E. T. O.

BOARD

OF

REVIEW

OPINIONS

CM ETO 15217

CM ETO 16479

VOLS. 29-30

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

Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 29 B.R. (ETO)

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CM ETO 15217 - CM ETO 15787

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Office of The Judge Advocate General

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

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RESTRICTED

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

15 SEP 1945

CM ETO 15217

UNITED STATES	5TH INFANTRY DIVISION
v.	Trial by GCM, convened at Deggendorf, Germany, 8 June 1945.
Private First Class RAYMOND J. NOLAN (31285240), Company L, 2nd Infantry	Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for one year. Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France.

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

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater 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 opinion, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Raymond J. Nolan, Company L, 2d Infantry, did, at or near Langscheid, Germany, on or about 12 April 1945, by his gross negligence in handling a firearm, to wit, a pistol, feloniously and unlawfully kill Private Arthur H. Thompson, Sr, a human being, by shooting him in the abdomen with a pistol.

(2)

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of one year. The reviewing authority approved the sentence and ordered its execution, but suspended the execution of that portion thereof adjudging dishonorable discharge until the accused's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 143, Headquarters 5th Infantry Division, 9 July 1945.

3. The evidence of the prosecution showed substantially the following: On the evening of 12 April 1945, accused's company was awaiting orders to resume an attack (R5). Accused, three other soldiers (including deceased Thompson) and a French civilian were in a room together. Accused displayed a French caliber 7.65 pistol to the others. As he began to place it in his hip pocket, it discharged and wounded his hand. The bullet was thereby deflected and entered deceased's abdomen. The pistol was not aimed at deceased, but when accused brought it back "it just naturally pointed in that direction" (R8,12,13,14). It was stipulated that Thompson's death resulted from the bullet wound (R16). Neither accused nor the others had been drinking (R9,11,14). Accused and deceased were good friends and had not been known to quarrel (R9,11, 14). After the shooting, accused "cried and walked the floor" (R14).

4. For the defense, accused's platoon leader testified that accused had a combat efficiency rating of excellent, had always been friendly with the other men, and that he had never seen him intoxicated (R16-17). After having been advised of his rights, accused elected to testify in his own behalf (R17). With reference to the discharge of the pistol, he testified (R18):

> "I went to transfer a pistol I have in my pocket to my hip pocket before going on outpost. As I started doing this, we started talking about it and they said it was different from any gun that they have ever seen before. As I started to lower it, it was discharged and hit me in the hand [and hit deceased]".

He and deceased had been "very good friends" (R18). His company was in combat and it was normal to carry a shell in the chamber (R19). The M-1 (rifle) was his assigned weapon but this pistol had been issued to him when he went "forward or into the line" (R20).

5. The offense alleged is involuntary manslaughter. This offense may result from a

"homicide unintentionally caused in the commission of an unlawful act not amounting to a felony . . . or by culpable negligence in performing a lawful act" (MCM, 1928, par.149a, p.165-166).

Here it was neither alleged nor proved that an unlawful act was committed; on the contrary, the uncontroverted evidence showed that accused's possession and carrying of the weapon were directly authorized in the circumstances. In finding accused guilty, the court determined that he had been guilty of gross or culpable negligence in performing a lawful act, viz., handling a firearm. Wherein did this negligence lie?

In a leading case on the subject (CM 240043, Vislan, 25 B.R. 349 (1943)), accused was preceding deceased up a hill and was swinging his rifle from side to side in a position of port arms. It discharged, killing deceased. In holding the record legally insufficient to support a finding of guilty of involuntary manslaughter, the Board of Review said:

"Involuntary manslaughter includes homicide unintentionally caused by culpable negligence in performing a lawful act. Instances of culpable negligence in performing a lawful act are: Negligently conducting target practice so that the bullets go in the direction of an inhabited house within range, and pointing a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be discharged (MCM, 1928, par.149a). But there is a substantial difference between the instances cited, and what the evidence shows that accused did. One who fires a rifle must exercise extreme diligence to know that nobody is within the line of fire, and one who voluntarily points a rifle at some one else is under the special duty to know that it is not loaded. Accused did not intentionally fire his rifle and did not point it; the most that can be said is that he handled it carelessly . . . Simple negligence is not sufficient to convert a homicide into involuntary manslaughter; there must be criminal or gross (culpable) negligence".

This language applies with equal force to the present case, where again accused neither pointed his pistol nor fired it.

(4)

It is uniformly held that the degree of negligence required to impose criminal liability is higher than that needed to establish negligence upon a mere civil issue (29 CJ, sec.141, p.1154). Whether negligence is culpable, that is, of a sort which is a crime and which authorizes penal punishment (State v. Custer, 129 Kan. 381, 282 P.1071, 57 ALR 909 (1929), is ordinarily a question for a court-martial in its capacity as a fact-finding body; however, it may become a question of law when it is so slight as not to meet the required standard (CM ETO 1414, Elia, citing People v. Angelo, 246 NY 451, 159 NE 394). In the present case, the cause of the discharge is entirely unexplained. No evidence of negligence in any degree is contained in the record except such as may be inferred from the discharge itself. The same situation exists as did in the Elia case (supra), where it was said,

> "It is even doubtful whether the record contains evidence to justify a conclusion that he was guilty of that degree of simple or ordinary negligence which would support a civil judgment for damages . . . [the] evidence falls short of shocking one's sense of proper action under the circumstances which is implicit in the conception and definition of 'culpable negligence'".

The Board of Review is of the opinion that the record of trial does not contain any substantial competent evidence of culpable or gross negligence or of any facts from which it could be legitimately inferred, and that the homicide was therefore within the classification of accidental.

6. The court was legally constituted and had jurisdiction of the person and offense. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and the sentence.

Wm. F. Sumrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald K. Carroll Judge Advocate

(5)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 15 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by 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 RAYMOND J. NOLAN (31285240), Company L, 2nd Infantry.

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 of guilty and sentence so vacated be restored.

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

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

(Findings and sentence vacated. GCMO 511, USFET, 26 Oct 1945).

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

BOARD OF REVIEW NO. 1

22 SEP 1945

CM ETO 15223

U N I T E D S T A T E S	) 5TH INFANTRY DIVISION
v.	) Trial by GCM, convened at Deggendorf, Germany, 9 June 1945.
Private JOHN SKUCZAS (33490813), Company E, 10th Infantry	) Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 15 years. Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John Skuczas, Company E, 10th Infantry did, near Bastendorf, Luxembourg on or about 21 January 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat against the enemy, and did remain absent in desertion until he was returned to his organization on or about 16 February 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 13 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 25 years. The reviewing authority approved the sentence but reduced the period of confinement to 15 years and as thus modified ordered the sentence duly executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement. The proceedings were published in General Court Martial Orders No. 165, Headquarters 5th Infantry Division, APO 5, U. S. Army, 12 July 1945.

3. On 20 January 1945 accused, having been assigned to Company E, 10th Infantry, reported with replacements and men being returned to duty to the company rear command post (R4,8). He spent the night there and was seen in the vicinity the next morning at 0700 hours (R5,9). Shortly thereafter when the truck left for the forward positions, he was absent and could not be found by search (R9). On 21 January the forward echelon of the company "had just completed an attack and was occupying a sector of the front line". The tactical command post was three or four miles north of Bastendorf, Luxembourg (R4). Accused was not seen in the company again during the period alleged (R4-5). Extract copies of competent morning reports showed absence without leave from 21 January to 16 February (R11;Pros.Ex.A).

4. Accused, after the defense counsel stated that his rights as a witness had been explained to him, elected to remain silent and no evidence was introduced in his behalf (R11).

5. The difficulty with this case is that there was no showing of existing hazards at the place where accused absented himself, or of hazards then impending of which he must have known. The location of the rear command post was not shown, and the record is silent as to whether it was far removed from enemy fire or well within its range. Under operational tactics in this war, it could have been near or far from the enemy, dependent upon the situation. As to impending hazards, accused was not proven to have been told what his assignment would be, or of any combat, or where the company was. He had just been returned to the company with other replacements. The proof that the company "had just completed" an attack, was no proof that there were, after he reached the trains, signs and sounds of battle from which he must have known of its existence and progress. Exact locations of our own and enemy troops, and the amount, kind and proximity of enemy fire, would have been proper evidence. Unless we are willing to hold that assignment in any capacity to an infantry company during war is hazardous duty, and all who leave it without permission, are guilty of the cowardly offense of desertion, the case must fail. We cannot hold that proof should be so lax. The Board of Review will take judicial notice of well known historical facts, such as D-day, the battle of the Bulge and the Rhine crossing, but it cannot take notice of the day to day location and operations of companies and divisions. It

is therefore our opinion that the evidence is legally sufficient only to support conviction of absence without leave in violation of Article of War 61 (CM ETO 8358, Lape and Corderman; CM ETO 8649, Siglaski). This case is of the exact pattern of CM ETO 7532, Ramirez wherein there was no evidence of circumstances under which accused absented himself from which it could be inferred that he knew his company was exposed to the hazards of battle and that his absence was motivated by a desire to avoid them. The holdings in CM ETO 6637, Pittala, CM ETO 7032, Barker and CM ETO 8955, Mendoza are the antithesis of this and the Ramirez case. In those cases the knowledge of the several accused as to the tactical situation was clearly inferable from the evidence.

6. The charge sheet shows that the accused is 20 years 11 months of age and was inducted 10 February 1943 at Allentown, Pennsylvania, 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 only so much of the findings of guilty as involves findings of guilty of absence without leave for the period alleged in violation of Article of War 61 and the sentence.

8. The designation of the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement is proper (Ltr., Hq. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 Aug. 1945).

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Daniel K. Carroll Judge Advocate

(10)

1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½, as amended by Act 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by Act 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private JOHN SKUCZAS, (33490813), Company E, 10th Infantry.

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

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

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

(Findings of guilty of Charge and Specification, except so much thereof as involves findings of guilty of absence without leave in violation of Article of War 61, vacated. GCMO 501, USFET, 23 Oct 1945).

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(11)

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

BOARD OF REVIEW NO. 1

2 OCT 1945

CM ETO 15225

U N I T E D S T A T E S	5TH INFANTRY DIVISION
v.	Trial by GCM, convened at Freyung, Germany, 8,12 June 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 30 years. Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France.
Private CHESTER A. BARTH (36336598), Medical Detachment, 11th Infantry	

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

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

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

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

Specification: In that Private Chester A. Barth, Medical Detachment, 11th Infantry, having received a lawful command from Captain Harry S. Dion, Medical Detachment, 11th Infantry, his superior officer, to return to 3rd Platoon of Company "K" 11th Infantry and continue his duties as aid man, did, at Haller, Luxembourg on or about 24 December 1944 willfully disobey the same.

CHARGE II: Violation of the 75th Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

(12)

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

Specification: In that * * * did, at Consdorf, Luxembourg, on or about 6 February 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: servicing Company K, 11th Infantry, as a litter bearer, and did remain absent in desertion until he surrendered himself on or about 25 February 1945.

He pleaded not guilty and was found not guilty of Charge II and its Specification, and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the other charges and specifications, except for the words "25th February 1945" in the Specification of the Additional Charge, for which were substituted in the findings of guilty the words "13th February 1945". Evidence was introduced of one previous conviction by summary court for wrongful appearance in Luxembourg City without the prescribed written pass in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, but reduced the period of confinement to 30 years, and as thus modified, ordered the sentence duly executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement. The proceedings were published in General Court-Martial Orders Number 131, Headquarters 5th Infantry Division, APO 5, U. S. Army, 9 July 1945.

3. a. Specification, Charge I:

On 24 December 1944, accused was a company aid man and during an attack was given permission by his platoon leader to go to the battalion aid station (R5,15). There he was examined by the battalion surgeon and ordered to return to his platoon (R6,24,25). He refused to obey the order (R6,8,25), and went to the company command post where he persisted in his refusal to return from 1700 hours until 2200 hours (R10-12). He stayed that night at the company command post (R11), and the next morning was back at the aid station (R16). He was sent forward to his platoon at about 0800 hours on 25 December with a corporal (R16-17). Later in the day on the 25th, he was again at the aid station, and was given a direct order by the battalion surgeon to return to the platoon, which order he refused to obey (R25).

b. Specification, Additional Charge:

An extract copy of a competent morning report established

accused's original absence without leave on 6 February 1945, which, according to stipulated testimony, was terminated by return to military control on 13 February (R13-14; Pros.Ex.A). The only evidence of the tactical situation on 6 February was that the mission of the battalion was "preparing to cross the Sauer River" (R13).

4. The defense introduced testimony that accused served as a litter bearer from 27 December 1944 to 2 February 1945, and as company aid man efficiently and courageously from 23 February until the end of the war (R18-20,23). A psychiatric report of 28 March 1945, stipulated in evidence, diagnosed accused's condition "psychoneurosis, anxiety state, moderately severe" and recommended "Restoration to duty status and dropping of charges" (R21). The accused, after his rights as a witness were fully explained to him, elected to remain silent (R21).

