30 caliber carbine against Second Lieutenant Charles S. Levy, Chemical Warfare Service, 84th Chemical Smoke GeneratorCompany, his superior officer, who was then in the execution of his office.

CHARGE III: Violation of the 96th Article of War. (Finding of not guilty)

Specification: (Finding of not guilty)

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 Charges I and II and the specifications thereunder and not guilty of Charge III and its 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 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 the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution was as follows:

a. Charge II and Specification. On 7 December 1944 accused was a smoke generator operator in the operations section of the 84th Chemical Smoke Generator Company. His section was at Lisdorf, Germany, engaged in laying a smoke screen (R9,10,19,28) and in contact with enemy forces (R9). On the evening of 7 December, accused attended a section meeting (R10,11,20), at which Second Lieutenant Charles S. Levy, the section leader, instructed the men as to their duties in the operations section (R11,20) and asked if anyone had any questions. Accused asked, "Lieutenant, have you ever heard about me?" Lieutenant Levy answered "No". "I was trained in artillery", said accused, "I wasn't trained in operating a generator and don't know anything about them". The Lieutenant proceeded to explain all it was necessary for accused to do was to carry a five-gallon can of water and a five-gallon

can of gasoline to the generator and to roll an oil drum up to the generator and "stick it". He only had to do this once every 45 minutes and all the rest of the time he could remain "in the cellar". Accused repeated that he was not trained as a generator operator. Lieutenant Levy said, "As long as you're down here you will maintain the generator and what's more you will follow orders". Accused was then standing with one foot propped on a chair, holding his carbine, which he "pointed down toward" the officer and said "Lieutenant, if I pull this trigger you'll know who's following who's order" (R11,12,20). When accused first started talking he worked the bolt of his carbine loading the piece (R17), and when he pointed it in the direction of the Lieutenant he was about 15 feet away, holding the weapon waist high with his hand on the trigger and with the safety off (R12,13,15,16,17,20,21,22). No shots were fired (R13). The lieutenant told accused to sit down and accused complied (R18).

b. Charge I and Specification. The next morning (8 December) accused was ordered to return in a truck to the company area in Bedersdorf, Germany, about seven kilometers away, and, accordingly, with the driver, Private First Class Ben T. Hunter, Jr., and Technician Fifth Grade Cirlee Willey, both of accused's company, he reported there (R13,21,25; see CM ETO 6970, Willey and Hunter, Military Justice Division). Upon his arrival he was ordered by the first sergeant to return to the line on the rations truck (R13,14,25,28,29). Accused did not return to the operations section (R14,21). Searches of the company area on 9 and 11 December failed to reveal his presence (R26,29). On 13 December accused and Willey were apprehended in Bouzonville, France (R8-9,31). Accused's status was shown in the company morning report for 8 December 1944, received in evidence without objection, as "from duty to desertion" (R29-30; Pros.Ex.A). On 7 and 8 December, enemy artillery and mortar shells fell periodically in accused's section area (R9,19,21).

4. Upon motion of defense, the court adjourned in order that the sanity of accused could be investigated (R33-35). He was examined during the period 24-26 December by a board of three medical officers (R37), one of whom was a neuropsychiatrist (R38). The board found that accused was sane at the time of the examination and at the time of the commission of his alleged offenses, that he was capable of realizing right from wrong, had normal control of his actions, and could cooperate intelligently in his defense. His intelligence was below that of a child of twelve (R38-41; Pros. Ex.B).

5. After his rights were explained (R42-43), accused testified that on the night of 7 December at the time of the incident alleged he was sitting on a sofa with his carbine. He did not face Lieutenant Levy. He just turned his head around (R44). The lieutenant asked him if there was anything in his rifle and

"I was sitting there with it between my legs and I said, 'I don't know, sir,' and I held it up and pulled the bolt back and said, 'There's nothing in it,' and I set it down".

At no time did he point the weapon toward the officer or make any threatening remarks (R44,45).

On 8 December 1944 he left the company area in a truck with Hunter and Willey, and knew he was supposed to go back to the line. His companions said they were going to the rear and accused asked them to go to the line. He said to them 'Let's go back; I know you're going wrong now" and asked "three or four times" to be taken back (R49). However, he stayed with them (R46) until 10 December when Willey "brought me back" to the company, but as to the hour, "I don't know whether it was during the night or day". He left again in the truck with Willey who said he was going to the line (R47). They did not go to the line and "somewhere near a town" he was taken by "Lt. Beckett" to the guardhouse. He was not scared to go back to the line (R48).

6. The court's findings of guilty are supported by substantial and convincing evidence that accused quitted his organization on 8 December 1944 with intent to avoid hazardous duty as alleged under Charge I and Specification (CM ETO 4701, Minnetto; CM ETO 3641, Roth; CM ETO 3473, Ayllon; CM ETO 3380, Silberschmidt and cases cited therein) and that he lifted up a weapon against his superior officer on 7 December 1944 as set forth in Charge II and Specification (CM ETO 1953, Lewis).

7. The charge sheet shows that accused is 24 years of age and was inducted at Fort George G. Meade, Maryland, 25 February 1942 to serve for the duration of the war plus six months. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and 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 committed in time of war is death or such other punishment as the court-martial may direct (AW 58). The penalty for lifting up any weapon against his superior officer in the execution of his office by a person subject to military law is

also death or such other punishment as the court-martial may direct (AW 64). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sep.1943, sec.VI, as amended).

[signature] Judge Advocate

[signature] Judge Advocate

Edward I. Stevens, Jr. Judge Advocate

CONFIDENTIAL

1st Ind.

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

1. In the case of Private First Class NATHAN O. PAYNE (33170642), 84th Chemical Smoke Generator Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 6946. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 6946).

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

(Sentence as commuted ordered executed. GCMO 76, ETO, 18 Mar 1945.)

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

BOARD OF REVIEW NO. 1 24 FEB 1945

CM ETO 6948

U N I T E D S T A T E S	2ND ARMORED DIVISION
v.	Trial by GCM, convened at Headquarters, 2nd Armored Division, APO 252, U.S. Army, 19 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private NOAH K. DAMRON (35226207), Company I, 67th Armored Regiment	

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, 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 Noah K. Damron, Company "I", 67th Armored Regiment did, at Bresles, France, on or about 1 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Liege, Belgium on or about 22 November 1944.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the Specifi-

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cation, except the words "was apprehended at Liege, Belgium", substituting therefor the words "surrendered himself to military control", of the excepted words not guilty, of the substituted words guilty, and of the Charge guilty. Evidence was introduced of one previous conviction by summary court for careless discharge of a 30 caliber service carbine in company bivouac area in violation of Article of War 96. All the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be shot to death with musketry. The reviewing authority approved the sentence, but recommended that if the sentence be confirmed, it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 20 years, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed only so much of the sentence as provided that accused be shot to death with musketry, but, owing to special circumstances in the case, commuted the sentence to dishonorable discharge from the service, forfeitures of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Prosecution's evidence summarizes as follows:

On 27 August 1944 accused, a member of Company I, 67th Armored Regiment, was assistant driver and gunner of a tank of which Staff Sergeant Jack D. Thompson was commander (R4,5). In an area about 40 miles north or north-east of Bresles, France (R7,11), on said date, the regiment was in contact with the enemy. It proceeded forward in double alignment. The lines were separated by a public highway. The tank on which accused served was about 75 yards from the highway. A company of the 41st Infantry served with the 67th Armored Regiment. At a given point in the advance, the regiment was halted and alerted to attack the enemy (R5,6).

While halted Thompson saw a German soldier approach at a distance of about 250 yards on the right flank of his platoon. He made him prisoner and delivered him into the custody of a detachment of "French underground". At that moment accused came to the point Thompson was "shaking the prisoner down" (R5,6). The tanks halted for about an hour. When Thompson received orders to advance, accused could not be found although Thompson searched the immediate area for him and called for him (R6). Accused had authority to move about in the area of the tank, but he was not authorized to leave his command. From 28 August to the middle of November 1944, Thompson did not see accused (R7).

On 3 September 1944, Technician Fourth Grade Stanley A. Dudek, a tank driver of Company L, 67th Armored Regiment, was parked at the side of a road at a point near the Seine River (France), endeavoring to secure gasoline so that he might overtake and rejoin his company. Accused, who rode in a peep, stopped and mounted Dudek's tank. He rode with him about five miles, when the tank's gasoline was exhausted. Dudek informed accused that he would not be able to "catch up with the company". A half-track of the 41st Armored Infantry Regiment (which was assigned to the 2nd Armored Division) approached, and Dudek suggested to accused that he ride the half-track in an attempt to reach his company. Accused said "that's a pretty good idea" and departed in the direction of the column (R8). Dudek next saw accused when he was brought to the company in Germany (R9).

Sergeant Stanley L. Herrin, 67th Armored Regiment, saw accused in a restaurant at Hasselt, Belgium on or about 25 October 1944 and conversed with him in the presence of another soldier. Accused

> "asked me how the boys were in the outfit and who was lost and who wasn't, and who wasn't with us, and I told him, and he asked where the Battalion was, and I told him where I thought it was located.
>
> * * *
>
> The only things he said was that he was with the Military Police and that he was under their jurisdiction.
>
> * * *
>
> He said he expected to go back I believe the following day after that. When the trucks went back" (R10).

There were no military police with him at that time (R10). Herrin next saw accused with the company in Germany (R10).

It was stipulated that accused was in military custody in the vicinity of Liege, Belgium on 22 November 1944 (R12). He was actually returned to his company by military police and placed in arrest on 26 November (R11,12).

4. After explanation of his rights accused elected to remain silent. No evidence was presented in his defense (R12).

5. Accused was absent without authority from his company from 27 August to 26 November, three months. There is evidence that during his absence he was twice advised as to the location of his unit (3 September and 25 October). The inference is reasonable and just that had he wished to do so he could either

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have returned to his company or surrender himself to military control. His absence was unexplained and was prolonged. These facts form a substantial basis from which the court was justified in concluding that accused absented himself from the military service with the intent of permanently abandoning it (CM ETO 6435, Noe, and authorities therein cited). The record is legally sufficient to support the findings of accused's guilt.

6. The charge sheet shows that accused is 18 years one month of age. He was inducted 11 August 1943 at Columbus, Ohio, 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 as confirmed and 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

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1st Ind.

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

1. In the case of Private NOAH K. DARON (35226207), Company I, 67th Armored Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed and commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record of trial in this office is CM ETO 6948. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 6948).

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

(Sentence as commuted ordered executed. GCMO 61, ETO, 2 Mar 1945.)

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

BOARD OF REVIEW NO. 2

24 APR 1945

CM ETO 6951

U N I T E D S T A T E S	80TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 80, 21 January 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 30 years. Loire Disciplinary Training Center, Le Mans, France.
Private WILLIAM J. ROGERS (13154441), Company C, 317th Infantry	

OPINION 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 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 sentence in part. The record of trial has now been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private William J. Rogers, Company "C", 317th Infantry, did, in the vicinity of Atton, France, on or about 22 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 surrendered himself at or near Niederfeulen, Luxembourg, on or about 4 January 1945.

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(275)

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 two absences without leave for one and eight days, respectively, in violation of Article of War 61, and for breach of restriction 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 30 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 37, Headquarters 80th Infantry Division, APO 80, U.S. Army, dated 3 February 1945.

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

Private First Class Albert E. Sanderson, Regimental Headquarters Company, 317th Infantry, testified that the accused was a member of Company C, 317th Infantry; that on about 22 October 1944 that company was located in the vicinity of Atton, France, and on about 4 January 1945 was near Niederfeulen, Luxembourg; and that it was the signature of Frank J. Watson, Captain, Infantry, Personnel Officer, which appeared at the bottom of the page on the morning report dated 31 October 1944 for Company C (Pros.Ex.A) and on the morning report dated 5 January 1945, of that company (Pros.Ex.B) (R6,7). The following occurred during the direct examination of this witness:

"Q. Private Sanderson, will you explain to the court what your regiment has been doing since about 15 October 1944 down to about 10 January 1945?
A. They had been in contact with the enemy, sir.

Q. Could you elaborate on that a little for the court's information?
A. On 8 November it was the Seille River crossing and there was a rest period starting approximately 7 December in St. Avold. It lead up to our latest fighting in Luxembourg about 19 December" (R7).

The two morning reports referred to were admitted in evidence without objection by the defense (R6,7). The duly authenticated extract copy of these reports, substituted with permission of the court, is quoted as follows:

HEADQUARTERS 317th INFANTRY
APO 80, U.S. Army

EXTRACT COPY OF MORNING REPORT OF ——

COMPANY "C", 317th INFANTRY

* * * * * * * * * *

EX. 'A' 31 October 1944
13154441 Rogers, William J 745 Pfc
Fr dy to MIA 22 Oct 44
* * * * * * * * * *
EX. 'B' 5 January 1945
13154441 Rogers, William J 745 Pfc
Red to gr of Pvt 4 Jan 45 per Co.O.#1.

CORRECTION (31 Oct 44)
13154441 Rogers, William J 745 Pfc
Fr dy to MIA 220ct 44.

/s/ Frank J Watson
/t/ FRANK J. WATSON
Capt., 317th Inf
Personnel Officer

SHOULD BE
13154441 Rogers, William J. 745 Pfc
Fr dy to AWOL 0600 22 Oct 44.

13154441 Rogers, William J. 745 Pvt
Fr AWOL 0600 22 Oct 44 to ar in qrs
4 Jan 45"
* * * * * * * * * *
(Pros.Exs. A,B).

Private First Class George Marcinik, Company C, 317th Infantry, testified, when asked what he knew about the duty status of the accused from about 22 October 1944, that the accused "was AWOL since 22 October 1944"; that the last time he remembered seeing the accused in the company was "about two months at least"; that the accused came back to the company "after he had been AWOL" "about the last of December"; that the last time he saw the accused before December was "before we crossed the Moselle River, "which was on 8 November 1944; that he, the witness, had been present for duty with the company since 22 October 1944 and had not been out any days since October (R8).