5. The proof fully sustained the findings of guilty of Charge I and its Specification (CM ETO 6809, Reed; CM ETO 7549, Ondi). The prosecution's case was sufficiently proved as to the order of 24 December as alleged (CM ETO 2469, Tibi).

6. As to the Additional Charge and its Specification, there is no evidence of hazardous duty existing at the place where accused's unauthorized absence began, or of impending hazardous duty of which he knew at the time of his departure. There was not even proof of the location of the company. Not all absences without leave from combat troops are desertion, and circumstances must be proved from which intent to avoid hazards may be inferred. The proof is therefore insufficient to sustain desertion, and will support only absence without leave from 6 to 13 February 1945 (CM ETO 9665, Hamilton and McCormick; CM ETO 8649, Siglaski; CM ETO 8358, Lape and Corderman).

7. The charge sheet shows the accused is 24 years nine months of age and was inducted 7 May 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. Except as herein stated, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty of Charge I and its Specification and only so much of the findings of guilty of the Additional Charge and its Specification as involves a finding of guilty of absence without leave from 6 February 1945 to 13 February 1945 in violation of Article of War 61, and legally sufficient to support the sentence.

(14)

9. The penalty for willful disobedience of the order of a commissioned officer in time of war is death or such other punishment as the court-martial may direct (AW 64). The designation of the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as the place of confinement is proper (Ltr., Hqs. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 Aug.1945).

Wm. T. Simmons Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll Judge Advocate

(15)

1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½, as amended by Act 20 August 1937 (50 Stat.724; 10 USC 1522) and as further amended by Act 1 August 1942 (56 Stat.732; 10 USC 1522), is the record of trial in the case of Private CHESTER A. BARTH (36336598), Medical Detachment, 11th 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 Additional Charge and Specification, except so much thereof as involves findings of guilty of absence without leave in violation of Article of War 61, be vacated, and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings of guilty so vacated, viz: conviction of desertion in time of war, be restored.

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

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

3 Incls:

(Findings of guilty of the Additional Charge and Specification, except so much thereof as involves findings of guilty of absence without leave in violation of Articel of War 61, vacated. GCMO 506, USFET, 16 Oct 1945).

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

BOARD OF REVIEW NO. 1

CM ETO 15227

U N I T E D S T A T E S v. Private CLIFFORD C. MASON (36612760), Company A, 2nd Infantry	5TH INFANTRY DIVISION Trial by GCM, convened at Freyung, Germany, 4 June 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 20 years. Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France.

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

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater 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 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 Clifford C. Mason, Company A, 2d Infantry, did, at Schieren, Luxembourg, on or about 8 January 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and to shirk important service, to wit, holding a defensive position in the line in the vicinity of Schieren, Luxembourg, and did remain absent in desertion

(18)

until he returned to military control on or about 28 January 1945.

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

Specification: In that * * * did, without proper leave, absent himself from his organization in the vicinity of Tandel, Luxembourg, from about 30 January, 1945, to about 21 March 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of 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 term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to 20 years and as thus modified, ordered the sentence duly executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement. He designated the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement. The proceedings were published in General Court-Martial Orders Number 167, Headquarters 5th Infantry Division, APO 5, U. S. Army, 12 July 1945.

3. Accused was transferred from an antiaircraft organization to the infantry and reported to Company A, 2nd Infantry, on 31 December 1944. He went into the line in first combat 1 January 1945 which lasted for at least three days and involved holding a position. Heavy casualties resulted (R7, 11). When shelling occurred, accused was very scared, more so than most soldiers, and sought shelter in cellars, even when shells were not falling in the immediate area, while others carried on with their normal duties (R9). The company was back some distance (but within enemy range) resting on 8 January 1945, scheduled to go back into the line that evening, of which fact the company was aware (R4).

By unsworn statement in court after full warning of his rights, the accused described his actions at such time as follows:

"I went in the basement down there, and when I came out there was nobody there. So that night the shells started coming in again, and I started walking, and I walked in the woods. I got so weak I couldn't walk no more. That's the last I remember" (R11).

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Accused said that he volunteered in July to transfer to the infantry because he "wanted to go up and fight", but one day after he finally was so assigned and in an attic writing, "a shell came in and hit two of the fellows and threw me up over another fellow". On 8 January, he claimed he had no knowledge of the intended move into the line and said "But I knew they were going sometime". He surrendered to the military police (R11-12).

Extract copies of competent morning reports established the two absences without leave for the periods alleged (R7-8; Pros.Ex.A). A stipulated psychiatric report diagnosed accused's condition as follows:

> "(1) Constitutional Psychopathic State. Inadequate Personality * * * (2) Psychoneurosis, anxiety state, mild" (R10).

4. There is no question as to the sufficiency of the proof of the absences without leave, but discussion is appropriate as to his intent on 8 January to escape hazardous duty. Excluding accused's unsworn claim to have applied for infantry service six months before the offense, all the evidence in the case points towards cowardice. He admitted leaving existing hazardous duty in the presence of falling shells and his past actions under fire were those of a coward. It remains but to consider whether the Specification which described the duty as "in the line" so limited the offense alleged as to void the conviction. We think not, for two reasons: first, presence of the company under artillery fire was, under the fluid fronts of modern warfare sufficiently "in the line" to fall within the allegation (Cf: definition (5) of "line", TM 20-205, Dictionary of U.S. Army Terms, 18 Jan 1944, p.155); and secondly, accused admitted knowledge that the company was going "in the line" (in the other sense of extreme front line) inevitably sooner or later in language from which reasonable imminence of such duty will be inferred. As to the latter, we have held that it is unnecessary for the dangers sought to be avoided to be immediate or specifically known, and that intent upon the part of an infantryman in combat to avoid dangers soon to be encountered will suffice to support conviction of desertion (CM ETO 12007, Pierce; CM ETO 12619, Hatfield; CM ETO 8172, St. Dennis). These holdings apply with particular force to this case where cowardice is proven, and departure under fire admitted. It is therefore our opinion that there was substantial evidence from which the court could properly infer that the accused intended to avoid hazardous duty, and the evidence is therefore legally sufficient to sustain the conviction for the despicable offense of deserting the service of the United States in battle, for which he merits the disdain of courageous men and punishment by the country he would not serve (CM ETO 14510, Collins; CM ETO 8610, Blake; CM ETO 8519, Brimmelie; CM ETO 6637, Pittala).

5. The charge sheet shows that accused is 26 years of age and was inducted 4 January 1943 at Geneva, Illinois, to serve for the duration of the war plus six months. (His service period is governed by the Selective Service Act 18 August 1941). He had prior service in the United States Naval Reserve (V-6 from 8 December 1941 to 1 May 1942).

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

7. The penalty for desertion in time of war is death or such other punishment as the court-martial may direct (AW 58). The designation of the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement is proper (Ltr., Hqs. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 Aug 1945).

Wm. F. Burrow

~~DONALD K. CARROLL~~ Judge Advocate

EDWARD [illegible] Judge Advocate

DONALD K. CARROLL Judge Advocate

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

BOARD OF REVIEW NO. 1

22 SEP 1945

CM ETO 15233

UNITED STATES	)	5TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Vilshofen, Germany, 18 June 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 20 years. Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France.
	)	
Private First Class EUGENE J. HANLEY (32055215), Company F, 11th Infantry	)	
	)	
	)	
	)	

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

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater 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 opinion, to the Assistant Judge Advocate General in charge of said office.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Eugene J. Hanley, Company F, 11th Infantry, did, at or near Coin-Les-Curvy, France, on or about 17 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Metz, France, on or about 18 April 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and 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 80 years. The reviewing authority approved the sentence but reduced the period of confinement to 20 years, ordered the sentence as modified executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as the place of confinement. The proceedings were published by General Court-Martial Orders No. 169, Headquarters 5th Infantry Division, APO 5, U. S. Army, 12 July 1945.

3. The evidence for the prosecution was substantially as follows: The first sergeant of accused's company testified that accused was not present for duty nor did he report to the company 17 November 1944; that he did not personally make a search for accused, but that a platoon sergeant made a search and reported to him that accused was not there, and that he did not see him again until he (accused) rejoined the company after V-E Day (R4-5). The company mail orderly testified that accused did not report to the company 17 November 1945, and that he would have known if accused had, since "they" always told him when a man reported so he would know where to send his mail (R6). Without objection by the defense, an authenticated extract copy of the morning report of accused's company, containing the following entries was admitted in evidence (R7,Pros.Ex.1):

"25 April 1945
(Correction 20 Nov 44)

Hanley, Eugene J. 32055215 pfc
Fr sl sick (LD) NBC Co D 5th Med Bn Cl
sta to dy 17 Nov.
SHOULD BE
Hanley, Eugene J. 32055215 Pfc
Fr sl sick (LD) NBC Co D 5th Med Bn Clr
sta to AWOL 17 Nov 44.
Hanley, Eugene J. 32055215 Pfc
(Dy: 745) Fr dy to sl sk (LD) NBC Hosp
(Name unknown) 5 Dec. & drpd fr records,
PER SEC II CIR 69, Hq ETOUSA dated 13
Jun 1944. Non-Battle loss.

ABOVE REMARK ERRONEOUSLY ENTERED 24 DEC 1944.

Hanley, Eugene J. 32055215 Pfc
Fr AWOL to Dy 18 April 1945.

/s/ William H. Pinnell
/t/ WILLIAM H. PINNELL
WOJG USA"

4. The accused, having been fully advised of his rights, elected to remain silent and no evidence was offered by the defense (R7).

5. a. The testimony of the witnesses for the prosecution established little. The first sergeant stated that accused was not present for duty nor did he report to the organization on 17 November 1944. However, it is now shown how he knew accused had not reported nor that, in that particular organization, incoming men reported to witness or to someone else with his knowledge. Witness' only knowledge as to accused's presence for duty or absence was contained in a hearsay report from another non-commissioned officer who purportedly made a search but who did not testify, and witness thus discredited his own testimony. He further testified that he did not see accused until after V-E Day, but it is not shown that witness was himself with the company during this period.

The testimony of the mail orderly is of even less probative value. He testified that he knew accused did not report to the company 17 November because some unnamed "they" would have informed him of such reporting; "to the best of his knowledge" accused returned to the company in May, but again it is not shown that witness was himself with the organization in the interim, nor that he would have had personal knowledge of accused's presence or absence. The testimony of these two witnesses does not show beyond a reasonable doubt that accused was not present with his company on 17 November 1944 or on any other date, and it is silent on the question of his authority to be absent.

b. As none of the elements of the offense charged are elsewhere established, they must be competently shown by the extract copy of the morning report if the findings and sentence are to be sustained. This is competent evidence of the facts presented, "except as to entries obviously not based on personal knowledge" (MCM, 1928, par.117a, p.121). This case differs from the typical morning report case in that accused did not absent himself from the reporting unit (Company F, 11th Infantry). The correcting entry shows on its face that the alleged unauthorized absence was from another organization (i.e., Company D, 5th Medical Battalion). There was no duty disclosed by this record imposed upon the warrant officer who signed the morning report to have personal knowledge of the personnel assigned to this second organization, with which he is not shown to have had any official connection or, a fortiori, of their status. The lack of personal knowledge required to make such documents admissible is apparent on the face of this morning report entry and its reception into evidence was therefore erroneous (memo for the JAG 30 March 1945, Washington, D.C.).

c. This objection does not apply to the final entry of the extract which shows accused from absent without leave to duty 18 April 1945. The return to duty was to the reporting unit, and his unauthorized absence was from that unit. The warrant officer who signed this entry is presumed to be the proper officer to make this morning report for the reporting unit. This entry establishes accused's absence without leave for a portion of 18 April 1945 CM ETO 12271, Cuomo; CM ETO 9204, Simmers).

d. The trial commenced at 1105 hours on 18 June 1945, the date on which the charges were served on the accused. The defense expressly stated that it had had sufficient time to prepare the defense in the case (R3), and there is no indication in the record of trial that any of accused's substantial rights were prejudiced within the meaning of Article of War 37 (CM ETO 3475, Blackwell, et al; CM ETO 4564, Woods). The procedure however merits the severest criticism.

6. The charge sheet shows that the accused is 29 years six months of age and was inducted 27 November 1940 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. 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 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 accused was absent without leave from his organization on 18 April 1945 in violation of Article of War 61, and legally sufficient to support the sentence.

8. The designation of the Delta Disciplinary Training Center was proper (Ltr. Hqs. Theater Service Forces, European Theater, AG 252, GAP-AGO, 20 Aug. 1945).

Wm. F. Brown Judge Advocate

Edward L. Stevens Jr. Judge Advocate

Donald K. Carroll Judge Advocate

(25)

1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½, as amended by Act 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by Act 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private First Class EUGENE J. HANLEY (32055215), Company F, 11th Infantry.