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

5. a. Absence without leave.

The preliminary question to be decided is the validity of the morning reports which were received in evidence. Captain Frank J. Watson, Personnel Officer, 317th Infantry, was shown to have signed both original morning reports (R6,7).

Prior to 12 December 1944 there was no express authority in the European Theater of Operations for a personnel officer to sign an original morning report, the only persons so authorized being the commanding officer of the reporting unit, or "the officer acting in command" (AR 345-400, 1 May 1944, par.42). There is no evidence in the record relating to the morning report dated 31 October 1944 (Pros.Ex.A) other than that it was signed by the personnel officer (R6). That morning report is, therefore, incompetent to prove the matters stated therein, and was not rendered competent by the failure of the defense to object to its admission in evidence.

Under date of 12 December 1944 the Commanding General, European Theater of Operations, issued a directive providing:

> "Morning reports of units in the theater will be signed either by the commanding officer of the reporting unit, or in his absence, the officer acting in command * * * or by the unit personnel officer * * *" (Cir.119, ETOUSA, 12 December 1944, sec.IV).

Under date of 3 January 1945, the Army Regulations on the subject of morning reports were revised, with the following provision:

> "Morning reports will be signed by the commanding officer of the reporting unit, or by an officer designated by the commanding officer" (AR345-400, 3 January 1945, par.43a).

In the present case, therefore, the morning report dated 5 January 1945 (pros.ex. B) was properly signed by the personnel officer. It is not competent, however, to prove events occurring prior to the time the duty was placed upon the personnel officer to know the facts stated. Consequently, this report cannot be held to prove that the accused initially absented himself on 22 October 1944; but it is competent to show that on 4 January 1945 the accused changed from a status of being absent without leave to arrest in quarters.

Outside the morning reports, the following evidence of absence without leave is found in the record: the testimony of Private First Class Marcinik, who belonged to the same company as accused, that the accused "was AWOL since 22 October 1944"; that he, the witness, had been present with the company for duty since 22 October 1944, but did not remember seeing the accused in the company for "about two months at least"; and that he saw the accused when the latter "came back to the company after he had been AWOL" about the last of December (R8,9). Although the testimony of Marcinik that accused's absence was without leave constituted hearsay knowledge or a mere conclusion, or both, on the part of the witness, it was competent evidence that accused was in fact absent from his organization for a period of about two months beginning 22 October. This evidence together with the admissible portion of the morning report of 5 January 1945, in the opinion of the Board of Review, sufficiently establishes a prima facie case of absence without leave for the period alleged and found.

b. Intent to avoid hazardous duty:

The Specification alleges that on or about 22 October 1944 the accused absented himself without proper leave "with intent to avoid hazardous duty, to-wit: participation in operations against an enemy of the United States."

To sustain a conviction under Article of War 28, the requisite intent must be proven to have been entertained by the accused at the time he quit his organization or place of duty (CM ETO 5958, Perry and Allen, and authorities cited therein).

There is no substantial evidence in this case that the accused had the intent to avoid hazardous duty at the time his absence began. The evidence shows and the court found that accused absented himself on 22 October 1944, but it fails to show what the situation of the accused's organization or place of duty was on or before that date, from which situation might be inferred an intent to avoid hazardous duty. The only evidence on this point purporting to cover 22 October 1944 is the testimony of Private First Class Sanderson, who, when asked what his regiment had been doing since about 15 October 1944 down to about 10 January 1945, responded: "They had been in contact with the enemy, sir". When asked to elaborate on his answer, he referred to events occurring on or about 8 November and 7 and 19 December (R7).

In the opinion of the Board of Review, this evidence is not sufficiently substantial to support a finding that the accused had the intent to avoid hazardous duty at the time he absented himself.

6. The charge sheet shows that the accused is 24 years old and that he was inducted on 23 November 1942 at Philadelphia, Pennsylvania. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Reviewis 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 the accused did, at the time and place alleged, absent himself without leave from his organization until the termination of his absence at the time and place alleged, in violation of Article of War 61, and legally sufficient to support thesentence.

8. The designation of the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement is proper (Ltr. Hq. European Theater of Operations, AG 252, Op. TPM, 19 Dec. 1944, par.3).

(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. 27 APR 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by Act 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and as further amended by Act 1 August 1942 (56 Stat. 732; 10 U.S.C. 1522), is the record of trial in the case of Private WILLIAM J. ROGERS (13154441), 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 Specifications, except so much thereof as involves findings of guilty of absence without leave in violation of Article of War 61, be vacated, and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings, viz: conviction of desertion in time of war, so vacated, be restored.

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

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

(Findings vacated in part in accordance with recommendation of Assistant Judge Advocate General. GCMO 148, ETO, 13 May 1945.)

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

BOARD OF REVIEW NO. 2 26 MAR 1945

CM ETO 6955

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Molsheim, France, 9 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private IRA M. SLONAKER (33515565), Company G, 30th Infantry	

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and EVINS, 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 IRA M. SLONAKER, Company "G", 30th Infantry did, at or near LeTholy, France 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: Combat with the enemy, and did remain absent in desertion until he surrendered himself at or near Eloyes, France on or about 24 October 1944.

Specification 2: In that * * * did, at or near Bruyeres, France, on or about 24 October 1944 desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he surrendered himself at or near Bruyeres, France, on or about 29 October 1944.

Specification 3: (Nolle Prosequi entered by order of Convening Authority).

Specification 4: (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 1, 2, and 4 thereunder. No evidence of previous convictions was introduced. All the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 3rd Infantry Division, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, disapproved the finding of guilty of Specification 4 of the Charge, confirmed the sentence, but due to accused's prior meritorious service in prolonged combat and the unusual circumstances in the case, 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 shows that on 7 October 1944 accused was a member of Company G, 30th Infantry, which organization was stationed near LeTholy, France (R10,17). On this date accused asked for and received, from his platoon leader, permission to go to "see the medics" (R10). The medical channels through which an ill or injured member of accused's organization would go, were from the company to the 2nd Battalion Aid Station where it would be determined whether the soldier should be returned to duty or evacuated (R11). The regimental surgeon testified that, if evacuated, his name would be entered on the aid station record, but if not evacuated and returned to duty, no entry is made in the record. Accused's name did not appear on the records of the medical aid station for the month of October 1944 (R12). On the 24th of October accused reported to T/5

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Leonard Wallace, Jr., attached to the Service Company, 30th Infantry, then located near Eloyes, France. At this time accused said that the "medics" had not sent him to the hospital and stated that he "couldn't stand front line duty" and that he "didn't want to go back", preferring rather to be "court-martialed"(R15,16). However, this same day, he was returned to his company (R16). There was received in evidence, without objection by the defense, an extract copy of the morning report of Company G, 30th Infantry Regiment, showing accused's absence without leave from his organization from 7 to 24 October 1944 (R8,9; Pros.Ex.A).

On 7 October 1944, the day accused absented himself from his organization, his company was in contact with the enemy, located 300 yards away. Although there was a lull in activity his platoon was tactically "in combat" with the enemy by patrol. Also there was "a fire fight" on the right and in the center the enemy was "digging into our positions"(R10,14). At the time accused rejoined his unit, on the evening of 24 October 1944, his company was preparing to "move out" into a "new area" (R17). He was placed with the headquarters group until the organization arrived at its destination. Before the company moved out, they had been issued ammunition and equipment preparatory to moving into an attack against the enemy. They were "loaded down with two bandoleers full of ammunition, rifles, and their grenades". The following morning accused was again missing. A search was made for him but he could not be found. He had no permission or authority to be absent (R15-18). Accused was not seen again until 29 October 1944 when he was returned to his organization (R25).

Concerning both absences, it was stipulated between counsel for the prosecution and the defense that if available as a witness the investigating officer would testify that, after duly informing him of his rights under the 24th Article of War, accused voluntarily made a sworn statement in writing, which document was received in evidence with the consent of the accused, and reads, in part, as follows:

> "On or about 7 October 1944, I received permission * * * /and/ went to the medics of the 2nd Bn. A Sgt there took my temperature and gave me some pills. * * * I had a temperature of 101.8 degrees. The Sgt told me to report back to my Company. I stayed in a barn close to the Medics and did not go back to my Company. * * * I did not know where my Company was but on the 24th of October 1944, I saw a Service Company truck and got a ride back to * * * /my/Company.* * * the Company started on a march /on this date/. While in the woods we began getting

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shelled. I lost my head and left the Company. I went to Grandvillers, France. * * * on 29 October 1944 /I turned in/ to the mail clerk * * * at Bruyeres, France" (R24,25; Pros.Ex.C)(Underscoring supplied).

4. After an explanation of his rights as a witness, accused elected to make an unsworn statement, through counsel. Such statement appears as follows:

"The accused * * * was inducted into the armed service on the 2nd of September 1943; * * * he joined the 3d Division while it was on the Anzio Beachhead in March, 1944; * * * he was assigned to Company "G" of the 30th Infantry. He remained on the Anzio Beachhead throughout the remainder of that campaign. He made the push to Rome with Company "G" of the 30th Infantry; * * * he also landed in southern France with his company and fought throughout the campaign in southern France until after his company had crossed the Moselle river. The accused has never lost a day from combat because of hospitalization. There are no previous convictions in this case whatsoever, nor has this accused at any other time appeared before a military court for any reason whatsoever" (R27).

No witnesses testified on behalf of accused and, after introduction of the above statement, the defense rested.

5. Competent uncontradicted evidence establishes the commission, by accused, of the offenses alleged in Specifications 1 and 2 hereof. Although accused received permission to go to the aid station, he became absent without leave from his organization when he failed to return from there to his company when so directed. He was under orders to rejoin his unit, this he failed to do and remained absent therefrom until 24 October 1944. When he rejoined his company on this latter date, his organization was beginning to move out in attack against the enemy. He was missing the following morning and continued in unauthorized absence until 29 October 1944, when he was again returned to his

organization. At the time of his first absence, his company was engaged in combat with the enemy, located approximately 300 yards forward. These facts, coupled with accused's voluntary statements that he "couldn't stand front line duty" and that he "didn't want to go back", preferring instead to be "court-martialed", supports the inference that accused entertained a specific intent to avoid the hazards and perils of combat with the enemy. Coincident with accused's second absence, his organization was moving into an attack against the enemy at night. Enemy shellfire was coming over and, according to accused, this occurrence caused him to lose his head and to leave his company. Under such circumstances the court was fully justified and warranted in finding that, in each instance accused absented himself with the specific intent to avoid the hazardous duty of combat with the enemy, as alleged (CM ETO 3473, Aylon; CM ETO 4686, Lorek; CM ETO 6177, Transeau and authorities cited therein). A soldier who quits his organization or place of duty with intent to avoid such hazardous duty or to shirk important service is declared by law to be a deserter (AW 28-58). All elements of the offenses charged are thus fully established (CM ETO 4138, Urban; CM ETO 5293, Killen; CM ETO 5555, Slovik).

6. The charge sheet shows that accused is 19 years of age and that he was inducted, without prior service, on 2 September 1943, to serve for the duration of the war plus six months.

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

8. The offense of desertion in time of war is punishable by 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).

Judge Advocate

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

1. In the case of Private IRA M. SLONAKER (33515565), Company G, 30th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 6955. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 6955).

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

(Sentence as commuted ordered executed. GCMO, 110, ETO, 7 April 1945.)

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

BOARD OF REVIEW NO. 1

21 FEB 1945

CM ETO 6961

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, 21 December 1944.
Second Lieutenant RALPH WILLIAM RISLEY, JR. (O-1312333), Company M, 379th Infantry	Sentence: Dismissal, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SHERMAN 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 75th Article of War.

Specification: In that 2d Lt. Ralph W. Risley, Jr., Company "M", 379th Infantry, did, at or near Saarlautern, Germany, on or about 4 December, 1944, misbehave himself before the enemy, by failing to place his 81mm Mortar Section into position, which had been ordered into position by 2d Lt. Leslie R. Ford, Acting Platoon Leader, Mortar Platoon, Company "M", 379th Infantry, to engage with the enemy, which forces, the said command was then opposing.

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He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and 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 dismissed the service of the United States, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority, the Commanding General, 95th Infantry Division, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution is as follows:

On 3 and 4 December 1944 at Saarlautern, Germany, Second Lieutenant Leslie R. Ford was the acting platoon leader of the mortar platoon of Company M, 379th Infantry. Accused was under his command (R6) and leader of the platoon's third section (R37). On 3 December at about 2215 hours (R7), Lieutenant Ford received orders requiring his platoon and the sections under it to support the third battalion in an attack at 0700 the following morning on Fraulautern, a suburb of Saarlautern, Germany (R6,7,22). At about 2300 hours Lieutenant Ford, accompanied by his section leaders, made a reconnaissance of the route that would be followed in connection with the attack and regarding the gun positions to be selected. Before they started out the section commanders were shown the approximate situation on the map. This reconnaissance group, consisting of three officers, including accused, and two enlisted men, accompanied Lieutenant Ford to the area where each section commander was shown the ground to be occupied by his section and an observation post from which he could point out targets. Lieutenant Ford pointed out to accused "his gun positions right on the spot they were to be set up". Although it was night there was visibility (R7) and objects such as buildings and "the bridge" could be seen 100 yards away and a man or soldier 20 or 30 yards distant. Lieutenant Ford testified that as they moved through the streets shells landed several times in their vicinity, whereupon accused

"left the group and ducked into doorways and getting along side of walls. I hadn't considered the shells close enough for him to be doing that and mentioned the fact to him not to act like a damn fool".