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

3. In view of the reduction of the offense from desertion involving an absence without leave of 153 days to absence without leave for one day, it is recommended that the period of confinement be reduced to a term not exceeding five years. In the event that you agree with this recommendation, the inclosed forms of action and GCMO should be modified accordingly. Please return the record of trial with required copies of ~~GCMO~~.

4. It is to be noted that the Staff Judge Advocate in his review dated 8 July 1945, recommended that the sentence be disapproved, and after further consideration made the same recommendation on 12 July. The Commanding General in his action on 12 July 1945 ~~did not~~ follow this advice.

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

(Findings of guilty of Charge and Specification except so much as involves findings of guilty of absence without leave on 18 April 1945 in violation of Article of War 61 vacated. Confinement reduced to five years. GCMO 507, USFET, 16 Oct 1945).

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

BOARD OF REVIEW NO. 3

9 AUG 1945

CM ETO 15243

U N I T E D S T A T E S	45TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 45, U. S. Army, 10 July 1945.
Private PETER C. NAPOLITANO (42024318), Company G, 179th Infantry Regiment	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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 Peter C. Napolitano, Company G, 179th Infantry, did, without proper leave, absent himself from his post and duties at or near Menarmont, France, from on or about 5 March 1945 to on or about 15 March 1945.

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

Specification: In that * * * did, at or near Siltzheim, France, on or about 15 March 1945, desert the service of the United States, and did remain absent in desertion until he returned to military control at or near Munich, Germany, on or about 4 June 1945.

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He pleaded guilty of Charge I and its Specification and not guilty to Charge II and its Specification. Two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by summary court for absence without leave for about 20 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 evidence for the prosecution may be summarized as follows:

On 5 March 1945, Company G, 179th Infantry, was "in rest-in training" at Menarmont, France (R5-7). Duly authenticated extract copies of the company morning report show accused "fr duty to AWOL 5 March 45 0600" and "fr AWOL to conf Regtl Stockade 15 Mar 45" (R4; Pros.Ex.A).

On the night of 15 March 1945, while Company G was bivouaced in a woods near Zitsheim, France, Private Paul E. Crouch, company runner, received orders to report to battalion headquarters and upon reporting was ordered to take two men, one of whom was accused, to the company. Crouch took accused to a location some 30 yards from the company command post and informed him that the company was alerted and "scheduled to move any moment" (R7,8). He further informed him that the guard would probably awaken the personnel at the command post in about five minutes and that he should stay at the command post and report to the first sergeant as soon as he was awakened. Since the battalion was "fixing to move out", the witness then immediately "went back". He did not thereafter see accused until the day of trial (R7-9). The company attacked Bilesbruch the following morning, encountered severe opposition and suffered numerous casualties (R6). Duly authenticated extract copies of the company morning report show accused "fr dy to AWOL 15 Mar 45" and "From AWOL to conf Regtl Stkd eff 4 Jun 45" (R4; Pros.Ex.A).

The first sergeant of the company had known accused from and after June of 1944 and, during the time the latter was with the company, the sergeant had received no complaints from him regarding his health. Nor did the first sergeant have knowledge from any other source that accused was in ill health. However, his contacts with the accused were not extensive (R5). The company commander had known accused since December of 1944 and testified that accused "was never sick that I know of" (R7). When Crouch took accused to the company command post on the night of 15 March, accused did not complain that he was ill (R9).

4. After having been advised of his rights, accused elected to be sworn as a witness on his own behalf. He testified that he had had "stomach trouble" in civilian life and was still suffering from it when he entered the army. On or about 2 March 1945, he returned to his company through replacement channels after having spent approximately four months in a hospital. After remaining with his unit for about two days he found that his stomach was troubling him again and secured permission to report to the aid station. Upon reporting, he told the medical officer who examined him that he had been in the hospital and that his "liver was bothering me again", but the medical officer, after a cursory examination, told him that he would be returned to duty. Accused testified that, upon being told this,

> "I figured to myself that if I went somewhere alone and could watch my food I could be all right again, because this greasy food and fat in it causes my stomach to blow up and swell, and get sick. I figured if I went alone for a while some place I would pick my food, so I went AWOL" (R11).

He went to Nancy, France, where he stayed for about 10 days. His condition did not improve and, thinking that a different medical officer might be on duty upon his return he went back to his unit in order that he might secure medical treatment. When he returned, he "went" with the regimental military police and was billeted in a barn for the night. However, later that night he was ordered to report to the lieutenant in command of the military police platoon and, upon reporting, was told to "get the hell out of here". He was then taken by a military policeman to the S-1 or the S-2 office. Shortly, thereafter a runner appeared, took him some 100 or 150 yards down the road and told him "Your company is over there, I have to go back". He started in the direction in which the runner had pointed but, being "sick and nervous on account of my stomach", he decided to leave and went back to Nancy. In Nancy, he stayed at the XV Corps rest center where he remained until on or about 14 May when he surrendered himself to the military police. He was ultimately returned to his regiment after successive transfers in and out of various stockades. He was still suffering from stomach trouble at the time of trial but had not "lately" been to see a doctor. When asked whether he ever intended to desert the service of the United States he testified,

> "It never entered my mind. I volunteered to go to the Pacific. I wanted to prove it to myself and it never entered my mind to desert" (R13).

On cross-examination and examination by the court, accused testified that, while he had suffered from stomach trouble prior to coming overseas, he had never been hospitalized while in the United States, but merely "went to the aid station and laid down over night until I got better - like that". He had been to the hospital while his unit was in Italy but the medical officers there had been unable to diagnose his ailment (R19). When he again went to the hospital in October, "they took a liver function test and found my liver was bad" (R17,19). He remained in the hospital for about four months on a "low fat" diet, eating "rice and gruel mostly" (R14,18). He was then released and, after spending some time in a replacement depot, was returned to his unit (R14). He thereafter left the unit because he could not secure adequate medical attention nor a correct diet, and went to Nancy (R19). However, he was unable to obtain proper food in Nancy and, although there were aid stations and hospitals there, he decided to return to his unit because he did not want to remain absent without leave any longer and because he felt he would receive better medical attention if he returned - "Dr. Brown was there and he knew my case" (R14,18). When he returned to his unit, he again saw that he would be unable to secure adequate medical attention and he again left because he was "sick and nervous" (R15,17). He was not informed that his company was on the alert and his nervousness was caused by his stomach ailment, not because his unit was going back into action (R14,17). On his second trip to Nancy he went to the XV Corps rest center. He stated that

> "All I needed was a pass to get in there so I pulled a white piece of paper and showed it to the guard and he figured it was a pass. He just figured I was one of the boys and let me in. I couldn't get out in the daytime because I didn't have a regular pass. I had to wait until it got dark. So, I spent most of my time right there" (R19).

Good food - "steak and stuff like that" - was available at the rest center and he was able to "pick out anything that I thought was good for me" (R18,19). He also was able to secure some medical treatment while at the rest center but the medication prescribed for him did not improve his condition (R15). He stayed at the center until he "was ready to go back to my outfit" at which time, still desiring to secure proper medical attention and wanting to get back to his unit "before the war ended", he reported to an officer at the center to get transportation back to his company (R15,16). Since transportation did not appear to be available, he then surrendered himself to the military police (R15,16).

He was examined by a medical officer on 22 June 1945 but the results of this examination were not made known to him (R16). On redirect examination, accused testified that the medical examination given him on 22 June took place in a crowded room and was conducted in an extremely cursory manner (R20).

5. The record of trial clearly supports the court's findings of guilty of Charge I and its Specification.

6. The evidence adduced in support of Charge II and its specification clearly shows that accused absented himself from his organization without authority on 15 March 1945, as alleged. While he sought to explain his departure on the ground that he was unable to secure a proper diet and adequate medical treatment at his own unit, he had been returned to duty by the proper medical authorities after four months in hospital and the fact that, in his view, he needed treatment not available in his unit furnishes no justification for his absenting himself to secure such treatment in a manner decided upon and selected by him. Further, his explanation of the reason for his departure is rendered suspect by the fact that he absented himself late at night at a time when his company was alerted for movement. If accused's testimony is to be believed, he spent most of the period of his absence at a military installation, i.e., the XV Corps rest center. However, he was there without authority and concealed his true status until such time as he "was ready to go back". The Manual provides that the offense of desertion

> "is complete when the person absents himself without authority from his place of service * * * with intent not to return thereto. * * * The fact that such intent is coupled with a purpose to return provided a particular but uncertain event happens in the future, to report for duty elsewhere, or again to enlist, does not constitute a defense",

and that the

> "fact that a soldier intends to report or actually reports at another station does not * * * prevent a conviction for desertion, as such fact in connection with other circumstances may tend to establish his intention not to return to his proper place of duty" (MCM, 1928, par.130a, p.142, 144).

Here accused not only absented himself from his organization at a time when it was alerted for movement but remained absent without leave for a period of about two months and did not see fit to return until after the cessation of hostilities in this theater. Under all the circumstances shown, the court was free to disbelieve accused's explanation of his absence and to infer that either at the time of his departure or at some time during his absence he entertained the requisite intent to constitute his offense that of desertion.

7. The charge sheet shows that accused is 21 years of age and was inducted on 6 September 1943 at Syracuse, New York. He had no prior service.

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

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

B. R. Keefer Judge Advocate

Marcellus C. Sherman 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. 3 15 SEP 1945

CM ETO 15246

U N I T E D S T A T E S	79TH INFANTRY DIVISION
v.	Trial by GCM, convened at Bochum, Germany, 17 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JOHN M. WHITEHEAD (20606238), Company B, 315th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In tha t Private John M. Whitehead, Company "B" 315th Infantry did, at the vicinity of Lintfort, Germany on or about 23 March 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he returned to military control at Bochum, Westfalen, Germany on or about 26 April 1945.

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

3. The evidence for the prosecution showed that on the evening of 23 March 1945, the battalion of which accused's company was a part was to make a tactical crossing of the Rhine (R11,12). Accused was personally oriented by his squad leader as to his functions and duties during the forthcoming operation (R12). At the forward assembly area, accused was missing and could not be found despite a search (R8,10). At the time of the crossing, in which accused did not participate, some artillery and mortar fire was received (R11,12). On 26 April 1945, accused was brought to the regimental stockade (R13,14).

4. After being advised of his rights, accused elected to be sworn as a witness in his own behalf. He stated that although assigned to a military police battalion while serving in the United States, he had requested a transfer to the 79th Division because it was to be formed as an infantry unit. On his first and only day of combat, he found that he was constitutionally unable to shoot and kill the enemy. He was evacuated to the 67th Evacuation Hospital at St. Mere Eglise and then to the 96th General Hospital, where he was under observation as a psychiatric patient. He was thereafter returned to his unit through reinforcement channels. On his return, he requested a transfer to a medical detachment as a litter bearer "or anything else in which I could help out" but nothing came of his request. He attributed his inability to kill to the fact that his mother had scolded him when he was a boy after he had thrown a stone at a robin. He stated that he "must have forgotten" about this incident at the time he volunteered for duty with an infantry division. He had never worked in a psychiatric ward nor read any books on psychiatry (R16-19).

5. The circumstances under which accused absented himself clearly justified the court in finding that he absented himself with intent to avoid hazardous duty, as alleged (CM ETO 1406, Pettapiece). Whether he was legally responsible for his acts was essentially a question of fact for the court's determination, and, on the evidence here, it does not appear that the court abused its discretion

in resolving this question adversely to the accused (Cf: CM ETO 4165, Fecica).

6. The charge sheet shows that accused is 23 years of age and enlisted on 9 October 1940 at Cairo, Illinois. No prior service is shown.

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

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

B R Keefe Judge Advocate

Malcolm C. Sherman Judge Advocate

B. H. Levy Jr. Judge Advocate

Branch Office of The Judge Advocate General
with the
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BOARD OF REVIEW NO. 2 5 SEP 1945

CM ETO 15249

U N I T E D S T A T E S	71ST INFANTRY DIVISION
v.	Trial by GCM, convened at Bad Hall, Austria, 22 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class HARVEY F. CHUTNICUTT (39015680), Company F, 66th Infantry	

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

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

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

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

Specification: In that Private First Class Harvey F. Chutnicutt, Company "F", 66th Infantry, did, at Horlach, Bayern, Germany, on or about 19 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Marie Kohl.

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

Specification: In that * * * did, at Horlach, Bayern, Germany, on or about 19 April 1945, wrongfully fraternize with a resident of Germany by visiting the home of Johann Kohl not on official business.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. All of the members 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, 71st Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the Prosecution:

During the early evening of 19 April 1945 at Horlach, Germany, the accused, a soldier of Company "F", 66th Infantry Regiment (R27), entered the court yard of the house of Johann Kohl and his wife Marie, both German. He carried a rifle under his arm. Frau Kohl was in the court yard cleaning sheets. Herr Kohl came from the barn. The accused asked them for beer or wine. They replied that they had none but would boil some coffee for him. Accused with rifle in hand ordered them into their house (R7,13). The went into the kitchen. Accused removed his helmet and sat down on the couch and motioned the woman to sit beside him. She refused. The husband sat there but accused pushed him away. He grasped the wife by the hand and made her sit there and put his arm around her neck. The husband protested but ceased when the accused pointed his rifle at him. Accused then arose and pulled the wife into the living room indicating that the husband was not to follow (R8,14). He made her sit on a couch in the living room, leaned his rifle in the corner by the couch, pulled off her pants, removed his jacket and unfastened his pants, pulled her clothes up to her waist and had sexual intercourse with her (R8,9). She cried continuously for help. Finally two other American soldiers who had been summoned by the husband came into the room. The accused partially

arose. After a few words between the soldiers, the two newcomers went out. The accused then laid himself again on top of the woman. After he was "finished" he asked where there was a restaurant. She showed him one from the window and then she ran outside and hid. She had not run away before because she was afraid that he would shoot her. She had no doubt about the identify of the accused (R9). It was daylight during this entire occurrence (R11).

Herr Kohl did not follow the two into the living room because when he started to do so and started to protest, the accused threatened him by pointing his rifle at him. He thereupon went outside to get help. He solicited the aid of a neighbor and found the two soldiers, who came into the house but after a few words between the accused and the soldiers, the latter left. At one time he looked through the door while his wife was in the living room and all he could see of them was their heads--his facing and above hers (R13-14). The husband and the neighbor who was the accused come out of the house later identified him (R16,17). Accused was apprehended by an officer later that evening about 150 to 200 yards from the Kohl's house (R29).

4. Evidence for the defense:

The accused, after being fully advised of his rights as a witness elected to remain silent and introduced no evidence.

5. Discussion:

a. Charge I (Rape). Rape is defined as the unlawful carnal knowledge of a woman by force and without her consent. Any penetration of a woman's genitals is sufficient. The force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM, 1928, par.148b, p.165).

The burden of proving lack of consent is upon the prosecution. Ordinarily this is shown by evidence of resistance.

> "Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent" (MCM, ibid).

Proof of resistance, however, is not necessary if it is proved that the woman was robbed of her power to resist through fear of death or great bodily harm engendered by the accused (Wharton's Criminal Law (12th Ed. 1932), sec.701, pp.942,944; CM ETO 10742, Byrd).

In the light of the foregoing principles of law, the record of trial reveals substantial competent evidence that clearly shows that the accused, who was positively identified by three persons, unlawfully entered the home of Herr Kohl and his wife, Marie, overcame all resistance with threats of death or great bodily harm by means of his rifle, and ravished the wife. Frau Kohl's testimony proved without contradiction the carnal knowledge, the force sufficient to effect penetration, and her lack of consent. It was not necessary in view of the fear engendered in her by the accused's threats with his rifle to prove greater resistance. The evidence was therefore legally sufficient to support the charge of rape contained in Charge I and its Specification (CM ETO 10742, Byrd).

b. Charge II (Fraternization). The accused, on the evidence outlined above, has been found guilty of wrongfully fraternizing with a resident of Germany by visiting the home of Johann Kohl. To fraternize means to associate as brothers. The accused's conduct as found by the court under Charge I and as shown by the evidence could not under any stretch of the imagination be considered as brotherly toward either Herr Kohl or his wife.

> "The terms 'fraternization' and 'fraternize' as used in connection with the relationship of American soldiers and the German civilian population definitely concern friendly association and comradely social relationships. The indigenous meaning of the words deny their applications to instances wherein American soldiers inflict upon German civilians acts of violence or where the latter are victims of anti-social or criminal acts committed by the former. * * * The evidence in the instant case disclosed a course of conduct by accused that does not fall within the definition of 'fraternization'". (CM ETO 10967 Harris 1945). (Dig. Op. JAG, 1912-40, sec.454(13) p.609).

The record is therefore legally insufficient to support the findings of guilty of Charge II and its Specification.

6. The charge sheet shows the accused to be 26 years of age. He was inducted without prior service at Fort McArthur, California, on 31 December 1941.

7. The court was legally constituted and had jurisdiction of the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial except as herein noted. The Board of Review is of the opinion that the record is not legally sufficient to support the findings of guilty of Charge II and its Specification, but is legally sufficient to support the remaining findings of guilty and the sentence.

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

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

(42)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 5 SEP 1945
TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private First Class HARVEY F. CHUTNICUTT (39015680), Company F, 66th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Charge II and its specification but is legally sufficient to support the findings of guilty of the remaining Charge 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. 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 15249. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 15249).

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

(Findings of the Specifications of Charge II and of Charge II disapproved. Sentence confirmed but owing to special circumstances, commuted to dishonorable discharge total forfeitures and confinement for life. Persuant to par. 87b MCM 1928 so much of previous action dated 18 July 1945 as inconsistent with this recalled. Sentence as commuted ordered executed. GCMO 481, USFET, 28 Sept 1945).

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

BOARD OF REVIEW NO. 2

7 SEP 1945

CM ETO 15250

U N I T E D S T A T E S	90TH INFANTRY DIVISION
v.	Trial by GCM, convened at Merkers, Germany, 15 April 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania
Private WILLIAM D. JOHNSON, JR., (36639810) Headquarters Company, 357th Infantry	

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

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

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private William D. Johnson, Jr., Headquarters Company, 357th Infantry, did, at Merkers, Germany, on or about 9 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Gertrude Schmidt.

Specification 2: In that * * * did, at Merkers, Germany, on or about 9 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frieda Erbsmehl.

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 specifications. Evidence was introduced of one previous conviction by a summary court-martial for absence without leave for fifteen days, in violation of Article of War 61. All of the members of the court present at

the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, 90th 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, confirmed the sentence, but owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, and designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement. The order directing the execution of the sentence was withheld pursuant to Article of War 50½.

3. The prosecution introduced evidence substantially as follows:

On 9 April 1945, at about eleven o'clock at night, accused, a member of Headquarters Company, 357th Infantry, and a dark haired companion came into a church in Merkers, Germany, where about thirty evacuated people were sheltered (R7,13,15,43). Accused and companion were each armed with a pistol (R33). After being told there was no wine there, theyprocured a candle and went from bed to bed inquiring for a red-headed girl and appraising the occupants with such remarks as "Too young" and "Good, nice" (R10,12,15,16,17,32). They came to the bed of Mrs. Frieda Erbsmehl who begged to be let alone. The soldiers struck her, pulled at her, caught her and cut off her hair when she attempted to escape. They threw her on a bench and accused completed intercourse with her without her permission while his companion threatened her and once hit her hand with the pistol (R8,9,12,13,17,19,26,30,33). They next went to the bed of Gertrude Schmidt who refused to go to bed with accused's companion who then struck her. She tried to push them away when they tried to kiss her whereupon they pointed their pistols at her, pulled her hair and grabbed the child by the neck. She escaped and sought help whereupon she was caught and again struck by accused's companion while accused struck the one to whom she appealed for help. She again escaped to the church tower. They pulled her downstairs and threw her on a bed. She then said she would go with them thinking she could get help outside the church. Accused's companion kicked her while she was dressing and then "raped" her. Accused then succeeded in "getting into her vagina" with the assistance of his companion and eventually had an emission. She held her legs rigid. She cried prior to and during the acts of intercourse; accused held her mouth and throat shut. The accused and his companion then went through the church, kicked everything around, went to all the beds, forced people to say they were "God damned Germans", and left the church about 1:30 or 2:00 (R10,11,12,19,21,22,23). One witness testified that accused "looked and acted like he was drunk" (R14). Another that "they might be a little drunk" (R30) and still another said "Both were drunk and right from the beginning made a lot of noise" (R34).

Both complaining witnesses were examined by a medical officer less than twelve hours after the occurrence. Frieda Erbsmehl had bruises over her left hand, right leg, and left thigh, but no signs of violence

about her vagina. Gertrude Schmidt had bruises on her right knee, left leg, and knee, left ankle, right thigh, right leg and left little finger but no signs of violence about the vagina. The bruises appeared to be caused by striking with a hard object. Since both women were married, the medical officer could not determine whether or not a penetration had occurred the previous night. On the day following the occurrence, accused's rifle belt with holster, canteen, first aid pouch and packet were turned over to an officer at the church (R41). On the morning following the occurrence, accused requested another soldier, Private First Class Nagy, to look for his cartridge belt and later they went to the church but did not find the belt. While in the church, the soldier made a remark about the condition of the church and asked accused what he did, or "something to that effect", to which accused shrugged his shoulders and said "we sat around" or "something to that effect" (R40).

For further particulars, attention is invited to a more detailed summary of the facts, with specific references to the record of trial, appearing in Paragraph 5 of the Theater Staff Judge Advocate's Review attached to the record.

4. The accused, his rights as a witness having been explained to him by the Law Member, elected to be sworn and to testify in his own behalf (R46). After supper on the night in question, accused drank almost a quart of reddish liquid which he was told was cognac and wine. He met a soldier in his platoon named Monahan who seemed to be a "sensible lad" (R51). They also drank several bottles of wine in celebration of a birthday. A man who had just returned from combat started telling his experiences but accused does not remember him finishing his account. He remembers nothing about the rest of the evening since "It hit me and I was out" (R47,48). The next he remembers is that sometime during the night he came to himself and somebody was trying to talk to him. He does not know whether he was in his own bed, who it was trying to talk to him, or what they wanted. He next recalls that Sergeant Grove woke him up the next morning. They were to go on a mission and he could not find his rifle belt and helmet. Monahan said he had seen him at the church and suggested he go to the church. He asked Nagy to go with him. He recalled nothing the next morning about the previous evening except that he got drunk. He recalls seeing the two accusing witnesses when he and two other soldiers were looking for better billets. Gertrude Schmidt had invited them in, "acted happy as hell to see us", and told them to have some coffee (R47, 48,49,50). About three times before, accused has gotten so drunk that he did not know what was happening and had passed out (R52).

The defense introduced other testimony which corroborated accused's testimony as to seeing Gertrude Schmidt on 8th or 9th of April while looking for billets (R44,45). On that occasion, Gertrude Schmidt talked English slowly. The accused's platoon occupies the building next to where Gertrude Schmidt was seen on this occasion (R46).

5. The evidence appears undisputed that the accused and his companion assaulted both complaining witnesses by threatening them with pistols, by striking them, and bodily throwing them down. Both victims attempted escape by running after other means to ward off accused's advances had failed. The alleged sexual act of the accused with each victim was completed with the assistance of his companion and without cooperation of the victim. Carnal knowledge of each woman was with force and without her consent. As to Gertrude Schmidt, it appears that she, after receiving extensive brutal treatment, agreed to leave the church with accused and his companion thinking she could get help from soldiers outside the church. However much this may have appeared to be consent to an act outside the church, it is not consent to the act complained of which occurred in the church.

Evidence of penetration in each case rests on the testimony of the respective prosecuting witness. There is no evidence, direct or circumstantial, in contradiction, but, on the other hand, there is an abundance of testimony in corroboration of the attendant circumstances. The accused claims he was intoxicated on the night in question and recalls nothing after drinking at a birthday celebration until someone tried to talk to him later in the night. The prosecution's witnesses confirm the matter of intoxication but vary in their estimates of the extent. However it may be noted that accused was able to pursue the complaining witnesses when they attempted to escape; that he went from bed to bed with his soldier companion apparently looking for a red headed girl and appraising the women with respect to age and qualities of interest to him; that he was conscious of any attempted resistance offered by the church occupants and able to determine and take the necessary means to neutralize it. It was the function and duty of the court to determine whether accused knew what he was doing; its finding will not be disturbed on appelate review (CM ETO 9611, Prairiechief).

6. The charge sheet shows that accused is 20 years of age and inducted 6 February 1943 at Chicago, Illinois without prior service.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330,

Federal Criminal Code (18 USCA 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

(48)

1st Ind.

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

1. In the case of Private WILLIAM D. JOHNSON, JR., (36639810), Headquarters Company, 357th 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 15250. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15250).

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

(Sentence as commuted ordered executed. GCMO 433, USFET, 22 Sept 1945).

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

BOARD OF REVIEW NO. 3

16 AUG 1945

CM ETO 15251

U N I T E D S T A T E S	)	3RD ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Sangerhausen, Germany, 29 and 30 April 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for life. The United States Penitentiary, Lewisburg, Pennsylvania.
First Lieutenant JOE H. RANDLE (01017598), 33rd Armored Regiment	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that 1st Lieutenant Joe H. Randle, 33rd Armored Regiment, did at Rheinkassel, Germany, on or about 5 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Susi Reiff.