No one else took cover.

After they returned to the company

"we went over again exactly how we would move forward, what to do with the foot troops, where to detruck and how to handle the ammunition and that was all we did that night" (R8).

This information was "passed down", the platoons were alerted for the move the next morning and ammunition and wire were straightened up.

At 0400 hours on 4 December the motor element of the platoon moved out on jeeps and accused went with it. Lieutenant Ford went forward with the trucks and arrived in the town (Saarlautern) at 0415 or 0420 hours. Because there were artillery shells landing at the entrance to the town, the men "detrucked", took the mortars and ammunition off the vehicles and moved forward on foot, a matter of "four or five blocks" to the gun locations of their respective sections. Accused was then following Lieutenant Ford and when they came to accused's area, Lieutenant Ford

"told him to go to his area and set up his guns and that the area for the second section was 100 yards away".

Accused asked "something about, 'all right, you want me to set up OP and then go forward and pick out the gun positions?'". Lieutenant Ford replied "Yes", and accused moved in with the section towards his area (R9,14). It was then about 0430 hours. There was no change made in the original orders and Lieutenant Ford said nothing to accused about waiting any place for further orders (R10,14).

At about 0700 hours Lieutenant Ford returned from the battalion command post and learned that accused's section was not set up, so he contacted the sergeant of the section and told him where to put his guns, to bring his telephone and wire,

and to move up and set up where Lieutenant Ford had his observation post. Lieutenant Ford did not see accused at that time (R10), but knew that neither of his two guns were set up because while he was talking with the sergeant

> "the squad leader came around the building with the gun and proceeded to the area I told them to set up their guns" (R11).

Sometime after daylight at about 0745 or 0800 hours he received a call from his commanding officer (R11-12) for fire to be delivered by accused's section which was not then ready and able to comply. He therefore ordered the second section to cover the target, although it was not in its sector. To accomplish this its guns had to be moved which required about ten minutes (R11). Lieutenant Ford could see that the trouble arose because troops to his front were pinned down by small arms fire. He sent his platoon sergeant to find accused, who arrived at the command post at exactly 1030 hours. He asked accused where he had been and why he had not set up his section. Accused replied he had been down in the latrine defecating. Lieutenant Ford told him he was no longer in command of the section. Accused said, "yes, I know", but did not explain why his guns were not set up or claim to be unwell (R12).

A map with scale 1/25000, identified by Lieutenant Ford as the "Saarlautern map", was offered and received in evidence, without objection, with permission of the court that it be withdrawn after the trial and a copy substituted (R15; Pros.Ex.A). Upon request, Lieutenant Ford placed an arrow on the map to show "the position the third battalion was to cross the Sarr River", drew a line in the direction in which they were to proceed and placed an arrow at the end of this line. He also drew a line above which was placed an "E" to represent the direction from which enemy fire came (R15).

Lieutenant Ford disclosed that the attack was to "jump off" at 0700 on 4 December 1944, and that the first fire mission was called around 0800. He had dispatched accused to set up his section at 0430 and first learned the section was not in position at about 0645 or 0650. From 0420 until 0645 he had no knowledge that the guns were not in position. One half hour would have been ample time to set up accused's section and have it ready to fire (R16). The attack jumped off over an open level field at about 0700 and almost immediately

began to "bog down". It was right after that that the call came for fire (R18), which accused's section was not ready to deliver (R17,18). Lieutenant Ford further testified that accused joined his organization in July, that he did not go on platoon problems during a few days "at Indiantown Gap", and that he failed in a mortar test which he took with other officers and noncommissioned officers in England (R19).

Captain Harold H. Meisner, commanding officer of Company M, 379th Infantry (R21), testified that on the night of 3 December between 2130 and 2230 hours, he received an order from the battalion commanding officer who was making the attack at 0700 hours the following morning "on the other side of the river". He gave his order to the platoon leader approximately at 2200 hours to make a reconnaissance of position areas before the attack. This they did and returned about one o'clock in the morning and thereafter

> "We left Felsberg at 3:30 in the morning. The mortars and machine guns left by vehicles for Saarlautern. The mortars were given the mission to support by fire the jump off on the morning of the 4th. The guns were to be in position when the foot element arrived. They were given three hours to get guns into action. I was with the mortar platoon with the battalion commander at the jump off" (R22).

Shortly after the attack commenced at about 0700, it was bogged down by heavy fire from machine guns and Captain Meisner, using the "300 radio", called for mortar fire from the third section (R11,14,18,22,25). Such fire should have come from the third section because it had direct observation on the target from across the river (R26). It would have made the enemy "button up" and decreased his visibility, but the fire did not come because (according to the reply which came back) the mortars were not set up (R25). Captain Meisner was in a position to observe the infantrymen pinned down because he "was right with them". After a lapse of ten or 15 minutes mortar fire was received (R23).

He talked with accused the next day when accused reported at the company command post and told the captain he was relieved of his section. Questioned as to the reason for his action, accused said he was sick and during his story Captain Meisner

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"counted up the number of times he claims he vomited and defecated and when he finished I told him that he must have vomited and defecated nine times. He was surprised that I had counted these occasions as mentioned in his story. His story didn't jibe. I asked him if he was scared of mortar and artillery fire and he said, 'Yes'. I asked him if he was aware of the fact that the infantry was depending on the mortar fire and that he was to set up regardless of mortar and artillery fire and he said he thought it might let up a little bit later. I said, 'That's no excuse after giving you three hours to get them in'. He gave no substantial reason. He more or less beat around the bush or alibied. That was all he had to offer" (R24).

If accused was sick he should have turned the section over to the section sergeant but to the best of Captain Meisner's knowledge he did not tell him or any other of his superior officers that he was sick and had to be relieved. The Captain did not tell accused at any time on 3 or 4 December that there was a change in orders or to await further orders (R24).

Staff Sergeant Henry F. Krause, squad leader of the sixth squad, mortar platoon, Company M, 379th Infantry (R26), testified that he was with the jeeps on the morning of 4 December 1944 when he and about four other enlisted men arrived at Saarlautern where the vehicles were unloaded. Accused took the men to the section area where they entered a building, part of a factory (R27,28) at 0400 or 0415 hours. There the section did nothing and accused said nothing except to suggest to Krause "that we go out and look for a house where the rain wouldn't come in". Krause said,

"The hell with looking for a house where the rain isn't coming in let's look for an OP and get the guns set up" (R27).

It was then 0445 or 0500. Accused went "in the little room and sat in the corner" and no orders were given about setting up the guns (R26-27). Krause took one of the men with him and went forward in an attempt to locate an observation post. At around 0600 or 0615 when he came back, accused was still there and did not say anything or give him any orders (R28). At 0710 Lt. Multop came over and in the presence of accused said something about ammunition and asked where communications were and if the guns were set up. Krause said, "No" and told him

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> "we had no OP or no mortar positions that the orders I got were that orders had been changed. That we should stay in the building until we received further orders. Then Lt. Multop told us we'd better shake our ass or something to that effect and get going" (R29).

Krause believed these words had reference to accused because he was the one who had to say where the guns would be set up, but accused just kept walking back and forth and then "took off with Sgt. Poderski". When accused returned he gave no orders and the men "were all griping and bitching". The law member ruled that these words were improper testimony, stating

> "The witness can describe what the lieutenant did, what the witness did has no bearing on the guilt or innocence of the accused" (R29).

The guns in accused's section were set up and ready to fire somewhere around 0800.

Examination by the court disclosed that the order to set up the guns were given by Sergeant Krause on his own initiative and that he received no order to this effect from anyone (R30).

Staff Sergeant Gus Janetos, section leader of the third section of the 81mm mortar platoon, Company M, on the morning of 4 December 1944, came up with the foot troops to Saarlautern and between 0430 and 0530 arrived at the place where the men were "inside the building, sitting there". Accused was present (R32) and said "we were to sit and wait for further orders". He was not doing anything about getting guns in position. At 0720 Sergeant Janetos received orders from Lieutenant Ford (R33) in accordance with which he got the guns into action between 0730 and 0800. Afcused was not then present and had given no orders to set up the guns. It was late that afternoon when he again saw accused (R34). Prior to 0720 when accused left he said "he was going on to establish an OP" (R33,35).

Staff Sergeant Leopold S. Poderski, squad leader in the third section, M Company, 379th Infantry, was present with the squad leaders and accused when they "were given the situation" by Lieutenant Ford prior to the attack on 4 December 1944. He arrived at the area in Saarlautern at about 0400 where accused "told us to go in the buildings and wait and we waited

there quite a while". They "just waited. We didn't know what to do. We just waited from further orders from him". They waited about two and one-half hours during which time accused did not do anything but at about 0700 he took Poderski and "Corporal Suchala" (R37-38)

> "out to the positions for the gun and when we got to the spot where my gun was to be he told me to set my gun up there and then shells started falling and the lieutenant took for cover" (R39).

He went 50 or 75 yards to the next building and "sort of ran or trotted in a crouched position". The shells were landing 50 to 75 yards away. He came back in about five minutes and told them to go back with the rest of the group (R39), and that they were supposed to wait for further orders. Back at the building he said nothing further about setting up the guns and waited in the corner of one of the two rooms in the building. Around 0800 he was by a window from which he showed Poderski his targets for the section area (R40-41). One of their guns could be set up and made ready to fire in 50 seconds "under favorite conditions" (R43).

Corporal Leroy Carr, of platoon headquarters, Company M, 379th Infantry, was serving as a guard in Saarlautern on the morning of 4 December 1944 and was posted "downstairs" in the building occupied by the company's command post between 0700 and 0800 hours. At about 0800 he saw accused sitting in a small room "about six by ten", the walls of which were of concrete (R43-44,46). This room was next to the latrine which Carr visited quite often as he was suffering from the "GI's". He saw accused there "Off and on all day". There were two stools in the latrine but he did not see accused using them and did not remember whether or not accused said he was sick (R45-46).

4. After his rights were explained, accused elected to be sworn and to testify in his own behalf (R46-47). His testimony that followed was voluminous and detailed (R47-63), the pertinent parts of which were in substance as follows:

He came into the Army in April 1940 and was assigned to the 5th Infantry. At the induction center, his classification test showed he had one of the highest "IQ's" so he was sent to Regimental Intelligence where he learned about wiring, supplies and so forth. He was transferred to the 550th Airborne Infantry in 1941 (R48) and passed through the grades of private, corporal and sergeant. Part of this service was spent

in Panama until his return to the United States on 13 November 1942. He attended Officer Candidate School at Fort Benning, Georgia and graduated 25 February 1943. Thereafter he served with an airborne unit and then attended Army Finance School from March 1943 until March 1944. He then went to an Infantry Replacement Training Center and was assigned to the 379th Infantry and took part in "West Virginia Maneuvers", where he "did a rather bad job of that and was transferred to the 378th". He was later reassigned to the 379th Infantry (R49) and at Camp Myles Standish "had the Third Section", M Company, 379th Infantry, and when they arrived in England, he learned he was going to stay with this company. He had not commanded troops and had had only two days training at Fort Benning and when he found he was in command of a mortar section he

> "told my commanding officer that was all the training I had and he told me that I'd better get out a field manual and start learning because I was in charge of a mortar section" (R50).

He did get a manual and study but when he took his first test the only knowledge he had was what he had read from the manual and what little he could remember from the instructions he received at Camp Benning in 1942 (R50).

On the night of 3-4 December he accompanied Lieutenant Ford and others of his company on the reconnaissance and a place for the third section was designated (R50,51,56). They returned to the company area, loaded ammunition and went forward again toward the area selected for his section (R51, 52). When they

> "came into the area the first section peeled off and then the second section and then Lt. Ford told me to take my men to the rear of the building. I said, 'Set up now?' and he said, 'Wait for further orders'" (R52).

At that time it was only necessary to stay there with the equipment and they "posted the guard" and moved into the building. He told his men that

> "we would have to wait for further orders and to keep a look out to the right because there was nothing but enemy on the right" (R52).

It was cold and the men "were bitching around". Accused looked for a place for an observation post "and the other guns". Meanwhile "the men were all getting restless and I still had to decide" (R52). It was during such occupation, which accused described in detail that his activities were interrupted by his suffering a pain in his stomach which made it necessary that he go to the toilet (R53). He found a latrine in a small room and he recounted the circumstances attendant on the many times he had to defecate and vomit. The next time he did get "upstairs" to join his men and passed the second section, Lieutenant Ford "was screaming for 'lights', light ammunition". As accused walked by, Lieutenant Ford said "Where have you been?" Accused told him he had just come from the latrine and Lieutenant Ford said, "I don't care where you've been or what you do but you are not in command of the section, understand?" (R54). It was then about 1030 hours, 4 December 1944.

Accused indicated that he knew he was supposed to lend support fire by 0700, that he suffered the cramp that required his constant attendance in the latrine after 0715, that this illness was not sufficiently severe to prevent his assuming his command, that he was afraid of artillery fire and that he was afraid that morning (R58,59). The following questions and answers are pertinent:

> "Q. You heard Corporal Carr testify regarding the latrine in this building. Was his description of the construction of the latrine substantially correct?
>
> A. I wasn't paying too much attention.
>
> Q. Assuming this envelope is the large room (illustrating with a large envelope), the latrine was built into the room something like this (indicating a small room within the large room). The walls were of stone or concrete?
>
> A. Yes sir.
>
> Q. You heard him testify that you were on numerous occasions in this little room when he went in there.
>
> A. Yes sir.
>
> Q. And you were not using the stool when he came in?

A. No sir.

Q. Couldn't you both use them at the same time?

A. It was at that time that I thought I was going to vomit and I was in a crouched position there" (R60).

Corporal Theodore Suchala, first gunner, M Company, 379th Infantry, testified for the defense and briefly described his activities with the third section on the morning of 4 December 1944. His testimony failed to disclosed any matters either beneficial or detrimental to accused (R63-64).