(50)

Specification 2: In that * * * did, at Rheinkassel, Germany, on or about 5 March 1945, forcibly against her will have carnal knowledge of Frau Liesel Olbertz.

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 and the Charge. 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 the term of his natural life. The reviewing authority approved the sentence, and forwarded the record of trial for action pursuant to the provisions of Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, but withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50½.

3. Each prosecutrix testified, without contradiction, that, at the time and place alleged, an American soldier forced her to submit to sexual intercourse with him by impliedly threatening to shoot her if she refused. Each positively identified accused as her ravisher and mutually corroborated the other as to significant surrounding circumstances. A third witness, Reiff, positively identified accused as the soldier involved and corroborated prosecutrices' testimony as to significant surrounding circumstances.

Accused elected to remain silent. Defense endeavored to establish an alibi by the testimony of two enlisted men of accused's command. One testified that he was with accused on the afternoon and evening of the date on which the offense was committed except for approximately forty-five minutes when accused was at the command post, but admitted on cross-examination that he left Rheinkassel prior to accused, at about 2100 hours, and did not see him for approximately two hours thereafter. The other testified that he was with accused at all times on the evening in question except for about ten minutes when accused was called to the command post. Only the latter's testimony, if believed, is effective to establish an alibi.

For further particulars of the evidence, the Board adopts the statement of the evidence set forth in paragraphs 5 and 6 of the review by the staff judge advocate of the confirming authority.

4. While some apparent inconsistencies were shown in the original description of accused, furnished by the German witnesses at the time

the offenses were reported, their positive identification of him in court cannot, in the light of the remainder of their testimony, fairly be regarded as other than substantial evidence that he was the offender. A controverted question of fact was thus squarely presented to the court, whose determination thereof is binding upon this Board on appellate review (CM ETO 1953, Lewis). The otherwise uncontradicted evidence adduced by the prosecution may be reasonably regarded as showing that accused achieved intercourse, in each instance, by threatening to shoot prosecutrix with his pistol if necessary to overcome such resistance as might be interposed to the accomplishment of his purpose; and that she, in each instance, submitted only through fear of death or great bodily harm, such fear being induced by said threat and accused's patent ability to execute it. The evidence is therefore legally sufficient to support the findings of guilty (CM ETO 8837, Wilson; CM ETO 9083, Berger et al).

5. The charge shows that accused is 33 years old and that, with prior service in the National Guard from June 1930 to January 1932, he was inducted at Jefferson Barracks, Missouri, 17 March 1942, and commissioned second lieutenant at Fort Knox, Kentucky, 24 April 1943. Officers of his command testified to his bravery in battle, his superior performance of dangerous missions, and the award to him, for bravery or heroism, of the Silver Star (oak leaf cluster recommended) and of the Bronze Star.

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

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

B R Sleeper Judge Advocate

(ON LEAVE) Judge Advocate

Judge Advocate

(52)

1st Ind.

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

1. In the case of First Lieutenant JOE H. RANDLE (01017598), 33rd Armored Regiment, 3rd 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 15251. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15251).

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

(Sentence ordered executed. GCMO 348, ETO, 27 Aug 1945).

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

BOARD OF REVIEW NO. 2

14 AUG 1945

CM ETO 15252

UNITED STATES	)	7TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	APO 257, U. S. Army, 23 April
Private RAYMOND R. LAMBERT (31448559), Company F, 87th Cavalry Reconnaissance Squadron Mechanized.	)	1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private Raymond R. Lambert, Company "F", 87th Cavalry Reconnaissance Squadron Mechanized, did, without proper leave, absent himself from his organization at APO 257, U. S. Army, from on or about 2135, 11 March 1945, to on or about 0315, 12 March 1945.

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

Specification: In that * * * did, at APO 257, U. S. Army, on or about 12 March 1945, by force and violenc

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and by putting her in fear, feloniously take, steal and carry away from the presence of Mrs. Anni Muller, one clock and one compass, the property of Mrs. Anni Muller, value about $15.00.

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

Specification 1. In that * * * did, at APO 257, U. S. Army, on or about 11 March 1945, unlawfully, wrongfully, and in Violation of letter, Headquarters Twelfth Army Group, subject: "Non-fraternization Policy", dated 30 September 1944, associate and fraternize with German Civilians, to-wit: Mrs. Anni Muller and Mrs. Kate Meisen by visiting, conversing, and drinking with them.

Specification 2. In that * * * did, at APO 257, U. S. Army, on or about 12 March 1945, wrongfully strike Mrs. Kate Meisen on the nose with a flashlight.

Specification 3. In that * * * did, at APO 257, U. S. Army, on or about 12 March 1945, wrongfully break and enter the home of Mrs. Anni Muller.

Specification 4: In that * * * did, at APO 257, U. S. Army, on or about 12 March 1945, wrongfully discharge a firearm in a private home, to-wit: the home of Mrs. Anni Muller.

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

Specification: In that * * * did, at APO 257, U. S. Army, on or about 12 March 1945, forcibly and feloniously, against her will have carnal knowledge of Mrs. Anni Muller.

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 all the charges and specifications, with an immaterial change in the wording, of Specification 1, Charge III. Evidence was introduced of two previous convictions by special court-martial for two absences without leave for ten and four days, respectively, each in violation of Article of War 61. All of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be shot to death by musketry. The reviewing authority, the Commanding General, 7th Armored Division, approved only so much of the sentence as

provides that the accused be shot to death by musketry, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, as approved, but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence as thus commuted pursuant to Article of War 50½.

3. Evidence introduced by the prosecution shows that at the time mentioned in the specifications accused was a private in Company F, 87th Cavalry Reconnaissance Squadron Mechanized, stationed at APO 257, United States Army (R7,33). On 11 March 1945, accused was a member of the guard, scheduled and notified to go on guard that night for the tour from ten until twelve o'clock. He did not report at the time the guard was assembled, could not be found thereafter, although the billets and company area were searched, and did not report for duty any time during that tour. His absence was unauthorized (R7-9,33,34).

On the night of 11 March 1945, at about 11 o'clock, accused and another soldier went to 31 Back Street, Bad Godesberg (Germany) where Mrs. Anni Müller was living with her friend, Mrs. Kate Meisen, in an apartment on the third floor (R10,14,18,22). (There is direct evidence that Mrs. Meisen was German (R22), and the record makes it clear that Mrs. Müller was of the same nationality (R29-31)). After the doorbell had rung for about five minutes, someone on the "first floor called for Mrs. Müller to go down." Mrs. Müller went down and opened the door. Accused and another soldier were there. The former gave her a push with a "machine pistol," "like a carbine," and asked to go upstairs where he searched everything and then asked for coffee, which was made. About this time, Mrs. Müller responded to a call for help from Mrs. Meisen, just home from the hospital, whom she found in bed, on the side of which the other soldier was sitting. Mrs. Müller helped her friend out of bed, into a morning jacket, and the four people went to the kitchen. There they drank coffee and the soldiers and Mrs. Müller drank wine. Accused asked Mrs. Müller for a kiss which she refused, whereupon he tore her morning coat and nightgown (R10,11,22-23,29,36; Pros.Ex.D). Taking a knife, he placed it on her arm and then pointing his "machine pistol" at her chest, he told her to go to the bedroom. (R11,24). She went, crying (R11), "since he pointed the pistol at me." In the bedroom, he "pushed the knife" in her back and told her to go to bed. He told her to take off all her clothes. She complied because of his threats. Accused then had "sexual intercourse" with Mrs. Müller, without her consent. During the act, he had his machine gun and the knife. She "couldn't do anything else"; she was deathly afraid (R24,25).

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After this intercourse was completed, the two returned to the kitchen where accused opened Mrs. Muller's morning coat, her only garment at that time, and showed her breasts to his friend. He then again forced her to go back to the bedroom where he again had "sexual intercourse" with her, penetrating her private parts with his penis. She had this intercourse with accused "since he kept pointing the pistol in my chest." They again returned to the kitchen (R10,11,25,26). The two soldiers remained a short while, during which time they broke two glasses and accused took an "airplane" clock and a compass, which belonged to her husband, from a drawer in the kitchen, after which they departed from the house, accused taking the clock and compass with him. She was afraid when he took this property, "he always kept pointing the machine pistol at me" and she gave him no permission to take it, nor did she bargain with him (R16,17,26,27,Pros.Exs.B,C).

Accused returned to this home again that night, at about 20 minutes to three (R13-15). Mrs. Meisen, who testified corroborating in part Mrs. Muller's story of accused's conduct toward her, told how during this second visit accused "smacked a flashlight across" her nose (R15). When accused returned and how he got in, Mrs. Meisen did not know since the door was "massive wooden" with a large window secured by iron bars. Mrs. Muller escaped from the house at the time of this second visit by sliding down a rope wash line which was fastened to the toilet seat and suspended out of a window. In sliding down the rope, she scraped skin off her left hand and suffered rope burns. Accused found Mrs. Meisen after Mrs. Muller had gotten away and with her accompanying him searched all the rooms again. He had just broken down the door to the apartment of another tenant on the first floor when he struck Mrs. Meisen with the flash light (R13-15,27,33,39), and when accused saw the blood on her he told Mrs. Meisen she could go upstairs (R15). Accused left and Mrs. Muller, who had hidden in the cellar, returned to her apartment (R15,27). In a quarter of an hour the bell again rang. Mrs. Muller answered the door and there was accused, alone (R15,27,28). This time accused took a Miss Lichtenberg, the tenant on the first floor in the building, along, and pushed her and Mrs. Muller and Mrs. Meisen, from one room to another upstairs, while he searched. In the front room, he tore down the curtains and fired his gun out the window. He then went to the toilet and fired three times out of the window there with a heavy machine pistol (R15,16,27,28,31). He then marched the three women, with their arms raised, to "August Street" (R16,28). Captain Harlan C. Stine, accused's commanding officer, was awakened at four o'clock in the morning of 12 March, and told that accused "had three women; that he was charging them with harboring German soldiers."

The next morning, this officer investigated counter-charges made against accused. He went to "that house" and found a door, such as

described by Mrs. Meisen in her testimony; the grill had been bent from the top exposing the opening in the door and there was mud on the side of the frame that a person entering could have scraped off his shoes. Upstairs, in the toilet, there was a rope secured at one end with the other thrown out the window. In the front room, he saw a table that had been overturned and broken, curtains that had been torn down and three or four empty shells, .45 caliber. In the court yard, under the bathroom window, he picked up two more empty shells. Accused was armed at the time with a M-3 sub-machine gun. On the morning of 12 March, he found that Mrs. Muller had her hands bandaged and the other woman had a scar across her nose with some blood on the front of her clothes. Accused said he had arrested the three women for harboring German soldiers. (R33-36,39). On 12 March, accused's "Tommy-Gun" was dirty, had been fired and not cleaned, and there were three rounds missing from the clip (R36-37). Also on that date, the clock and compass, Exhibits "B" and "C", were found in the possession of accused (R37). First Sergeant Link corroborated Captain Stine as to the wounds of the two women, as to the condition of the bent iron grill and as to the presence of the "fresh" mud (R39). A letter of 30 September 1944 issued out of Headquarters 12th Army Group forbad and defined fraternization. The contents of this letter had been made known to accused by his company commander before the night of 11 March. In it, drinking with Germans was defined and condemned as fraternization (R39-41;pros.ex.A).

4. On cross-examination, Mrs. Meisen said that when she came out of the hospital Sunday, before accused was at her house, "There was two American soldiers at her home." German soldiers, friends, had visited her apartment before the Americans arrived. She and her friend had not been "very intimate" with these former visitors. Those two soldiers had been "gentlemen" and neither had "made love" to the women (R19,20). Mrs. Muller said that one "Hans Spater" had previously brought two American soldiers to their apartment. He asked Mrs. Muller if she had "two women for these soldiers" and she told him, "No." (R29). During the assault on her by accused, he held a pistol at her chest and she (Mrs. Muller) at no time cried out or made any sound in a loud voice, nor did she struggle or make any attempt to prevent accused from having intercourse, as she "couldn't fight." (R30). German soldiers had previously visited her apartment and remained all night (R31).

5. The defense called Captain Arthur R. Slade, Jr., the investigating officer, as a witness. He first saw Mrs. Muller and Mrs. Meisen on 15 March while he was investigating charges made by them against accused under Articles of War 61, 93 and 96. Prior to 15 March, this witness had no knowledge that Mrs. Muller claimed to have been raped (R41,42).

After explanation of this rights as a witness, accused elected to remain silent (R43).

6. The court recalled Mrs. Muller as its witness. She first stated that she complained of being raped to the captain who came around the next day. She next said, answering a question as to which day it was that she told the captain she had been attacked:

> "It was when we were investigated by Captain Slade and told him everything then." (R43).

7. Charge I, Specification: Accused was shown to have been absent without authorization from his organization at the time, place and for the period alleged. This was in violation of Article of War 61, as charged.