5. It was stipulated by and between the prosecution, the accused and the defense that an overlay presented to the court was a fair and accurate representation of the map referred to in the testimony of Lieutenant Ford and the markings he made on the map and this overlay could be substituted for the original map and attached to the record as Prosecution's Exhibit "A" (R65).

6. In announcing the sentence imposed, the court erroneously used the words "to be dishonorably discharged the service" instead of "to be dismissed the service", which incorrect terminology was immediately called to the court's attention by the trial judge advocate. The court thereupon declared a recess, during which the law member and the defense counsel "contacted the Division Staff Judge Advocate" (R67). The court then reconvened and again announced the sentence including therein the appropriate words "to be dismissed the service" (R68). The procedure adopted was not improper under the circumstances and no substantial right of accused was thereby injuriously affected (MCM, 1928, par.51g, p.40).

7. There was substantial convincing evidence from which the court could properly find that accused, while before the enemy, misbehaved by failing to place his 81mm mortar section in position to engage with the enemy at the time and place and in the manner alleged. His malingering conduct in seeking his own personal safety endangered the safety of his regiment and aggravated the misbehavior alleged in violation of Article of War 75 (CM ETO 5770, Kieffer, and cases therein cited).

8. The charge sheet shows that accused is 23 years seven months of age and was commissioned a second lieutenant 25 February 1943 at Fort Benning, Georgia. He had prior enlisted service with

the Regular Army for a period of two and a half years.

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

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

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 21 FEB 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant RALPH WILLIAM RISLEY, JR. (O-1312333), Company M, 379th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 6961. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 6961).

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

(Sentence ordered executed. GCMO 64, ETO, 3 Mar 1945.)

6961

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

BOARD OF REVIEW NO. 3

CM ETO 6983

U N I T E D S T A T E S	)	XII CORPS
	)	
v.	)	Trial by GCM, convened at Nancy, France, 8 December 1944.
	)	
Captain MAURICE A. CARLSON (O-502860), Finance Department, Finance Section, Headquarters Fourth Armored Division.	)	Sentence: Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification I: In that Captain Maurice A. Carlson, F.D., Finance Section, Headquarters Fourth Armored Division, did, at Toul, France, on or about 9 November 1944, wrongfully obtain from Technician Third Grade John W. Lee, cashier, 88th Finance Disbursing Section, a one hundred dollar ($100.00) bill, serial number B03891007A, currency of the United States, with the intent to sell said bill in France at a profit in violation of that prohibition against dealing with United States currency in liberated territory which is set forth in paragraph 1 of letter Headquarters European Theater of Operations, file AG 1210p, Subject: "Prohibition Against Circulating, Importing or Exporting

United States and British Currencies in Liberated and Occupied Areas", dated 24 June 1944.

Specification 2: (Disapproved by Confirming Authority).

He pleaded not guilty to and was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. Two thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority, the Commanding General, XII Corps, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the findings of guilty of Specification 1 as involved a finding that accused did, at the time and place alleged, wrongfully obtain from Technician Third Grade John W. Lee, Cashier, 88th Finance Disbursing Section, a one hundred dollar ($100.00) bill, serial number B03891007A, currency of the United States, disapproved the finding of guilty of Specification 2, confirmed the sentence but remitted that portion thereof adjudging confinement at hard labor for five years, and withheld the execution of the sentence pursuant to Article of War 50½.

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

The immediate superior of the accused, Lieutenant Colonel George L. Eatman, Finance Officer, 4th Armored Division, testified that the letter described in Specification 1 of the Charge, prohibiting certain transactions in currency of the United States, was received in his section early in September of 1944 and that, while he could not be certain that accused saw the letter at that time, it was his practice upon receiving communications of this type to circularize them among the personnel of his office, including accused, in order that such personnel might familiarize themselves therewith (R10-12). He further stated that "posters were posted in the finance office stating the gist of the letter" prior to 9 November 1944 (R10).

On the morning of 9 November, accused came to the 88th Finance Disbursing Section, then located at Toul, France, and inquired of Technician Third Grade John W. Lee, cashier, whether he had on hand any American currency (R7,9). As a result of the inquiry thus made, accused acquired from Lee a one hundred dollar bill, serial number B03891007A, currency of the United States, giving him in return therefor the sum of 4957 francs, the approved rate of exchange. Lee stated that although it was not customary to "sell" such currency to military personnel, he did

so in this instance because of the fact that accused was a finance officer. Accused gave no indication at the time why he wished to acquire the bill in question (R7-9).

On 10 November 1944, accused and Lieutenant Colonel Charles B. Milliken, Finance Officer, Headquarters, Third United States Army, reported to the Office of the Fiscal Director, Headquarters, European Theater of Operations, and were in turn sent by that office to the Office of the Theater Provost Marshal where accused was questioned in Colonel Milliken's presence by a Lieutenant Yerg of the Criminal Investigation Division (R13). At the time of this interrogation, accused had in his possession and delivered over to the officers conducting the investigation the one hundred dollar bill described above (R13). Without advising accused of his rights under Article of War 24, Lieutenant Yerg elicited from him information which, in its entirety, amounted to a confession. This information was then reduced to writing and, after being advised of his rights, accused signed the written statement thus prepared (R13,14). Upon being asked whether accused's statements were freely and voluntarily made, Colonel Milliken testified,

> "I think accused was more or less scared into making the statements he made prior to being warned, but after he had been sworn in he made the statements voluntarily" (R19).

He was also asked,

> "Colonel, do you think that if this accused had not made the statements that he made before he was informed of his rights that he would have made the statements that he made after he was informed of his rights?"

to which he replied, "No, sir, he would not. Not all the statements" (R20). On the evidence thus presented, accused's statement was admitted into evidence over the objection of the defense. That portion of the statement which is relevant here reads as follows:

> "I am assigned to the Unit heretofore mentioned and am the Deputy Finance Officer for the 4th. Armored Division. I arrived on the Continent with my Unit on the 14th. of July, 1944. At the time I left the United Kingdom, and for some time prior thereto, I was familiar with the various directives pertaining to dealing in currency, and knew that we were only permitted to bring a small amount of foreign currency with us, other than Francs, and not to exceed ten shillings.

> At about the time the Troops entered Paris, or shortly thereafter, I learned through rumor and general conversations, that U.S. currency could be sold at a profit. * * * On 9 November, 1944, I obtained a $100.00 bill, serial #B03891007A from an enlisetd cashier in the 88th. Finance Disbursing Section. I now have this note in my possession and I identify it as the one I so obtained. I intended to sell this note in Paris, if an opportunity presented itself, at a profit" (R20, Pros.Ex.B).

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

5. Technician Third Grade Lee was recalled as a witness by the court and testified that in "selling" the one hundred dollar bill to accused, he acted in his capacity as cashier of the 88th Finance Disbursing Section and that prior to the transaction the bill was the property of the government, not his personal property (R25). When asked whether accused purchased the bill as a "finance employee", he answered, "That is the reason I sold it to him" (R26).

6. In passing upon the legal sufficiency of the instant record of trial, consideration must first be given to the question whether the court properly considered accused's confession in making its findings. In this connection, the testimony of Colonel Milliken shows that accused was not advised of his rights under Article of War 24 prior to being questioned and was "more or less scared into" giving the information which he gave orally. This testimony, taken together with Colonel Milliken's testimony as a whole, must be accepted as showing that at least some duress or coercion was employed in questioning the accused. This being true, accused's oral statements, regarded as a confession, were inadmissible in evidence as not having been voluntarily made (MCM, 1928, par. 114a, p.116).

The information given orally was then reduced to writing in the form of a statement and, after being advised that he was not required to sign such statement and that it could be used against him in the event of further proceedings, accused signed the statement thus prepared. If this statement is regarded merely as the formal consummation of accused's preliminary oral statements, the warning given came too late to have any tendency to show that the statement was voluntarily made and, the use of duress having been shown, it follows that the statement must be rejected.

If regarded as a separate and subsequent confession following upon a prior oral confession (shown to have been improperly induced), the warning given was not broad enough to render the written confession voluntary for the reason that accused was not informed that the prior oral confession could not be used against him. In the absence of such advice, accused might well have thought that by signing the written confession he could not make his case worse then it already was, and this supposition is in fact borne out by affirmative testimony to the effect that accused would not have signed the written confession had he not previously orally given the information recited therein. Thus, the warning given was not sufficient to insulate the written confession from the improper influences which induced the prior oral confession and hence, even if the written confession is analyzed as a second confession, it, like its predecessor, was inadmissible as not having been voluntarily made (CM ETO 1201, Pheil; CM ETO 1486, MacDonald and MacCrimmon; 2 Wharton's Criminal Evidence (11th Ed, 1935) sec.601, p.998; 20 Am. Jur., sec. 487, p.424). Therefore, under any of the analyses suggested above, accused's confession or confessions were improperly received in evidence.

This being true, the following rule becomes operative in passing upon the record of trial:

> "The rule is that the reception in evidence in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved" (see CM ETO 1201, Pheil).

The Specification alleges that on or about 9 November 1944 accused wrongfully obtained certain currency of the United States in violation of paragraph 1 of "letter Headquarters European Theater of Operations, file AG 121 Op, Subject: 'Prohibition Against Circulating, Importing or Exporting United States and British Currencies in Liberated and Occupied Areas', dated 24 June 1944". Although it appears that this letter was rescinded and superseded by a similar letter dated 23 September 1944 (paragraph 2a of which reenacted paragraph 1 of the earlier letter), this fact did not, under the circumstances of this case, render the Specification fatally defective

(42 CJS, sec.138, pp.1033,1034; Maresca v. United States (C.C.A. 2nd, 1921), 277 F 727, cert. den., 257 U.S. 657, 66 L.Ed. 420; Johnson v. Biddle (C.C.A. 8th, 1926), 12 F, (2nd) 366).

Paragraph 1 of the letter dated 24 June 1944, as reenacted by paragraph 2a of the letter of 23 September 1944, provides in part as follows:

> "Except as authorized, all personnel subject to the jurisdiction of this headquarters * * * are prohibited from importing, holding, transferring, exporting, or in any way dealing in United States or British paper currency in liberated or occupied territory within the European Theater of Operations".

It will be noted that while the above paragraph prohibits certain transactions and dealings in currency of the United States, authorized transactions are expressly excepted from its scope. Hence, on first examination, it might be thought that in order to prove a violation of the provision it would be necessary for the prosecution to show not only that a transaction of the prohibited type was consummated by the accused but that its consummation was unauthorized in the particular instance charged. However, it should be remembered that, in general, it is incumbent upon an accused to bring himself within the operation of a proviso or exception to a statute. For example, in a prosecution for selling cocaine without the necessary written prescription from a registered physician, it was held that after evidence of a sale of cocaine was introduced, the burden of proof was on the defendant to show that such sale was upon the prescription of a physician as required by the statute, People v. Montgomery, 271 Ill. 580, 111 N.E. 578 (1 Wharton's Criminal Evidence (11th Ed., 1933) sec.202, p.223, ftnote 15).

> "An indictment or other pleading founded on a general provision defining the elements of an offense * * * need not negative the matter of an exception made by proviso or other distinct clause whether in the same section or elsewhere; and * * * it is incumbent on one who relies on such an exception to set it up and establish it".

(McKelvey v. United States, 260 U.S. 353, 43 S.Ct. 132, 67 L.Ed. 301); and see Faraone v. United States (CCA 6th, 1919) 259 F. 507, and Merritt v. United States (CCA 9th, 1920, 264 F. 870), the latter case holding that in a prosecution for hoarding sugar, it devolved upon defendant to introduce evidence bringing him within the exceptions of the statute negatived in the indictment. Upon the basis of the authorities cited, it is concluded that, under the wording of the paragraph above quoted, authority to engage in the challenged transaction is an affirmative

defense and that, if it was adequately alleged and compellingly shown that accused in fact consummated a transaction prohibited by the quoted paragraph, the prosecution's case was complete.

It was alleged that accused did wrongfully "obtain" certain currency of the United States from an enlisted cashier of a finance disbursing section. While it would have been better practice to allege a violation of the paragraph in the words of the paragraph itself, it is the conclusion of the Board of Review that to "obtain" currency of the United States constitutes a "holding" or "dealing in" such currency within the broad meaning of those terms as used in the paragraph here under discussion, and hence that the Specification sufficiently alleged a violation thereof. Further, competent evidence of record compellingly shows that accused did in fact "obtain" certain currency of the United States, as described in the Specification, and that he had such currency in his personal possession on the day following its acquisition. A violation of the paragraph having been shown, it was for the accused, if he could, to bring himself within the exception noted by showing that he was authorized to make the transaction in question. Having failed to do so, and there being compelling evidence to show that he engaged in the prohibited activity, the findings of guilty may properly be upheld.

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 charge sheet shows that accused is 27 years of age, that he enlisted 28 September 1939, was appointed a warrant officer 15 May 1942 and a second lieutenant 5 November 1942.

9. A sentence of dismissal is authorized upon conviction of an offense in violation of Article of War 96.

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B [illegible] Judge Advocate

(308)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 27 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Captain MAURICE A CARLSON (O-502860), Finance Section, Headquarters, 4th Armored Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 6983. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 6983).

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

(Sentence ordered executed. GCMO 331, ETO, 12 Aug. 1945.)

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

BOARD OF REVIEW NO. 1

3 MAR 1945

CM ETO 6997

U N I T E D S T A T E S	)	XX CORPS
	)	
v.	)	Trial by GCM, convened at Headquarters XX Corps, Thionville, France, 25 January 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York
Privates PETER F. JENNINGS (20148225) and WILLIAM G. ABBOTT (11052894), both of Battery D. 455th Antiaircraft Artillery, Automatic Weapons Battalion	)	

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

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

2. Accused were charged separately and tried together on the following charges and specifications:

JENNINGS

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Peter F. Jennings, Battery D. 455th Antiaircraft Artillery Automatic Weapons Battalion, did, at or near Gorze, France, on or about 10 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: Operations against the

enemy and did remain absent in desertion until he was apprehended at or near Pont-A-Mousson, France, on or about 26 December 1944.

ABBOTT

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Willima G. Abbott, Battery D. 455th Antiaircraft Artillery, Automatic Weapons Battalion, did, at or near Gorze, France, on or about 10 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: Operations against the enemy and did remain absent in desertion until he was apprehended at or near Pont-A-Mousson, France, on or about 26 December 1944.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the votes were taken concurring, was found guilty of the Charge and Specification preferred against him. Evidence was introduced of one previous conviction of accused Jennings by summary court for wrongfully appearing in a certain town and for failing to carry identification in violation of standing orders evidently in violation of the 96th Article of War; and evidence was introduced of three previous confictions of accused Abbott: two by summary court for absence without leave for three days in violation of the 61st Article of War, and for wrongfully appearing in a certain town and for failing to carry identification in violation of standing orders evidently in violation of the 96th Article of War, and one by special court-martial for absence without leave for 93 days in violation of the 61st Article of War. Three-fourths of the members of the court present at the time the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentences, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement for each accused, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The papers accompanying the record of trial and the charge sheets disclose that the original charges preferred against accused were laid under the 75th Article. The date on each charge sheet -

7 January 1945 - is the same as the date of each original verification by Captain Henry F. Burroughs, Jr., the accuser. The charges were referred to First Lieutenant James D. Paden for investigation under the 70th Article of War on 9 January 1945. The investigating officer completed his investigation and made his report to the commanding officer, 455th Antiaircraft Artillery, Automatic Weapons Battalion, on 11 January 1945. Thereafter on 13 January 1945 the charges were forwarded by the battalion commander to the Commanding General, XX Corps, with recommendations that the accused be tried for "the offense committed and charged against them under the 75th Article of War".

An indorsement from the battalion commander to the Commanding General, XX Corps, dated 16 January 1945, recited:

> "These cases were re-investigated in compliance with verbal instructions of the Judge Advocate Section, your headquarters. I recommend trial by General Court-Martial under Article of War 58".

Accompanying the indorsement was a certificate of the original investigating officer which states:

> "16 January 1945
> I certify that I have re-investigated this case of Pvt. William G. Abbott, 11052894 and Pvt. Peter F. Jennings, 20148225, and read the new charge under Article of War 58 to them. I informed them of their rights under Article of War 70, and asked them if they cared to call in any witness for cross-examination. They did not want to cross-examine any witness nor did they wish to make a statement.
>
> I recommend that these cases be tried by General Courts-Martial".

Over the original charge on each charge sheet there has been stapled a piece of paper which bears the charges as set forth in paragraph 2 hereof. Each of these stapled pieces of paper bears in red ink the initials "ABM", which are doubtless those of Major Andre B. Moore, the trial judge advocate of the court before which the accused were arraigned and tried. There is no evidence that the accuser, Captain Henry F. Burroughs, Jr., was afforded the opportunity of either withdrawing as accuser or reverifying the charges after they had been changed from the 75th Article of War to the 58th Article of War. The inference, therefore, is reasonable that this alteration of matter above his signature was made without his knowledge or consent.

Although not shown as one of the documents accompanying the record of trial, the implication is indisputable that the shifting of the charges from Article of War 75 to Articles of War 58-28, after the original chargeswere signed and verified by the accuser, was prompted by the letter of 5 October 1944 (signed by the Theater Judge Advocate) from Headquarters European Theater of Operations, which is set forth in extenso in CM ETO 4570, Hawkins. The pre-trial practice in the instant case followed that of the Hawkins case, supra, and that of CM ETO 5155, Carroll and D'Elia, except that in the instant case there was a pro forma reinvestigation of the charges after the alterations had been effected. However, there is no evidence that the accuser consented to the alterations or that he verified the new charges. Upon the authority of the holdings in the cases above mentioned, the Board of Review concludes that the pre-trial practice in the instant case did not injure or impair the substantial rights of either accused or affect the jurisdiction of the court before which accused were arraigned and tried. However, the Board of Review quotes, as highly relevant to the situation here disclosed, the statement of the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations contained in his indorsement approving the holding in the Hawkins case:

> "While the practice followed in this case has been upheld as legal, it is not approved as correct. The provisions of Article of War 70 and the Manual for Courts-Martial, even though held directory and not jurisdictional, are intended to be followed. When charges are changed in a substantial way and particularly where severer penalties attach on conviction, it is not necessary to have a re-investigation if the complete facts are already disclosed, but the new charges should be reverified by the accuser or another. The adherence to established practices produces better trials, insures justice and eliminates serious legal questions, which may be reached later by habeas corpus with the outcome uncertain".

4. Prosecution's evidence proved the following facts:

On 10 October 1944, both accused were members of Battery D, 455th Antiaircraft Artillery, Automatic Weapons Battalion. Captain Henry F. Burroughs, Jr., was battery commander. On said date the

battalion was stationed about 1000 yards from the town of Gorze, France. It was located in a field adjoining the 739th Field Artillery Battalion. The latter fired heavily on the group of Metz forts which were located about 4000 yards distant and were visible. The mission of the antiaircraft battalion was to furnish interior security for the artillery battalion. The former was constantly on duty and engaged enemy aircraft on several occasions (R6,7). The battery remained in this area for about 30 days and then moved to a point south of Champiey, France, and east of the Moselle River (R9) - a distance of about five miles (R10).

When off duty the members of the antiaircraft battalion, upon obtaining permission of their section chiefs, were authorized to leave their positions for short periods of time to visit other sections or to go for a walk. However, they were not authorized to leave the battery area to visit the town of Gorze (R7).

Accused Abbott on 10 October was an ammunition handler in his section. He received permission from his section chief, Sergeant Hassel O. Williams, to visit number four gun section located about 200 yards from his own section. He was supposed to return to his station, but he did not return. Williams telephoned number four gun section and, upon determining that he was not present with it, reported his absence to the first sergeant of the battery (R10,11).

Accused Jennings was a member of number three gun section and was "number one man on a director crew" (R12). Accused Abbott appeared at section three on 10 October and, while in his company, Jennings requested Sergeant Kenneth D. Sauer, his section chief, for permission to walk about the immediate vicinity. The permission was granted, but this did not include authority to visit the town of Gorze. At about 1400 hours, at a time Jennings was a member of a shift on duty, the two accused left the site of section three. No time limit was fixed for Jennings' absence and the authority allowed him only to "take a walk around the area". Without special permission none of the men was accustomed to go farther than another gun section (R13). Captain Burroughs was unable to locate either of accused in the area or in the adjoining towns (R8). Sauer did not see Jennings again until January 1945 (R12).

It was stipulated

> "that the period of absence in this case ended on the 26th of December at a point midway between Pont-A-Mousson and Toules, France" (R15).

5. In defense, each accused elected to appear as a sworn witness:

Abbott testified that he and Jennings left the battery area and went into "the village" (Gorze) where they remained about three hours. They consumed liberal quantities of cognac, brandy, and beer and became "pretty drunk" (R16,20). He admitted he had no authority to leave the battery area on 10 October (R20). They then went to Mars-la-Tours, where they imbibed more intoxicating liquor. They then went to Verdun, where they remained for about two hours. They intended to return to their gun sections and obtained a ride at about 7 pm with a driver who said he was going to Mars-la-Tours (R17). Instead they were carried to a town near Liege, Belgium. They were arrested by military police for being "off limits" and were taken before a summary court and "they court-martialed us and told us that we were free to leave" (R18). The military police did not ask accused for passes, and accused neither informed them they were absent without leave nor did they ask for the location of their organization (R18,20). After their dismissal by the summary court they went towards Aachen. They stopped with an "ack-ack" outfit and the 237th Engineers. The only effort they made to return to their battery during their absence was when they inquired of a military policeman the route to Verdun (R22). They finally came back to Verdun and remained with the military police on the night of 24 December. The police did know of the location of their outfit. On Christmas morning they "hitch-hiked" in the direction of Metz (R19). En route they were apprehended by the military police (R22).

Jennings testified that on 10 October he received permission to leave his gun section before Abbott arrived and had planned to visit number two section (R23). His chief gave him permission "to take a walk". After Abbott arrived Jennings decided to go to town with him (R24). He admitted that when he left the battery area he was a member of a gun crew then on duty and that the battery was in contact with the enemy (R26). The remainder of his testimony was substantially of the same tenor and effect as that of Abbott (R24-26).

6. As against both accused, there was admitted in evidence proof of a conviction by summary court on 20 October 1944 for wrongfully appearing in the town of Seraing, Belgium; and, in the case of Jennings, for failing to carry identification. The conviction was after the offenses charged in the instant case and before the trial of accused therefor. Obviously this was error (CM ETO 6468, Pancake). However, it did not prejudice accused because in their own testimony in defense they testified to their arrest and trial on 20 October 1944 for the exact offenses covered by these convictions.

7. The evidence is uncontradicted that each accused, with knowledge that his battery was actively engaged with the enemy, left it without authority or permission and was absent for 77 days. There can be no doubt as to the correctness of the court's conclusion that each

of them intended to avoid the hazards and perils of combat. They did in fact successfully evade the performance of important combat duties during their absence. They showed an obvious lack of sense of duty and responsibility as soldiers. The charges were proved by substantial evidence (CM ETO 4702, Petruso; CM ETO 5643, Harris and Wilhite; CM ETO 6468, Pancake; CM ETO 6623, Milner).

8. The charge sheets show the following with respect to the service of the respective accused:

Jennings is 22 years nine months of age. He enlisted 12 July 1940 at Fort Williams, Maine. Abbott is 21 years four months of age. He enlisted 3 June 1942 at Boston, Massachusetts. Neither had prior service.

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

10. The penalty for 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 of each accused is authorized (AW 42; Cir.210, WD, 12 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 29 MAR 1945

CM ETO 7000

U N I T E D S T A T E S	)	IX AIR FORCE SERVICE COMMAND
	)	
v.	)	Trial by GCM convened at Reims, France, 5 December 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
First Lieutenant SELBY H. SKINNER (O-2044740), 75th Station Complement Squadron, 1st Transport Group (Prov)	)	

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DETEY, 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 1: In that 1st Lt Selby H. Skinner, 75th Station Complement Squadron, 1st Transport Group (Prov), did, at St. Truiden, Belgium, on or about 30 September 1944, with intent to do him bodily harm, commit an assault upon Corporal Zolton Sardy, 93rd Medical Gas Treatment Battalion, by shooting him in the hand with a carbine rifle.

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Specification 2: In that * * * did, at St. Truiden, Belgium, on or about 30 September 1944, with intent to do him bodily harm, commit an assault upon 1st Sgt Harold C. Stacy, Headquarters Detachment, 93rd Medical Gas Treatment Battalion, by threatening him with a dangerous weapon, to-wit, a carbine rifle.

Specification 3: (Disapproved by reviewing authority).

Specification 4: (Disapproved by reviewing authority).

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

Specification 1: In that * * * was, at St. Truiden, Belgium, on or about 30 September 1944, in a public place, to-wit, in the Cafe De Bol, St. Truiden, Belgium, and in a public street in St. Truiden, Belgium, drunk and disorderly while in uniform.

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

Specification: In that * * * did, at St. Truiden, Belgium, on or about 30 September 1944, through neglect, suffer a motor vehicle, to-wit, a ¼ Ton, 4 x 4 truck, property of the United States Government, of the value of more than Fifty ($50.00) Dollars, to be damaged by allowing the vehicle to be parked on or immediately adjacent to street railway tracks, with inadequate space for passage of the street railway cars.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority, the Commanding General, IX Air Force Service Command, disapproved the findings of guilty of Specifications 3 and 4 of Charge I, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the

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Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement 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 the evening of 30 September 1944, accused drove into the town of St. Truiden, Belgium, parked his jeep on the street railway tracks and entered a bar where he had a drink while other soldiers at the bar inspected his carbine "pulling and shutting the bolt and passing it around" (R6-7,11-12). His condition was such that an acquaintance, First Sergeant Harold C. Stacy, Headquarters Detachment, 93rd Medical Gas Treatment Battalion, suggested that he be permitted to carry accused's gun, promising to return it in the morning (R6).

Later the same evening, accused's jeep was struck by a tram car (R7,11-12). Accused, holding his carbine at port arms, circulated unsteadily through the crowd that gathered at the scene of the accident, swearing and threatening to "get" the motorman for running into his jeep (R7-8,16). First Sergeant Stacy, seeing him in the center of the street, approached with the intention of relieving him of the carbine. Accused pointed the gun at the first sergeant, saying, "Keep away from me, I would hate to have to shoot you" (R9,19). Stacy turned and went away (R10). He saw accused "as he entered the /tram/ car with the gun in his hands, asking for the conductor". Accused was staggering and appeared "pretty well stewed up" (R8-9).

Five minutes later, holding his carbine "ready to fire", accused entered the Cafe Du Bol near the scene of the accident where he found First Sergeant Stacy, Corporal Zolton Sardy of the 93rd Medical Gas Treatment Battalion, and about 25 other men (R10,20). Corporal Sardy invited accused to have a drink, at the same time walking toward him, continuing to approach after accused remarked, "Leave me alone, Junior". When Sardy was within three or four feet of accused, "the gun went off and creased the boy and he lost one or two of his fingers" (R10,20-21). Other soldiers promptly closed in on and disarmed accused (R10,21). Stacy drove his jeep home for him (R12). He testified that he could not state the approximate value of the jeep but "would say about a thousand dollars". It was definitely of a value in excess of $50.00 (R11).