Charge II, Specification: Testimony of the prosecution shows that at the time and place alleged, during a period of violence, characterized by intimidation and assault, accused took from the presence of Mrs. Muller who was the legal custodian thereof, and without her consent, property which the court properly found to be of some value. There was intimidation if not violence. The value of property taken by robbery is not material. This was robbery (MCM, 1928, par. f, p.170-171) in violation of Article of War 93, the Article under which the Charge was laid.

Charge III, Specification 1: The evidence shows that accused drank coffee with Mrs. Muller and Mrs. Meisen, and drank wine with Mrs. Meisen, two German subjects, as alleged. This violated the direction of non-fraternization contained in the letter mentioned in the specification. Such violation was subversive of good order and military discipline and constituted a violation of Article of War 96, as charged.

Specification 2. There is no doubt that accused hit Mrs. Meisen on the nose with a flashlight, as alleged. This was, at the least, a simple assault, properly charged under Article of War 96.

Specification 3. The evidence leaves no doubt that accused bent the iron grill work on the door of the house in which Mrs. Muller lived and that he forced his way in. This was unauthorized and illegal and constituted a violation of Article of War 96, as charged.

Specification 4. There was the uncontradicted evidence of the two witnesses that accused discharged a firearm in the private home of Mrs. Muller, as alleged. In addition, empty shells were found on the premises the next day and accused's weapon showed evidence of having been fired at such recent date as not to have been cleaned. If there was legal excuse for his firing his weapon accused should have stated it to the court. He remained silent and the evidence supports the conclusion of the court that it was unjustified. This conduct,

too, was in violation of Article of War 96.

Charge IV, Specification. This specification alleges that at the time and places of these other wrongful acts accused raped Mrs. Anni Muller. "Rape is the unlawful carnal knowledge of a woman by force and without her consent." (MCM, 1928, par.148b,p.165). The court accepted and believed the testimony of Mrs. Muller that accused penetrated her person with his penis, that she did not consent, that accused employed force to accomplish his purpose, and that her failure to resist was due to her fear of accused. Muscle and brute strength are not the only force which the law recognizes in rape. Accused's technique relied on a pistol and a knife with which he menaced and cowed his victim. This in a sense may be said to represent the ultimate in force. Acquiescence, the failure to resist, through fear is not consent (1 Wharton's Criminal Law,(12 Ed. 1932) sec.701,p.942). There was substantial, competent evidence on which the court could find accused guilty of rape, as charged.

8. The charge sheet shows that accused is 26 years of age. He was inducted 28 March 1944 at Providence, Rhode Island, without prior service.

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

10. 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

15252

(60)

1st Ind.

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

1. In the case of Private RAYMOND R. LAMBERT (31448559), Company F, 87th 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 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 15252. For convenience of reference please place that number in brackets at the end of the order. (CM ETO 15252).

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

(Sentence as commuted ordered executed. GCMO 362, USFET, 29 Aug 1945).

15252

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

BOARD OF REVIEW NO. 2

17 SEP 1945

CM ETO 15268

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATION
v.	
Private ANTHONY COSENTINO (12193857), 512th Replacement Company, 101st Replacement Battalion, Ground Force Reinforcement Command	Trial by GCM, convened at 12th Reinforcement Depot, Tidworth, Wiltshire, England, 12 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification 1: (Disapproved by reviewing authority).

Specification 2: In that Private Anthony Consentino, 512th Replacement Company, 101st Replacement Battalion, then of 513th Replacement Company, 6924th Replacement Battalion (Provisional), formerly 101st Replacement Battalion, Ground Force Reinforcement Command, did without proper leave absent himself from his organization at Tidworth, Wiltshire, England, from about 18 January 1945 to about 2 February 1945.

Specification 3: In that * * * did without proper leave absent himself from his organization at Tidworth, Wiltshire, England, from about 15 February 1945 to about 9 March 1945.

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

Specification 1: In that * * * having been duly placed in confinement at the 101st Replacement Battalion Stockade, Tidworth, Wiltshire, England, on about 14 January 1945, did at Tidworth, Wiltshire, England, on about 18 January 1945, escape from said confinement before he was set at liberty, by proper authority.

Specification 2: In that * * * having been duly placed in arrest at London, Middlesex, England, about 2 February 1945, did at London, Middlesex, England, about 2 February 1945, break said arrest before he was set at liberty by proper authority.

Specification 3: In that * * * having been duly placed in confinement at the 12th Replacement Depot Stockade, Perham Downs, Wiltshire, England, on or about 6 February 1945, did at Perham Downs, Wiltshire, England, on about 15 February 1945, escape from said confinement before he was set at liberty by proper authority.

Specification 4: In that Private Anthony Cosentino, 512th Replacement Company, 101st Replacement Battalion, Ground Force Reinforcement Command, having been duly placed in confinement at the 12th Replacement Depot Stockade, Perham Downs, Wiltshire, England, on about 10 March 1945, did at Perham Downs, Wiltshire, England on about 22 March 1945, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private Anthony Cosentino, 512th Replacement Company, 101st Replacement Battalion, Ground Force Reinforcement Command, did, at Perham Downs, Wiltshire, England, on or about 22 March 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at London, Middlesex, England, on or about 23 April 1945.

He pleaded not guilty to all specifications and charges except the Specification of Charge III to which he pleaded guilty with exceptions and substitutions and entered a plea of not guilty of Article of War 58 but guilty of violation of Article of War 61. All members of the court present at the time the vote was taken concurring, he was found guilty of all specifications and charges. Evidence was introduced of two previous convictions by summary court and special court-martial for two days' and six days' absence without leave, respectively, in violation of Article of War 61. All members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, United Kingdom Base, disapproved the findings of guilty of Specification 1, Charge I, approved the sentence and forwarded the record of trial

for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but, owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence purusant to Article of War 50½.

3. The following evidence was introduced by the prosecution concerning the findings of guilty of the charges and specifications as approved:

The accused, a member of the 513th Replacement Company, 101st Replacement Battalion, Ground Forces Replacement Command (Pros.Exs.D,E), was confined in the 101st Battalion Stockade, Tidworth, on 14 January 1945 (R17;Pros.Ex.O). On 18 January 1945, accused escaped (R20). No authority for his release had been issued (R20) and he was absent without leave (R9;Pros.Ex.E). A search was made and he could not be found (R20). On 2 February 1945, he was put under arrest by military police in London. While riding with them in the back seat of a jeep where he had been placed, accused jumped out of it and ran pursued by the military police. Accused was caught and taken to a guardhouse for confinement (R15-16;Pros.Ex.O). On 6 February 1945, accused was placed in confinement in 12th Reinforcement Depot Stockade, Tidworth (R17;Pros.Exs.O,K). On 15 February 1945, while working on a detail, accused escaped from the guard and went to London where he was apprehended on 9 March 1945. His absence was without authority (R11;Pros.Exs.O,F). By order dated 14 February 1945, accused was transferred to 512th Replacement Company and shown transferred in AWOL status on morning reports of 513th Replacement Company and 512th Replacement Company on 16 February 1945 (R11-12;Pros.Exs.G,H). On 10 March 1945, he was confined in 12th Reinforcement Depot Stockade, Perham Downs (R18, Pros.Exs.O,M). On 22 March 1945, accused escaped from a guard while on a detail and went to London where he was apprehended on 23 April 1945 in uniform with a pass made out to "George Bolt" and a series of "filled out" passes (R13-14;Pros.Exs.O,N). The apprehending military policeman testified that, when accused was searched, he did not see a return train ticket and that there was nothing thrown away (R14-15). Accused absented himself from the Stockade without leave (R12;Pros.Ex.J). The accused's voluntary statement made prior to the trial was admitted without objection. In this statement, accused admits all the escapes and absences alleged but denies that his intention was to escape when he ran away from the military police on 2 February 1945 and states that his intention was to return when he was picked up on 23 April 1945 (R21;Pros.Ex.O).

4. The accused, his rights having been explained to him by the law member, elected to make an unsworn statement through his counsel as follows:

> "On the evening of 22 April I went to the Railroad Station and purchased a return railroad ticket to Tidworth with the intention of returning the next day. The M.P. apprehended me before I got to the

Railroad back to Tidworth and this Railroad ticket was actually taken out of my wallet and was not returned to me. I asked the M.P. to return it to me and said that I would not need it any more and he threw it away" (R22).

5. The accused's pre-trial statement, admitted without objection and corroborated by other competent evidence, clearly establishes the elements of proof necessary for conviction of the absences without leave at the times and places alleged in violation of Article of War 61, the breaking of arrest, and the escapes from confinement in violation of Article of War 69. As to the Charge in violation of Article of War 58, the absence without leave at the time and place alleged is established by competent documentary evidence, accused's pretrial statement and his plea. In view of accused's escape from confinement and his apprehension over a month later in possession of a pass not his own, the court could properly infer an intent not to return in absence of uncontradicted evidence which could be the basis of an inference consistent with an intent to return (MCM, 1928, par.130a, p.144; CM ETO 1629, O'Donnell; CM ETO 12045, Friedman).

6. The charge sheet shows that accused is 21 years and two months of age and enlisted 5 December 1942 without prior service.

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

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

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 17 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private ANTHONY COSENTINO (12193857), 512th Replacement Company, 101st Replacement Battalion, Ground Force Reinforcement Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 15268. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15268).

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

(Sentence as commuted ordered executed. GCMO 441, USFET, 2 Oct1945).

15268

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

BOARD OF REVIEW NO. 2

CM ETO 15272

U N I T E D S T A T E S	XIX CORPS
v.	Trial by GCM, convened at Friedberg, Germany, 25 June 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 First Class WILLIS J. NICHOLS (33082809), ANGELO G. MELILLO (42013190), and SAMUEL A. PACK (35774952), all of Troop A, 113th Cavalry Reconnaissance Squadron, Mechanized	

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

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

2. Accused were tried in a common trial to which each consented upon the following charges and specifications:

NICHOLS

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

Specification: In that Private First Class Willis J. Nichols, Troop A, 113th Cavalry Reconnaissance Squadron, Mechanized, did, at or near Inden, Germany, on or about 28 February 1945, desert the service of the United States and remain absent in desertion until he was apprehended at Romershoven, Belgium, on or about 14 May 1945.

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

Specification: In that * * * did, at or near Inden, Germany, on or about 28 February 1945, in conjunction with Private First Class Angelo G. Melillo, Troop A, 113th Cavalry Reconnaissance Squadron, Mechanized, and Private First Class Samuel A. Pack, Troop A, 113th Cavalry Reconnaissance Squadron, Mechanized, knowingly and willfully apply to his own use and benefit one 1/4 ton Truck of a value in excess of $50.00, properly of the United States Government, furnished and intended for the military service thereof.

MELILLO

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

Specification: In that Private First Class Angelo G. Melillo, Troop A, 113th Cavalry Reconnaissance Squadron, Mechanized, did, at or near Inden, Germany, on or about 28 February 1945, desert the service of the United States and remain absent in desertion until he was apprehended at Malinex, Belgium, on or about 7 May 1945.

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

Specification: In that * * * did, at or near Inden, Germany, on or about 28 February 1945, in conjunction with Private First Class Willis J. Nichols, Troop A, 113th Cavalry Reconnaissance Squadron, Mechanized, and Private First Class Samuel A. Pack, Troop A, 113th Cavalry Reconnaissance Squadron, Mechanized, knowingly and willfully apply to his own use and benefit one 1/4 ton Truck of a value in excess of $50.00, property of the United States Government, furnished and intended for the military service thereof.

PACK

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

Specification: In that Private First Class Samuel A. Pack, Troop A, 113th Cavalry Reconnaissance Squadron, Mechanized, did at Inden, Germany, on or about 28

February 1945, desert the service of the United States and did remain absent in desertion until he was returned to military control at Romershoven, Belgium, on or about 14 May 1945.

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

Specification: In that * * * did at or near Inden, Germany, on or about 28 February 1945, in connection with Private First Class Willis J. Nichols, Troop A, 113th Cavalry Reconnaissance Squadron, Mechanized, and Private First Class Angelo G. Melillo, Troop A, 113th Cavalry Reconnaissance Squadron, Mechanized, knowingly and without proper authority apply to his own use and benefit, one 1/4-ton Truck War Department No. W-20419668 of the value of more than $50.00, property of the United States Government, furnished and intended for the Military Service thereof.