4. The only evidence for the defense was the testimony of accused, who, after his rights were explained to him, elected to take the stand under oath. He testified in substance as follows:

Returning from a mission in his jeep, he imbibed two beers and a drink of gin at about 7:30 pm (R25,28,30). Entering St. Truiden about an hour later, he had trouble with his lights (R26,27). He parked his unlighted jeep near a cafe, unaware of the tram line running by it. He did not see the tracks (R26,27,29,30). He drank a beer in the cafe, and some of the boys there played with his loaded carbine (R26,33). He

thought First Sergeant Stacy was "kidding" when he asked accused to let him carry the gun (R33). When informed that his jeep had been hit by a tram, accused left the cafe and found 15 or 20 soldiers and four or five civilians around the tram car. He sought the motorman to ascertain the damage to the other vehicle which was standard procedure in case of accident. He did not threaten to shoot the motorman. His remarks were misinterpreted (R26). He did not want to hurt anybody and all he told Stacy was to go away and leave him alone (R31). He was not drunk (R32). Failing to find the conductor and believing his jeep would not run, he re-entered the cafe (R26-27). As Sardy approached and reached for his carbine, accused was hit by various enlisted men from five different angles at once and the gun went off accidentally (R27,29). His jeep was the property of the United States (R33).

5. Substantial evidence supports the findings of guilty of assault with intent to do bodily harm with a dangerous weapon, as alleged in Specifications 1 and 2, Charge I. In the case of First Sergeant Stacy, accused pointed his loaded carbine at the first sergeant, threatening to shoot him unless he kept away. Thus an overt act coincided with an expressed intent and a present ability to do great bodily harm. When a menacing gesture with a dangerous weapon accompanies a demand which accused has no legal right to make, the assault is complete (CM ETO 3255, Dove).

In the case of Sardy, substantial evidence shows that accused fired as Sardy approached, after pointing his carbine at Sardy and telling the latter to leave him alone. A sane person is presumed to have intended the natural and probable consequences of his acts - and malice is presumed from the use of a deadly weapon (MCM, 1928, par. 112a, p.110). Whether he was too drunk to entertain the specific intent to do bodily harm when he committed the assaults was here clearly a question for the court's determination (Bull.JAG, Vol.II, No.11, Nov. 1943, sec.451(10), p.427).

The evidence adequately supports the courts finding of drunkenness and disorder in the Cafe Du Bol and in the adjacent public street. The offense, involving the unbridled terrorizing of enlisted men and foreign civilians by an armed and drunken American officer, was justifiably regarded as a violation of Article of War 95 (MCM, 1928, par.151, p.186).

The showing that accused parked his unlighted jeep on the tram tracks supports the conclusion of culpable negligence upon which the findings of guilty of Charge III and its Specification are based. The evidence establishes government ownership and, although neither model, make nor condition (other than usability) of the vehicle were shown, and no competent testimony was adduced to establish its value, judicial notice of army price lists precludes the possibility that it was less than $50.00 (MCM, 1928, par.125, pp.134-135).

6. The charge sheet shows that accused is 26 years two months of age, that he enlisted 18 March 1937, was discharged as a private 22 April 1939, re-enlisted 4 November 1939 and was appointed second lieutenant, Army of the United States, 23 September 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. Dismissal and confinement are authorized on convictions under Article of War 93 and 83.

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

Benjamin R Cooper Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

B. H. Lowry Jr Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 MAR 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of First Lieutenant SELBY H. SKINNER (O-2044740), 75th Station Complement Squadron, 1st Transport Group, (Prov), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 7000. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 7000).

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

(Sentence ordered executed. GCMO 96, ETO, 4 April 1945).

7000

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

BOARD OF REVIEW NO. 1

23 FEB 1945

CM ETO 7001

U N I T E D S T A T E S	) OISE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)
Second Lieutenant CHESTER R. GUY (O-1573246), 489th Quartermaster Depot Supply Company	) Trial by GCM, convened at Reims, France, 22 December 1944. Sentence: To be dismissed the service.

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 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 96th Article of War.

Specification: In that Second Lieutenant Chester R. Guy, 498th Quartermaster Depot Supply Company, being present at a fight between soldiers of the 489th Quartermaster Depot Company and the 64th Quartermaster Base Depot Company, did, at Reims, France, on or about 6 December 1944, fail to use his utmost endeavor to stop same in that, being the only officer present at the time the fight occurred, he did not reduce them to discipline or stop the fight.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed from the service. The reviewing authority, the Commanding General, Oise 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. Undisputed evidence for the prosecution showed the following:

On 6 December 1944 Jean Andre Jacobs, owned and operated Henri's cafe, located at 22 Rue Theirs, Reims, France (R7,11,13). At the end of one of the rooms, which was six meters wide by eight meters long (R8-9), was a bar four meters in length (R12). One table, to the left of the bar (facing it), was separated by a small partition from the other tables and chairs, which were arranged near the wall opposite the bar. There were no tables between the first mentioned table and the bar (R9), and the space in front of the bar was unobstructed (R12).

About 8:30 pm on that date accused, a member of the 489th Quartermaster Depot Supply Company, entered the barroom with five enlisted men and sat at the table at the left of the bar with two of the soldiers. The three other soldiers sat at another table (R7,8,9,12,20). About 9:20 pm, Master Sergeants Thomas P. Healy and Bob Sutton, both of Headquarters and Headquarters Company, 64th Quartermaster Base Depot, entered the cafe and stood at the bar talking to Jacobs and his wife Marie for 20 to 30 minutes (R8,13). During this time Healy consumed about three drinks of champagne (R16). He noticed that accused, the only officer present, drank with the two soldiers at his table. Other "members of the same party were going back and forth talking loudly". Accused talked to them and went "back and forth between tables a couple of times" (R14). At this time there were about 12 persons in the barroom (R8,9), including two French girls who were accompanied by two soldiers. There were also two other civilians (R8,9,10).

About 9:50 pm (R14) one of the group of three soldiers, mentioned above, arose and tore down from the wall a French poster concerning aid to prisoners of war. Jacobs told the soldier his action "wasn't right". Whereupon the tallest of the three arose, and another soldier, "the one that began the fight", directed the offending soldier to pick up the poster and replace it. There was "a lot of noise" and loud talking. The three

soldiers, who were "slightly drunk", attempted to start a quarrel with the two soldiers who accompanied the girls, but they did not respond (R8,14). Thereupon Sutton, who was at the bar, told the three aggressors to keep quiet. He was answered with insults (R8). The agressors then forced the two soldiers out of the cafe and the girls accompanied them. The group then "milled around" and formed in a semi-circle before the bar (R14) where Healy and Sutton were standing (R9,14). Sutton told the tall soldier he should leave the cafe. The latter offered "to fight it out with his fist" (R8). Loud words were exchanged and the tall soldier, who was standing in front of Sutton, "told him he was going to throw him out too" (R14,16). The threat was repeated to Sutton by a short dark soldier standing near Healy (R16). Accused sat at his table about 12 feet away from the bar when the commotion started (R9,21). His view of the disturbance was unobstructed by the partition on his right (R11). Later he stood "right in front" of Healy (R14), who warned him that "he had better control those men, that there was going to be a lot of trouble if he didn't. He told me I had better mind my own god-damn business". The tall soldier then "stepped in" and struck Sutton who stepped forward and was again struck by "the man on the other side"(evidently the short dark man) (R14,16). Healy "got kind of messed up", started to attack the tall soldier and was hit by someone from behind (R14,17,18). The fight was accompanied by loud, insulting talk. A soldier, who sat at the end of the room endeavored to send for aid but the tall soldier prevented him from doing so (R10). The fight continued for two or three minutes during which time about three blows were struck and glasses were broken (R11,12,16-17,18). Then the group "milled together" and after the proprietor opened the double doors at the front of the cafe, everybody went outside except one soldier who was drunk and could not be removed (R8,10-11,12,13,14,16). Jacobs testified that accused was able to see the fight, which was "just in front of him between himself and the door" (R11). According to Healy's testimony, accused was probably four feet away from the tall soldier and Sutton during their altercation (R16). Prisoner James B. Sapp, of accused's company, testified that he was present at the scene of the fight (R20), and did not think that accused participated in it (R21). Healy's testimony confirmed Sapp's presence at the scene (R15). Jacobs testified he did not see accused engaged in the fight (R11).

When the group went outside, accused followed. He was the last to leave the cafe (R11,12). Healy testified that accused was on his left when outside (R14) where the tall soldier "started on" Sutton who was in the doorway. Blows were struck, and the men "were altogether on Sutton". It was a general fight

"as far as they were concerned" (R17). Healy grasped the tall soldier, jerked him away and fought with him "back toward the building and down the street a little bit" (R14,17). He heard Sutton say he had been badly cut and hastened back to his aid. Accused and the soldiers involved in the fight were near Sutton, who "had a cut down the right side of his face from his ear. A cut on the upper lip and blood was coming from his head". Healy forced his way through the men, grasped Sutton and told accused, who was standing directly in front of him, to "take a good look at what his men did". Healy did not recall what accused said but he started arguing with witness and mumbled something. Healy told him that he, accused, was responsible for the occurrence. Accused's men urged him to "take me on", and accused pulled at his unbuttoned jacket (R15,18). Healy brushed him aside and helped Sutton through the crowd to a dispensary two blocks distant (R15). The injured soldier was evacuated on 8 December (R19).

The fight outside the cafe occurred about 9:55 pm and continued for about three minutes (R15,18,21). It was very dark except directly in front of the door, where the light shone from within the cafe made it possible to see the fight (R15). Because of the darkness Healy could not see the number of men involved in the street fighting and did not know what accused was doing during this episode (R17). Sapp testified he thought about three or four people were involved in the fight outside of the cafe (R21). At one point accused returned to the interior of the cafe and removed the drunken soldier (R10). Military police reached the scene about 15 minutes after the fight moved outside (R12).

4. After he was advised as to his rights, accused elected to remain silent. The defense introduced no evidence (R21-22).

5. a. The Specification, under Article of War 96, alleges that accused,

> "being present at a fight between soldiers of /his company and another company/ did * * * fail to use his utmost endeavor to stop same, in that, being the only officer present at the time the fight occurred, he did not reduce them to discipline or stop the fight".

At common law it was not only the right but also the duty of a private individual, without a warrant, to arrest any person committing or attempting to commit in his presence a felony or a misdemeanor amounting to a breach of peace and also to prevent the commission of such offense (1 Wharton's Criminal Law, 12th Ed., sec.383, pp.512-513; 4 Am. Jur., Arrest, sec.35, p.24, sec.38, p.26; 1 Restatement of the Law of Torts, sec.119, pp.249-257). The common law right and duty of a peace officer to arrest under such circumstances, somewhat broader than that of a private person (4 Am.Jur., Arrest, supra; 1 Restatement of the Law of Torts, sec.121, pp.25[illegible]-265), has been further enlarged by statute (4 Am.Jur., Arrest, sec. 26, p.20). Under the District of Columbia Code, it is a misdemeanor for any member of the police force to neglect to make an arrest for an offense against the laws of the United States committed in his presence (Tit.4, sec.4-143 [20:494]).

Article of War 68 specifically recognizes the power of officers, among certain other persons subject to military law,

> "to part and quell all quarrels, frays, and disorders among persons subject to military law and to order * * * persons subject to military law [other than officers] who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith".

This Article and its predecessors are merely an application to the relations of the military service of the common law principle that it is the power and duty of any citizen to put a stop to a breach of the peace committed in his presence and to arrest a participant in an affray (Dig.Op. JAG, 1912, XXIV A, fn., p.124, and authorities there cited; Tillotson, Articles of War Annotated, p.145). The obvious analogy between the position of an officer of the Army and a civilian peace officer with respect to the duty of maintaining good order in their respective spheres is indicated by Winthrop in his examples of neglects to the prejudice of good order and military discipline on the part of an officer:

> "Failure to maintain discipline in his command by the suppression of disorders" (Winthrop's Military Law and Precedents Reprint, p.726).

In the opinion of the Board of Review the failure of an officer to endeavor to the utmost by reasonable means to stop a fight

between soldiers, at which he is present, to quell the disorder and to separate and arrest the participants is a neglect to the prejudice of good order and military discipline, if not also conduct of a nature to bring discredit upon the military service, in violation of Article of War 96. The Specification clearly states an offense.

b. The evidence shows that accused was present at a public cafe, engaged in a drinking bout with enlisted men of his company. A soldier precipitated a disturbance by tearing a poster off the wall, after which with two companions, he endeavored to start a fight with two other soldiers accompanied by French girls, whom they forced from the cafe. Thereafter a group formed around the bar where Master Sergeants Healy and Sutton stood and two soldiers, evidently of accused's company, threatened in loud tones to throw Sutton out of the cafe. Although accused was the only officer present and could clearly see and hear the whole affair, he made no attempt to intervene, even after Healy warned him to control his men in order to avert a "lot of trouble". Accused's attitude was shown in his reply that Healy had better mind his "own god-damn business". Healy's fears were proved justified by the fist blows which Sutton then received from the soldiers who had threatened him. When the fight, which concentrated upon Sutton, moved outdoors, accused followed the group and was the last to leave the cafe. Even after Healy, standing directly in front of accused, grasped Sutton who was bleeding from face and head injuries and asked that "he take a good look at what his men did", accused took no steps to quell the disorder or to arrest the participants, but merely argued and mumbled. When urged by his men to fight with Healy, accused evidently started to remove his jacket.

The fact that accused was present at the scene drinking with enlisted men and was thus guilty of prejudicial disorder in violation of Article of War 96 (CM ETO 6235, Leonard, and authorities therein cited), cannot excuse or extenuate his failure to use his utmost endeavor to stop the fight. His guilt of the Specification was abundantly proved.

6. a. The record shows (R2) that the trial took place only four days after the charges were served on accused. He was asked if he objected to trial at this time and replied in the negative (R3). The record of trial does not indicate that his substantial rights were prejudiced in any degree. Due process of law was duly observed (CM ETO 4004, Best; and cases cited in CM ETO 4564, Woods, Jr.).

b. Upon examination of Healy by the president of the court, the witness testified that he read a report of investigation of Sutton's line of duty status by the surgeon at the 99th General Hospital. The president asked the witness what the report said, whereupon he testified:

> "I don't remember the technical language but it stated the cut extended from the lobe of the ear into the fact into the mucuous membrane and had severed several nerves and a gland. I don't remember the name of the gland" (R19).

This testimony was inadmissible in the absence of evidence that the report could not be produced and should not have been elicited by the interrogator, particularly in view of his position as president of the court. Any objection to the testimony, however, might properly be regarded as waived by the failure of the defense to assert the same (MCM, 1928, par.116a, p.120). Moreover, the witness had previously described Sutton's injury in his testimony. It does not appear that accused's substantial rights were injuriously affected.

7. The charge sheet shows that accused is 31 years six months of age and had the following service: enlisted in National Guard 5 November 1933; inducted into active Federal service 1 April 1941 with Headquarters Company, 1st Battalion, 183rd Field Artillery (National Guard); graduated from Officer Candidate School 23 May 1942 as a second lieutenant.

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

9. A sentence of dismissal is authorized upon a conviction of Article of War 96.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 23 FEB 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant CHESTER R. GUY (O-1573246), 489th Quartermaster Depot Supply Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 7001. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 7001).

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

(Sentence ordered executed. GCMO 57, ETO, 1 Mar 1945.)

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

BOARD OF REVIEW NO. 1

21 FEB 1945

CM ETO 7032

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Molsheim, France, 12 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private GLENN A. BARKER (36764639), Company F, 30th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private GLENN A. BARKER, Company "F", 30th Infantry, did, at or near Eloyes, France, on or about 10 October 1944 desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he was apprehended at or near Marseille, France, on or about 9 November 1944.

Specification 2: In that * * * did, at or near Bult, France, on or about 19 November 1944 desert the service of the United States by

absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he was apprehended at or near Bult, France, on or about 20 November 1944.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and 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 "remainder" of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution summarizes as follows:

Specification 1

On 10 October 1944 accused was en route from a hospital to his unit, Company F, 30th Infantry. He reached the Service Company of the regiment, then stationed at or near the town of Eloyes, France, and was to ride from there to Company F on a ration truck. He was informed as to this mode of travel (R6,7). (The towns of Eloyes and Le Tholy, France, are in close proximity (R15)). Accused requested the clerk of Company F, then stationed with the Service Company, to issue him a pair of shoes. The clerk referred him to the supply sergeant who was with the Battalion S-4 (R7). Accused, with permission of the clerk, then went to the kitchen for coffee. When the ration truck arrived the clerk could not find accused and did not see him again until the evening of 19 November when he encountered him in the orderly room of the company at Bult, France (R9). The supply sergeant testified that on 10-11 October accused did not come to him and request issuance of shoes (R12,13). On 10-11 October Company F was engaged in active front-line operations against the enemy (R11,13,16). Accused was not present with his company from 10 October to 9 November and permission had not been granted him to be absent (R16). An extract copy of the morning report of the company dated 24 October 1944 was admitted in evidence without objection (R14,15; Pros.Ex.A). It shows the following entry as to accused:

"Fr hosp unk LD NBC to reasgd to AWOL sc 10 Oct."

In a pre-trial voluntary statement made to the investigating officer, accused stated:

> "On or about 10 October 1944, I was returning from the hospital back to the Company. I had very poor shoes on and needed a new pair. I went back to the town of Eloyes, France, where I found the Company Clerk, and he told me that Sgt Rankin, the Supply Sgt of the Company, would have to get the shoes for me. I got to thinking of the artillery up there and decided not to go back. I went to Remiremont, France, and from there to Marseille, France, where I stayed until I was picked up by the MP's on the 9th of November 1944" (R21; Pros. Ex.D).

Specification 2

On 19 November 1944, Company F was in a bivouac area at Bult, France, 15 kilometers from the front lines. At 1900 hours it commenced to move forward to make a crossing of the Meurthe river. It was an active operation against the enemy which resulted in a definite "break through" of his line. The attack was scheduled to commence early on the morning of 20 November (R9,13,14,17,18).

Accused appeared at the orderly room of the company on the afternoon of 19 November (R8). He drew clothing and equipment from the company supply sergeant (R13). The executive officer of the company talked with accused (R17). In the evening of 19 November Company F loaded its vehicles and moved forward toward the Meurthe river. Immediately before loading operations commenced, accused was present with his company (R17). When the company reached the river about 0300 hours, 20 November, a few shells from the enemy fell on it. The first sergeant of the company checked with the platoon sergeants and accused was reported as missing and he could not be found. He had no authority to leave the company (R17-19).

An extract copy of the morning report of Company F of 28 November, admitted in evidence without objection (R20; Pros.Ex.B), shows the following with respect to accused:

> "Fr AWOL sc 19 Nov. to ar in Regt'l Stockade sc 21 Nov."

The extra-judicial voluntary statement of accused (Pros.Ex.D) contains the following relevant statement:

"I was returned back to the Company, on the 19th of November 1944. When the Company loaded on the trucks, I got on with the platoon and went as far as an intersection when the truck stopped. I got off. I told no one that I was getting off. I caught a ride with a TD and went with them. The next day, they turned me over to the Division MP's" (R21,22; Pros.Ex.D).

4. After an explanation of his rights, accused elected to remain silent and presented no evidence in defense (R22,23).

5. All of the elements of the offenses alleged were proved beyond reasonable doubt. Accused deliberately absented himself without authority from his company on both occasions when he learned that he was about to join in active combat. That he desired to avoid the hazards and perils of battle is the only reasonable conclusion which can be drawn from his conduct. Substantial competent evidence sustains the findings of the court as to both specifications (CM ETO 4054, Carey et al; CM ETO 5393, Leach; CM ETO 5565, Fendorak.

6. The charge sheet shows that accused is 23 years of age. He was inducted 6 August 1943 to serve for the duration of the war plus six months. He had no prior service.

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

8. 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 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

21 FEB 1945

CM ETO 7047

UNITED STATES	VIII CORPS
v.	
Private WALTER D. GAITHER (34552516), Battery "C", 333rd Field Artillery Battalion	Trial by GCM, convened at Bastogne, Belgium, 15, 16 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years, United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. Confinement in a penitentiary is authorized for the offense of taking and using without the consent of the owner, a motor vehicle, for the profit, use or purpose of the taker (AW 42; District of Columbia Code, sec.22-2204 (6:62)). However as accused is under 25 years of age and the sentence is for not more than ten years the place of confinement should be changed to the Federal Reformatory, Chillicothe, Ohio (Cir.291, WD, 10 Nov.1943, sec.V, par.3a, as amended by Cir.25, WD, 22 Jan.1945, sec.II).

Judge Advocate

Judge Advocate

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 19 MAY 1945

CM ETO 7078

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private ARTHUR L. JONES (34411490), Company B, 356th Engineer General Service Regiment	Trial by GCM, convened at Granville, Manche, France, 12 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 Private Arthur L. Jones, Company "B", 356th Engineer General Service Regiment, did, at Viessoix, Calvados, France, on or about 17 October 1944 forcibly and feloniously, against her will, have carnal knowledge of Madame Madeleine Porquet, Vaudry, Calvados, France.

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

3. Prosecution's evidence and also the testimony of the defendant proved that at the time and place alleged three separate and distinct acts of intercourse occurred between accused and Madame Porquet. The situation thus presented is governed by the following proposition:

> "It is generally held that, where the indictment charges but a single act and two or more are disclosed by the evidence, the prosecution should be compelled, on motion of defendant, to elect on which one it will rely.
> * * *
> Where different acts of intercourse are introduced in evidence and no motion for election is made, the trial court should, of its own motion, require the prosecution to elect which act it seeks to rely on, or the court should treat the first act as to which the state introduces evidence as the act it elects to rely on, and should instruct the jury to confine itself to such evidence, and to consider the evidence of the other acts merely as corroboration. Too, where no motion is made to compel the prosecution to elect, defendant cannot complain on appeal because no actual election was made, it being presumed in such a case that the prosecution elected to stand by the offense first shown by the evidence and that the evidence of the other acts was introduced to corroborate and explain the evidence of the act charged" (52 C.J., sec.138, pp. 1106,1107).

Therefore, the findings of accused's guilt will depend upon the evidence relevant to and surrounding the first act of intercourse. The only pertinent inquiry required by the record of trial is whether Madam Porquet consented to this particular act of intercourse or whether she submitted under fear of her own life or of bodily harm. On this issue the evidence of the prosecution and of the defense is in conflict.

> "There is a difference between consent and submission; every consent involves submission, but it by no means follows that a mere submission involves consent * * * " (52 CJ, sec.26, pp.1017).

> "Consent, however reluctant, negatives rape; but when the woman is insensible through fright or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape" (1 Wharton's Criminal Law(12th Ed.1932), sec.701, p.942).

The question whether the victim, without intimidation of any kind, fully consented to the act of intercourse or whether it was committed by accused by force, violence, terrorization and against her will, was a question of fact within the exclusive province of the court. In the instant case there is substantial evidence that Madam Porquet was overcome by fear of death or bodily harm and that the submission of her body to the lust of accused was not a free, voluntary act. Under such state of the evidence the finding of the court, notwithstanding accused's statements to the contrary, will not be disturbed by the Board of Review on appellate review (CM ETO 3740, Sanders,et al; CM ETO 3933, Ferguson, et al; CM ETO 4194, Scott; CM ETO 5363, Skinner; CM ETO 6042, Dalton).

4. The charge sheet shows the accused is 26 years 4 months of age. He was inducted 29 August 1942 at Fort Benning, Georgia 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 of the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence.

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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).

_____ 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 FEB 1945

CM ETO 7086

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, 18 January 1945.
Private (formerly Private First Class) EMILLIO DELL AMURA (31316192), Company I, 13th Infantry	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, SHERMAN and STEVENS, Judge Advocates

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

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

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

Specification: In that Private Emillio Dell Amura, Company I, Thirteenth Infantry, then Private First Class, did, without proper leave, absent himself from his organization in the vicinity of Bergstein, Germany, from about 15 December 1944, to about 23 December 1944.

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

Specification: In that Private Emillio Dell Amura, Company I, Thirteenth Infantry, did, in the

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> vicinity of Brandenberg, Germany, on or about 1730, 3 January 1945, desert the service of the United States by absenting himself 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 until he surrendered himself in the rear at I Company Kitchen, Thirteenth Infantry, in the vicinity of Klienhau, Germany, on or about 2100, 3 January 1945.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and 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 period of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Charge I and Specification. Accused's guilt of absence without leave from his organization from 15 December 1944 to 23 December 1944 was established beyond all reasonable doubt.

4. Charge II and Specification. Prosecution's evidence supporting this charge summarizes as follows:

On 3 January 1945, Company I, 13th Infantry, was located about 1800 yards from the enemy lines at coordinates 065342, map of Rideggen, Sheet No. 5304 Germany, scale 1/25000 (R16). Accused at about 1000 hours on said date was taken by his squad leader, Sergeant Theodore Keyes, to the regimental S-1 who informed him that he was to be tried by a special court-martial for a previous offense, but in the interim he was returned to the company for full duty. On the way to the company accused said to Sergeant Keyes:

> "_____the special, I want a general court. All they will do with a special is take my money away from me, I would rather have a general" (R9).

Accused and his squad leader returned to the company (R9) and with

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three other enlisted men were stationed in the basement of a building situated about 450 to 500 yards from the area of accused's squad. Due to heavy artillery, machine gun and mortar fire the squad leader, accused and other enlisted men remained in the building all day (R9,11, 13).

The company commander, acting pursuant to directions of his battalion commander, during the afternoon of 3 January issued orders directing Company I to relieve the 8th Reconnaissance Group in the front lines that evening, and at 1700 hours directed that the movement of the company would commence at 1900 hours (R17). Accused's squad leader received such order, promptly communicated the same to accused and other members of the group and directed them to pack their equipment (R10,13). At 1730 hours Sergeant Keyes, accused and the other soldiers left the building to proceed to the squad area. It was exceedingly dark. Accused was last seen by Keyes as he came out of the building. When the group arrived at the squad area accused was missing. A limited search of the building and area failed to reveal accused. He had no authority to absent himself (R10,11,13,14,17). At 2100 hours on 3 January accused appeared at the company kitchen which was located in the field train area in the Hurtgen Forest (R15).

5. After his rights were explained, accused in an unsworn statement asserted that he went to the kitchen in order to received from Staff Sergeant Charles Pierce an explanation of his special court-martial papers (R23). He denied that he had stated to Keyes that "he wanted a general court" (R24).