Each pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, each was found guilty of the charges and specifications preferred against him. Evidence was introduced as to one previous conviction of accused Nichols by special court-martial for absence without leave for four days in violation of Article of War 61. Each was sentenced, by separate vote, three-fourths of the members of thecourt present when the vote was taken concurring, 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 sentences, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Evidence introduced by the prosecution shows that at all times mentioned in the specifications accused were members of Troop A, 113th Cavalry Reconnaissance Squadron (R8). On 27 February 1945, this organization arrived at Inden from Beverst, Belgium, where it had been stationed for a month on a rear security mission. A temporary bivouac was established at Inden "awaiting orders for our next mission, which we expected to be an attack". About 4:00 am on the 28th, orders arrived to proceed to Rotingen. Before departing it was discovered that the three accused were missing. The area was searched and they could not be found (R8,9, 13). They were entered in the troop morning report as absent without leave on 28 February 1945 (R7; Pros.Exs.1,2). On that day, a quarter-ton "jeep", number 20419668, belonging to this troop, was removed and

was missing from its area. It was worth more than $50.00, and it was never returned to this command (R9,16,17). Accused were subsequently apprehended by military authority, Melillo on 7 May, and Nichols and Pack on 14 May 1945 (R6,7; Stip; Pros.Exs.3,4). From the date of their initial absence until after their apprehension, accused were not seen in this command (R9,14). Accused Nichols voluntarily made a signed statement in which he admitted that he absented himself without leave from his unit while it was stationed in Germany and that when he left he took and departed in a 1/4 ton Army Truck which belonged to his unit (R9,10; Pros.Ex.5). Troop A moved out of Inden on the 28th, after the unsuccessful search for accused (R13), and moved into Rotingen where it stayed for a week and then moved on. It did not go into combat for about two weeks (R12).

4. None of the accused testified, and no witnesses were called by the defense.

5. Charge I, specification, against each accused.

The uncontradicted evidence shows that each accused left his command without authority on 28 February 1945, and remained absent until his apprehension in the month of May, over two months later. Their departure took place during a period of war and at a particular time when their organization was approaching and expecting to engage the enemy.

On these facts, a strong presumption of guilt was created. The burden of going forward with the evidence shifted and found all of accused silent. From these facts, unexplained, the court was justified in inferring that the absence without leave of accused was accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service. This was desertion in violation of Article of War 58 (MCM, 1928, par.130a, p.142; CM ETO 7663, Williams; CM ETO 9333, Odom; CM ETO 13956, Depero).

Charge II, specification, against each accused.

Each accused is charged separately with having misapplied a ¼ ton truck property of the United States at the time and place alleged in the specification. This date and place were the same as those which marked the initial absence of each accused. And on that date and at that place such a truck, of a value of more than $50.00, was missing from the area of the company to which accused belonged and from which they took off. The absence of this truck was unaccounted for. It must have been misapplied to an unauthorized use, otherwise it would not

have been "missing". Accused Nichols confessed that he took the truck. He was properly found guilty of misapplication of this government property in violation of Article of War 94. The corpus delicti, the misapplication of the truck, was sufficiently established to support the confession of Nichols (MCM, 1928, par.114a, p.115; par.150i, pp.184, 185).

The situation is different with respect to accused Melillo and Pack. They did not admit the taking or misapplication of the truck. Moreover, Nichols in his confession definitely implicated these two in the taking. This confession was admitted in evidence and the law member failed to instruct the court that this admission could "not be considered as evidence against the others". This was an error (MCM, 1928, par.114c, p.117; CM ETO 1764, Jones-Mundy). This error was prejudicial to the substantial rights of accused Melillo and Pack, under this charge and specification against them, since the remaining competent evidence as to their guilt of this offense cannot be said to have been compelling (CM ETO 1693, III Bull.JAG 185).

6. The charge sheets show that accused Nichols is 29 years, one month of age and was inducted 14 June 1941 without prior service; that Melillo is 22 years, 11 months of age and was inducted 7 September 1943 without prior service; and that Pack is 21 years, one month of age and was inducted 23 September 1943 without prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty, as to accused Nichols, legally insufficient to support the findings of guilty of Charge II and its Specification but legally sufficient to support the findings of guilty of Charge I and its Specification against accused Melillo and Pack, and legally sufficient to support the sentences.

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

23 AUG 1945

CM ETO 15274

U N I T E D S T A T E S	5TH INFANTRY DIVISION
v.	Trial by GCM, convened at Menden, Germany, 19 April 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class WOODROW J. SPENCER (15057897), Private First Class CLYDE E. BACON (35483205), and Private CECIL C. MORTON (7081810), all of Company F, 10th Infantry.	

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

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

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

SPENCER

CHARGE: Violation of the 92d Article of War.

Specification 1: In that Private First Class Woodrow J. Spencer, Company F, 10th Infantry did, at Frankfurt am Main, Germany, on or about 2 April, 1945, forcibly and feloniously, against her will, have carnal knowledge of Fraulein Vera Spindler.

Specification 2: In that * * * did, at Frankfurt am Main, Germany, on or about 2 April, 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Emilie Spindler.

(74)

BACON

CHARGE: Violation of the 92d Article of War.

Specification 1: In that Private First Class Clyde E. Bacon, Company F, 10th Infantry did, at Frankfurt am Main, Germany, on or about 2 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Fraulein Vera Spindler.

Specification 2: In that * * * did, at Frankfurt am Main, Germany, on or about 2 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Emilie Spindler.

MORTON

CHARGE: Violation of the 92d Article of War.

Specification 1: In that Private Cecil C. Morton, Company F, 10th Infantry did, at Frankfurt am Main, Germany, on or about 2 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Fraulein Vera Spindler.

Specification 2: In that * * * did, at Frankfurt am Main, Germany, on or about 2 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Emilie Spindler.

Each accused pleaded not guilty and, all of the members of the court present at the time the respective votes were taken concurring, each was found guilty of the specifications and Charge against him. No evidence of previous convictions was introduced against either accused. All of the members of the court present at the time the respective votes were taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, 5th Infantry Division, approved the sentences and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentences, but commuted the sentence as to each accused to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the

place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that at about 2000 or 2030 hours on 2 April 1945, shortly after the capture of Frankfurt am Main, Germany, by the American forces, residents of an apartment house on Friesengasse Street heard shooting in the streets (R18,59-60). Shortly after, a knock was heard at the door of a ground-floor apartment occupied by Frau Emilie Spindler, aged 34, and her 14-year-old daughter, Fraulein Vera Spindler, both of whom had retired for the night in separate beds in the same bedroom. Frau Spindler turned on the lights and answered the door where she saw a Frenchman and four American soldiers who were armed with a rifle and pistols. After the Frenchman had requested information as to the whereabouts of two American soldiers, which Frau Spindler was unable to give them, the group entered the apartment without permission, firing their weapons into the air as they came (R26-33,54). "They were drunk and they had a bottle" (R42,50). Two soldiers sat on Vera's bed and said something like "baby", and then the light went out. One soldier grabbed Frau Spindler, threw her on her bed, and "played around" with her but did not succeed in having intercourse with her. She screamed for "Mr. Schwaerzel" and her brother, who were supposed to be in the building. Then a second soldier grabbed her and took off her pants. She was "so much afraid" and excited. She struggled with him, but he succeeded in penetrating her private parts with his private parts. Then a third soldier succeeded in penetrating her private parts with his private parts, although she "tried to push him back". The light "went on and off all the time". After the third soldier had finished, a fourth one "raped" her, achieving penetration in spite of her efforts to push him away. Then another soldier, apparently the one who had failed to have intercourse the first time, succeeded in penetrating her private parts with his private parts. Then a "tall" soldier, who had "used" her before, beat her up because she refused to take his penis into her mouth (R29,34-39). Altogether she was "raped" seven times, being "used twice by each one with the exception of the tall one" (R30,39). At one time Frau Spindler jumped out a window, ran to the cellar and called for help, "but nobody could help me because there was constant shooting". She returned because of her child (R30,43,44). During the acts, Vera, who was still in the same room, often called "Mother", and at one time when Frau Spindler yelled, "Now I am finished", Vera called, "Mother, are you still alive?" (R41). At the trial, Frau Spindler identified each accused as one of the four soldiers who had intercourse with her, and identified

accused Spencer as the tall soldier who had beat her (R39-41,52).

After the two soldiers sat down on Vera's bed, shortly after entering the room, one of them kissed her, put his hand on her legs, and then threw her on the bed. When she "tried to refuse" he threatened her by pointing his gun at her. Then, she testified:

> "I couldn't refuse any longer. I probably was too excited at that time. He took my pants off and he raped me. When he was through the second came. He too raped me. Then came the third one. He too raped me. * * * As the fourth one raped I still kept yelling for water. * * *After the fourth one had finished I got water to drink. * * * While we were up there they continued to shoot like mad" (R54-55).

She tried to leave the house but they would not let her. She did not consent to the acts (R58-59). At the trial she identified each accused as one of the soldiers who penetrated her private parts with his private parts (R56).

During the night of 2 April, Wilheim Schwaerzel, who resided on the same floor the Spindler apartment was on, heard Frau Spindler call his name and that of "Karl", and heard shooting in the Spindler apartment after 2000 hours. He could see silhouettes through the shutters and saw "some kind of fighting" in the apartment. He heard Mrs. Spindler call, "My child, my child", and heard cries of the child such as "Mother, are you still alive?" and "Let me go. I can't breathe. Let me go to the toilet" (R59-62).

Shortly after midnight, both Frau Spindler and Vera jumped from a window and went to the home of a friend. Soon after there was shooting in the street again (R30,44,55). They did not return until 0700 hours that morning, at which time the soldiers were gone. A table was turned over, a glass was broken, there were marks of shots in the apartment, and "one man had relieved himself in the room" (R44-45,70). There were three empty wine bottles and a schnapps bottle on a table (R42). Frau Spindler took a letter from under a book where she had placed it the night before on finding it in the bed during the time accused were there. The envelope of the letter, identified by her and Vera and introduced in evidence, was addressed to "Private Woodrow J. Spencer 1505789, Co. F, 10th Inf., APO #5, c/o P.M., New York N.Y." (R45,48,51,53,58; Pros.Ex.3).

During the afternoon of 3 April, Frau Spindler and Vera each separately identified accused Spencer and Morton from a line-up of 16 soldiers dressed as nearly alike as possible. Subsequently the same day they each separately identified accused Bacon in a line-up of all the members of F Company excepting Spencer and Morton. They were unable to identify the fourth soldier who was in the apartment (R20-21, 46-47, 57,66-71). Accused Spencer had a "7.65 pistol" in his possession when he was thereafter placed under arrest by his company commander (R15).

At about 1700 hours on 3 April, Frau Spindler and Vera were each examined by an American medical officer. Vera was having her period and the hymenal ring had been freshly torn, probably within the last one or two days. In the officer's opinion she was a virgin before the hymen was ruptured. She was nervous and cried easily. There were no bruises or contusions on her body. Frau Spindler had bruises on her nose, on both arms and on the inner aspect of her left thigh, and a slight tenderness in the posterior vaginal wall. Smears for spermatozoa, taken from both prosecutrices, were negative, but this had little significance because the spermatozoa disintegrate rapidly in the vagina, and Vera's bleeding would have washed out any sperm (R63-66).

4. After each accused was advised of his rights, accused Spencer and Morton elected to remain silent and accused Bacon elected to testify (R106-108). Bacon stated that at about 1700 hours on 2 April he ate chow and went to the fourth platoon command post where he engaged in a "bull session" until around 2030 hours or 2100 hours, when he went to bed, leaving Morton at the command post. After about 15 minutes somebody crawled in bed with him. He thought it was Anthony Mostek, who had been sleeping with him, but he did not talk to the person and nobody was in the bed when he awoke the next morning. He had nothing to drink that evening, and never saw Frau Spindler or Vera Spindler before they pointed him out in the identification line-up (R108-115).

For the defense, two sergeants, two privates first class and one private, all of accused's company, each testified that he saw accused Bacon and Morton in the fourth platoon command post around 2000 or 2030 hours on 2 April, at which time neither appeared to have been drinking. The testimony is generally vague as to the exact length of time they were there, some indicating that they left around 2030 hours, and some indicating they were there only momentarily (R72-100).

It was stipulated that Private First Class Anthony Mostek, if present, would testify that he saw accused Morton

and Bacon at the fourth platoon command post at about 2000 or 2030 hours on 2 April, and further that he went to bed about 2130 to 2200 hours with a person he presumed to be accused Bacon because Bacon had been sleeping in the same room with him for several nights (R105-106).

A sergeant testified that at about 2200 hours accused Morton came into the room where the witness had just retired and sat on the edge of a bed. The next morning Morton was asleep in the same bed with accused Spencer (R99-100).

A private testified that he woke Morton at 0100 hours to go on telephone guard in relief of the witness, at which time Morton appeared to have been sleeping (R94-95). A private first class testified that at 0200 hours Morton woke him to go on telephone guard as Morton's relief (R90).