6. While the evidence is not as explicit as desirable with respect to the location of the company kitchen, it is sufficient to support the inference that it was situate a considerable distance from the area of accused's squad. It was located in the "Hurtgen forest * * * in the field train" area. In any event accused's duty required him to be in his squad area at 1730 hours preparatory to move into the front lines with his company. He seized the opportunity afforded him by the movement of Sergeant Keyes' group from the building to the squad area to go, without permission, to the company kitchen where he had no authority to be. His "place of duty" was the squad area; not the kitchen. One and one half hours intervened between the time he left his group until he appeared at the kitchen, during which time the company moved to the line of battle. There can be no question that accused realized he would face front line perils and hazards that night. He had been under enemy fire all day and therefore knew the enemy was in near proximity. From this body of evidence the court was justified in drawing the inference that he deliberately absented himself from his squad to avoid hazardous duty in the front lines. His guilt of the offense charged was fully proved (CM ETO 2473, Cantwell; CM ETO 4054, Carey et al; CM ETO 5293, Killen)

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7. The charge sheet shows that accused is 19 years of age. He was inducted 13 February 1943 to serve for the duration of the war plus six months. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally 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). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4) and 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1 23 FEB 1945

CM ETO 7148

U N I T E D S T A T E S	)	3RD INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Molsheim,
	)	France, 19 December 1944. Sentence:
Private AMIEDIO V. GIOMBETTI	)	Dishonorable discharge, total for-
(31005452), Company L,	)	feitures and confinement at hard
7th Infantry	)	labor for 50 years. Eastern Branch,
	)	United States Disciplinary Barracks,
	)	Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Amiedio V. Giombetti, Company "L" 7th Infantry did, near Pozzuoli, Italy, on or about 7 August 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he surrendered himself to military authorities on or about 19 September 1944.

Specification 2: In that * * * did, near Domfaing, France, on or about 6 October 1944, desert the service of the United States, by absenting

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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 Marseille, France, on or about 22 October 1944.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the Charge and specifications thereunder. 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 labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to 50 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. a. Specification 1: On 6 August 1944 Company L, 7th Infantry, was stationed at Pozzuoli, Italy. Accused was a member of the 3rd Platoon of the company (R12). Prior to that date the company received instructions in amphibious warfare. Its vehicles had been waterproofed and waterproof gas masks had been issued to the personnel (R13,15). Accused was issued a pass on that date. Under standard operationg procedure of the company the holder of a pass was required to return bo his company by reveille the next morning (R15). Accused did not return on the morning of 7 August (R13,15,16) and was shown on the company morning report as absent without leave on said date (R10; Pros.Ex.1). In an extra judicial written statement voluntarily given in the pre-trial investigation, accused stated:

"On 6 August 1944 at Pozzouli, Italy, after a month of Amphibious Training, I left my Company because I wanted a rest from soldiering. When I left on 6 August 1944 I knew we had been training for combat and would return to combat. I stayed away from my Company till about 15 Sept. 1944 when I turned in to M.P.'s in Naples" (R20; Pros.Ex.2).

The company thereafter made an amphibious landing on the shores of southern France (R16). The court and the Board of Review may take judicial notice of the historic fact that the first increment of American troops landed on the shores of southern France between Marseille and Nice on 15 August 1944 (MCM, 1928, par.125, p.134; Neely v. Henkel, 180 U.S. 109, 45 L.Ed. 115; 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).

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The evidence in the case, supplemented by accused's statement, was of such substantial nature as to permit the court to infer that accused, with full knowledge that his company would participate in the expedition to France at an early date, deliberately absented himself from his organization in order to avoid such hazardous duty. All elements of the offense charged were proved (CM ETO 2473, Cantwell and authorities therein cited; CM ETO 4054, Carey et al).

b. Specification 2: Accused's voluntary pre-trial statement (R20; Pros.Ex.2) also contained the following:

> "On 6 Oct. 1944 I had been returned to my Regiment in Vagney, France, When I returned I knew the company was in the lines but I left again that day because I couldn't stand the artillery fire. On about 10 November I again turned in at Marsailles, France and was brought to the 7th Inf. Stockade on 8 December 1944".

On 6 October 1944, Company L, 7th Infantry, occupied a defense position near Vagney, France, and was under heavy artillery fire (R21). Vagney is near Domfaing, France (R22). Accused's absence from his company without authority on 6 October was shown by the company morning report (R18; Pros.Ex.1). His pre-trial extra judicial statement (Pros. Ex.2) may therefore be considered in determining his guilt. The above-quoted excerpt therefrom, when considered with evidence of Company L's tactical position on 6 August, obviously convicts accused of the offense charged (See authorities quoted supra, par.3a).

4. The charge sheet shows that accused is 28 year 9 months of age. He was inducted at Worcester, Massachusetts, 1 March 1941, to serve for one year. His service period is governed by the Service Extension Act of 1941. He had no prior service.

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

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,

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Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sep. 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2 3 APR 1945

CM ETO 7153

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Molsheim, France, 19 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JAMES E. SEITZ (19048854), Company L, 7th Infantry	

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 Charge and specifications:

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private James E. Seitz, Company "L" 7th Infantry did, near Domfaing, France, on or about 20 October 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he surrendered himself to his company on or about 27 October 1944.

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Specification 2: In that * * * near Les Rouge Eaux, France, on or about 30 October 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he came into military control on or about 7 December 1944.

He pleaded not guilty. The court amended Specification 2 so that the closing phrase reads "at a time and place unknown". (R17).All the members of the court present when the vote was taken concurring, he was found guilty of the Charge and both specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 20 October 1944 accused was a member of Company L, 7th Infantry, which organization, on this date, moved from Eloyes to an area near Domfaing, France (R9,11,12). Accused was present with his company during this movement (R10). His company moved into an assembly area and was ready to attack with the 45th Division(R10). T/5 Martin Goldberg, the company clerk, who had the duty to keep a check and to make a report of all present and absent, wounded or killed, testified that the enemy "threw shells in continuously" and that L Company suffered three or four casualties while in the assembly area prior to the attack (R9,10,11). Before moving out the company was reformed by platoons and when they moved out to attack the enemy, accused was absent. Goldberg made a search for him throughout the area. He "looked" and "yelled" for accused but did not find him (R10). He was next seen when he "returned to duty" on 27 October 1944 (R10,11). An extract copy of the morning report of Company L, 7th Infantry was received in evidence showing accused's absence without leave from his organization on 20 October 1944 and his return to military control on 27 October 1944, as alleged (R8; Pros.Ex.A).

On 30 October 1944, Company L was located near Les Rouge Eaux, France and was preparing to again attack the enemy (R11,12). The company moved out in attack towards Maramosa, France and ran into heavy fire from "flack wagons, SP guns, mortars and machine guns" (R11). Although the number of casualties in this engagement

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is not shown, the company commander was wounded and the company considerably disorganized by enemy action (R11). Accused was present with his company prior to the attack but missing when a personnel check was made subsequent to the battle (R11). He was not wounded and his absence was unauthorized (R8,11). He was next seen by T/5 Goldberg on 19 December 1944 (R12). An extract copy of the morning report was introduced showing his absence from military duty from 30 October until 8 December 1944 (R8; Pros.Ex.A).

4. After an explanation of his rights as a witness, accused elected to make an unsworn statement, through counsel, which statement reads as follows:

> "He joined the 3rd Division on February 6, 1944 and was assigned to 'I' Company of the 15th Infantry. At the time the accused joined the 3rd Division it was in combat on the Anzio Beachhead. The accused served in the capacity of a squad leader in that company throughout the campaign on the Anzio Beachhead. He made the push to Rome from the Anzio Beachhead with the 15th Regiment. The accused was then transferred to the 7th Infantry Service Company and served in the capacity of Supply Sergeant until the regular replacement arrived for that TO vacancy. He was then assigned to 'L' Company, a rifle company in the 7th Infantry during the first week of September 1944, and fought with that company in the capacity of a rifleman throughout the remainder of the campaign in Southern France. The accused has never been AWOL. There are no previous convictions whatsoever in this case; in fact, this accused has never before appeared before any type of military court whatsoever"(R16,17).

No witness appeared on behalf of accused and, after introduction of the above statement, the defense rested (R17).

5. Competent uncontradicted evidence establishes that accused absented himself withoutproper leave from his organization on 20 October 1944 and remained in unauthorized absence until he voluntarily returned to his company on 27 October 1944. And that on 30 October he again absented himself without leave from his organization and that he remained absent until he returned to military control at a time and place unknown. At the time of his first

absence, his organization had moved to an assembly area and reformed preparatory to joining the 45th Infantry Division in an attack against the enemy, near Domfaing, France. Their position was then being shelled "continuously" and the company suffered casualties. At the time accused absented himself on the second occasion, his company was again preparing to move out in attack against the enemy. This time the movement was towards Maramosa, France, when the company "ran into" heavy fire from enemy "flack wagons, SP guns, mortar and machine guns". As a result of this engagement accused's company commander was wounded and the company considerably disorganized. Prior to each of these engagements accused was present with his company but absent therefrom during and subsequent to the battles. His absence was unauthorized. Under such circumstances the court was fully justified in finding that on each occasion accused knew that an attack against the enemy was about to be made and that he absented himself with the specific intent to avoid such hazardous duty, within the meaning of Article of War 58 (CM ETO 4743,Gotschall; CM ETO 6093, Ingersoll; CM ETO 6177, Transeau).

6. The charge sheet shows that accused is 31 years of age, and that he enlisted on 28 September 1940 at Fort MacArthur, California. 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 (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).

[signature] Judge Advocate

(SICK IN QUARTERS) Judge Advocate

[signature] Judge Advocate

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

BOARD OF REVIEW NO. 1

16 FEB 1945

CM ETO 7189

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, 31 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private CHESTER A. HENDERSHOT (39209008), Company C, 13th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Chester A. Hendershot, Company C, Thirteenth Infantry, did, in the vicinity of Brandenberg, Germany, on or about 24 December 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 Verviers, Belgium, on or about 3 January 1945.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of

the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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 showed that on 24 December 1944 accused was a member of the 1st Squad, 3rd Platoon, Company C, 13th Infantry (R9). On the morning of said date the company was attached in support of the 121st Infantry and was located in a wooded area in the vicinity of Brandenberg, Germany (R5). During the night of 23-24 December Company C had been subjected to enemy artillery fire. Probably a dozen rounds fell during the night (R8) at a distance of 200 to 400 yards from the company area (R6,11). Machine-gun fire could be heard in the distance. The enemy was located 700 or 800 yards from the platoon (R11). At 0600 hours 24 December, the company commander issued an order to the commander of accused's platoon that an attack on the enemy would commence at 0830 hours. The platoon commander repeated the order to his platoon sergeants and squad leaders about 0700 hours (R5-7). Accused had been on guard during the night, but was selected by his squad leader to become a member of a detail which would proceed a distance estimated by witnesses to be from 400 to 800 yards to the rear to secure rations for the platoon's breakfast (R8-10). He left the platoon in a detail of five men and proceeded to the ration point (R12,14,15,19). He did not return to the platoon from the mission (R10,14,19). A search of the platoon area failed to reveal him (R16). The company attacked at about 0830 hours and encountered the enemy about 600 or 700 yards from the line of departure (R11,15). The accused voluntarily surrendered himself to the military police on 3 January 1945 at Verviers, Belgium (R20), which is 35 to 40 miles distant from Brandenberg, Germany (R19).

4. Accused, as a witness in his own behalf, stated that he had been placed on the ration detail at 0530 hours 24 December; that he proceeded to the ration point with the detail but that when he reached it he "just kept on going. I didn't stop, sir". He went to Verviers, Belgium, with the intention of remaining a few days in order to rest (R23). He admitted he absented himself without leave (R24), but asserted that he did not consider the platoon a hazardous place (R24) and did not leave it to avoid danger (R23). Verviers, Belgium, was in the rear of the platoon position. The last enemy shell came into the platoon area about 1500 hours on 23 December and there was harassing fire from the enemy on the evening of said date (R24). Accused testified that when his squad leader placed him on the ration detail he did not inform him of either an alert or attack order (R23).

5. The evidence is clear and positive that on the morning of 24 December 1944, at the time accused left the platoon for the ration point, his platoon was under orders to attack the enemy which was located about 700 or 800 yards from the platoon area; that when he arrived at the ration point he left the detail without authority and thereafter remained absent for 10 days, after which he surrendered to military authorities at Verviers, Belgium, 35 or 40 miles distant from the platoon's position on 24 December. Two of the fundamental elements of the offense charged were therefore established without contradiction (CM ETO 2432, Durie; CM ETO 2481, Newton). With respect to accused's knowledge of the imminence of the attack, his squad leader testified that at the time he placed accused on the ration detail he informed him that he was alerted to move and to prepare his bedding roll (R11,12). Private First Class James E. Henderson, a member of the ration detail, stated that the squad leader's order given prior to departure of the detail was for the detail to prepare their rolls as the platoon was to attack at 0830 hours (R13,15). Private William C. Schaff, another member of the ration detail, asserted the squad leader gave the detail an order to "roll up our rolls" before it departed and that he considered such order an attack order (R18,20). Private Elmore Seders stated the attack order was given after breakfast (R21). Accused denied that the squad leader gave him either an alert or attack order (R23).

The question whether accused was given actual notice as to the exact hour of the attack is relevant to the issue but is not wholly determinative. The over-all situation of the platoon must also be considered. It is manifest that the enemy was only 700 or 800 yards distant from it; that during the night the platoon had been under artillery fire and small-arms fire was heard in the vicinity. Accused and his unit were obviously on the front line confronting the enemy. It was not in either a reserve or a rest area. Under these circumstances a question of fact for determination of the court was presented (CM ETO 1432, Good; CM ETO 1589, Heppding; CM ETO 5293, Killen). The summary above given is convincing that there is substantial evidence to support the court's finding that accused knew when he left the ration detail that his platoon would within a short period of time attack the enemy. The question whether accused entertained the specific intent to avoid the hazardous duty which he knew was awaiting him was also a question of fact for the court. The evidence is certainly adequate to support its finding on this issue. No other inference was possible under the circumstances revealed (CM ETO 2473, Cantwell and authorities therein cited; CM ETO 5293, Killen, supra). Accused's guilt was proved beyond reasonable doubt.

6. The charge sheet shows that accused is 19 years and two months of age. He was inducted 7 June 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 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 Sep 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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BY CARL E. WILLIAMSON, LT. COL.,
JAGC, ASST EXEC ON 20 MAY 54