5. The evidence shows that each prosecutrix positively identified each accused at the trial as one of four soldiers who had carnal knowledge of her at the time and place alleged in each of the specifications. The finding in the bed where some of the acts occurred of the letter addressed to accused Spencer tends to substantiate in part the accuracy of the identification as to him. In view of such positive identification, it is clear that the other evidence relating to the identification parades, even if improper, did not prejudice accused's substantial rights (see CM ETO 6554, Hill; CM ETO 7209, Williams). Although there is considerable evidence tending to refute the fact that accused Morton and Bacon were at the apartment during all of the time the acts were alleged to have taken place, the factual determination as to their presence and participation in the acts was, under the evidence, a question for the court (CM ETO 3200, Price; CM ETO 3837, Smith).

It appears that in her testimony, Vera, the 14-year-old prosecutrix, repeatedly used the legal conclusion "rape", and that in order to prove penetration the prosecution employed leading questions by pointing to each accused and asking her the identical question as to each: "Did his private parts penetrate yours?" to which she replied "Yes" (R56). To some extent such questions were used also in the interrogation of the mother (R36-39). However, in view of Vera's immaturity and her reluctance to testify, the lack of any objection by the defense, natural difficulty resulting from differences in language as between the witnesses and their interrogator, other voluntary testimony by the mother, and other corroborating factors in the case, it is concluded that such testimony was both competent and substantial (CM ETO 5869, Williams; 3 Wharton's Criminal Evidence (11th Ed.,

1935), sec.1270, p.2136-2137; 70 C J, sec.689, p.530).

The testimony of each prosecutrix indicates that she offered some degree of physical resistance and also that she was placed in fear of her life or great bodily injury by the actions of accused in wantonly shooting their weapons in the room, in pointing a gun at the daughter and in using force against the mother to the extent of beating her. Their testimony is strongly corroborated by that of a neighbor, by physical evidences appearing in the apartment the following morning and by testimony relating to the physical examinations made of each prosecutrix the day following commission of the acts. The evidence clearly supports the findings of guilty as to all specifications relating to each accused (CM ETO 9083, Berger et al; CM ETO 3933, Ferguson et al; CM ETO 3740, Sanders et al).

6. In denying the motion, the law member stated that if, during the course of the trial, it should appear to him that any evidence was introduced of a nature to render a common trial unfair to any of the accused, he would then "put in effect the severance with regard to such of the accused as it may appear was hampered in his defense", thus clearly recognizing the Federal rule (Logan v. United States, 14 U.S. 263, 296, 12 S.Ct. 617, 36 L.Ed. 429; Morris v. United States, 12 Fed.2d 727, 729; United States v. Glass, 30 Fed.Sup.397) adopted and applied by the Board of Review in CM ETO 6148, Dear, et al. The case is distinguishable from CM POA 283, held legally insufficient because there the two accused had antagonistic defenses. Had such a situation arisen in the instant case, or any other prejudice to the substantial rights of any accused resulted from their being tried together, denial of the motion to sever would have constituted reversible error (FM 27-255, par.91b, p.85). Since the record of trial shows no such resulting prejudice, the law member's ruling in this instance constituted a lawful exercise of judicial discretion. It is now settled that

> "Where, as in the present case, the appointing authority has directed a so-called 'common trial' of two or more accused, separately charged with offenses of the same character committed at the same time and place and provable by the same evidence, the denial or granting of a motion for severance by one or more of such accused is within the sound judicial discretion of the court, whose ruling will not be disturbed unless it is shown that it injuriously affected the

substantial rights of the accused" (CM ETO 6148 Dear, et al; see also Dig. Op JAG 1912-40, sec. 395(49), p.234).

7. The charge sheets show that accused Spencer is 22 years and 8 months of age and enlisted 12 October 1940 at Fort Thomas, Kentucky. Accused Bacon is 23 years and 4 months of age and was inducted 6 July 1942 at Louisville, Kentucky. Accused Morton is 25 years and 4 months of age and enlisted 9 February 1940 at Fort McClellan, Alabama. No prior service by any accused is shown.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(81)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 25 AUG 1945
TO: Commanding General, United States Forces, European Theater, APO 887, U.S. Army.

1. In the case of Private First Class WOODROW J. SPENCER (15057897), Private First Class CLYDE E. BACON (35483205) and Private CECIL C. MORTON (7081810), all of Company F, 10th 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 15274. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15274).

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

(Sentence ordered executed. GCMO 380 (SPENCER) ETO, 4 Sept 1945).
(GCMO 381, (BACON) ETO, 4 Sept 1945).
(GCMO 382, (MORTON) ETO, 4 Sept 1945).

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

BOARD OF REVIEW NO. 3 15 SEP 1945

CM ETO 15304

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Salzburg, Austria, 15 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private MURRAY M. TAX (32340559), Company K, 7th Infantry	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Private Murray M Tax, Company "K", Seventh Infantry, did, without proper leave, absent himself from his organization, at Pozzuoli, Italy, from about 28 June 1944 to about 14 October 1944.

Specification 2: In that * * * did, without proper leave, absent himself from the Seventh Infantry, at Dieulouard, France, from about 18 February 1945 to about 13 March 1945.

He pleaded not guilty, and was found guilty of the Charge and specifications, except in Specification 1 of the Charge,

the words "about 14 October 1944" substituting therefor the words "to a date unknown". Evidence was introduced of one previous conviction for absence without leave for three and a half hours in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct for the period 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 went absent without leave from his company at Pozzuouli, Italy, 28 June 1944 (R7; Pros.Ex.A), and had not thereafter been present for duty when his acting platoon sergeant, who would have seen him if he had been there, left the unit on 13 September (R8-9).

On 18 February 1945, while a member of the 7th Regimental Work Platoon going forward from Beblenheim to Dieulouard, France, accused went absent without leave therefrom and, according to Company K morning report, remained in that status until 17 March 1945, when he was marked "fr AWOL to arrest in Regt Work Plat" (R10-13; Pros.Ex.A). A witness who was present with the work platoon from 18 February to 13 March 1945, did not see accused from 18 February until approximately a week before the trial (R11).

4. No evidence was presented for the defense and accused, after his rights were explained to him, elected to remain silent.

5. Competent uncontradicted evidence supports the findings of guilty. No evidence was introduced to show the termination of the first absence without leave. Although the sergeant's testimony indicated that it continued at least until 13 September, the court's finding, by exception and substitution, merely that it continued "to a date unknown", was consistent with the evidence adduced, and not improper.

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

15304

7. The charge sheet shows that accused is 29 years five months of age and that, with no prior service, he was inducted at Fort Jay, New York, 21 May 1942.

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).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

E L Levy Jr Judge Advocate

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

BOARD OF REVIEW NO. 4 7 NOV 1945

CM ETO 15320

U N I T E D S T A T E S	)	FIFTEENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Bad Neuenahr, Germany, 30 June, 1 July 1945. Sentence: COOPER, acquitted. WADE, dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class FREDERICK W. WADE (39208980), and Private THOMAS COOPER (35766893), both of Company K, 385th Infantry.	)	

HOLDING by BOARD OF REVIEW NO. 4
DANIELSON, MEYER and ANDERSON, Judge Advocates

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

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

WADE

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Frederick W. Wade, Company K, 385th Infantry, did, at Krov, Germany, on or about 14 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Rosa Glowsky.

(88)

COOPER

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Thomas Cooper, Company K, 385th Infantry, did, at Krov, Germany, on or about 14 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Mathilde Klein.

Each accused pleaded not guilty (after Wade's plea in bar, hereinafter discussed, was overruled) and, three-fourths of the members of the court present at the time the vote was taken concurring, Wade was found guilty of the Charge and Specification preferred against him. Cooper was acquitted. Evidence of two previous convictions was introduced against Wade, one by special court-martial for failure to repair at the fixed time to the properly appointed place of assembly and willful disobedience of and disrespect toward a noncommissioned officer in violation of Articles of War 61 and 65 respectively, and one by summary court for absence without leave for 28 days in violation of Article of War 61. 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 20 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

The proceedings as to Cooper were published in General Court-Martial Orders No. 54, Headquarters Fifteenth United States Army, APO 408, U.S. Army, 24 July 1945.

3. The prosecution introduced substantial competent evidence tending to show that on or about 14 March 1945, at Krov, Germany, Wade forcibly had carnal knowledge of Rosa Glowsky, as alleged in the Specification, while the defense introduced evidence to negative the issue of guilt. An issuable question of fact was thus tendered for resolution by the court, and the findings of the court, being responsive to the evidence before it, are not, under the circumstances presented by the record of trial, subject to reexamination here.

4. When the court convened, Wade interposed a plea in bar on the ground of former jeopardy (R2), but at the suggestion of the court this plea was properly reserved until arraignment (MCM, 1928, par.64, p.50). Upon arraignment his plea in bar was renewed (R7), and in support thereof a duly

authenticated record of former trial (at Pfalzfeld, Germany, 27 March 1945) by a general court-martial appointed by the Commanding General, 76th Infantry Division, was introduced (R7; Def. Wade's Ex.A (hereinafter referred to as "Def.Ex.A");MCM 1928, par. 68, p. 53). The prosecution then introduced a letter from the Commanding General, 76th Infantry Division, to the Trial Judge Advocate of the former court, withdrawing the Charge and Specification forming the basis for the proceedings appearing in the record of former trial, prior to the findings (R9; Pros.Ex.A). Argument was had upon the plea in bar (R9-12), the court overruled the plea (R12), and Wade thereupon pleaded to the general issue (R12).

The action of the court in overruling the plea in bar presents a serious question, and one which appears to be a matter of first impression.

The record of former trial discloses that Wade was tried before a court of competent jurisdiction upon the Charge and Specification involved here. He was arraigned and issues were joined by his plea to the general issue (Def.Ex.A, pp. 5,6); the prosecution introduced evidence and rested (Def. Ex.A, pp. 7-22); and the defense introduced evidence and rested (Def.Ex.A, pp.22-60). Both the prosecution and the defense then stated they had nothing further to offer, the court stated it did not desire any witnesses called or recalled, and, after arguments were made, the case was submitted and the court was closed (Def. EX.A, p.60). The court was opened later and announced that it desired to hear other named witnesses, and continued the case until a date to be fixed by the Trial Judge Advocate (Def.Ex.A, p. 60). Seven days thereafter, on 3 April 1945, and prior to further action by the court, the appointing authority withdrew the charges, and directed that no further proceedings be taken by the court in connection therewith (Pros. Ex.A). On the same day he transmitted the charges and allied papers to the Commanding General, Third United States Army, with a recommendation for trial by general court-martial, stating that the case had been continued because of the unavailability of two witnesses due to illness, and that the tactical situation made the obtainment of the witnesses impracticable and precluded prompt disposition of the case (Charge Sheet, 4th Ind.). Thereafter, on 18 April 1945, the Commanding General, Third United States Army, transmitted the charges and allied papers to the Commanding General, Fifteenth United States Army, requesting that he assume court-martial jurisdiction because the civilian witnesses were residents of the territory under his jurisdiction (Charge Sheet, 5th Ind.). The Commanding General, Fifteenth United States Army, in compliance with this request, assumed court-martial jurisdiction, and on 26 April 1945, referred the case for trial by general court-martial (Charge Sheet, 1st Ind.).

The question for solution is whether Wade, under the facts disclosed by the record, was placed in jeopardy, so as to bar a second trial, when he was arraigned and tried by the general court-martial appointed by the Commanding General, 76th Infantry Division.

5.(a) That no person shall be twice placed in jeopardy for the same offense is a maxim of great antiquity which has found expression in the Constitution of the United States and the Articles of War (Winthrop's Military Law and Precedents (Reprint, 1920), p.259). The Fifth Amendment, in pertinent part, provides that no person shall be subject for the same offense "to be twice put in jeopardy of life or limb", while Article of War 40 in part recites that "No person shall, without his consent, be tried a second time for the same offense". That the intendment of these two inhibitions against double jeopardy is the same, has long been recognized, and the "rulings * * * by the civil courts will therefore be applicable to similar cases at military law". (Ibid,p.259). The Fifth Amendment itself, however, is a limitation on courts-martial, as they, like other courts deriving from an exercise of the Federal power, are subject to the restrictions of the Bill of Rights except insofar as special constitutional provision for them is made (CM ETO 2297, Johnson and Loper; Sanford v. Robbins,(C.C.A.5th, 1940), 115 F(2nd) 435; United States v. Hiatt,(C.C.A. 3rd 1944), 141 F(2nd) 664; cf. Ex parte Quirin, (1942) 317 U.S. 1 , 87 L.Ed.3). Thus in Sanford v. Robbins, supra(at p.438), the court said:

> "We have no doubt that the provision of the Fifth Amendment, 'nor shall any person be subject for the same offense to be twice out in jeopardy of life or limb', is applicable to courts-martial. The immediately preceding exception of 'cases arising in the land or naval forces' from the requirement of an indictment, abundantly shows that such cases were in contemplation but not excepted from the other provisions".

Although this provision of the Fifth Amendment effects a limitation on the power of courts-martial, it is only a conditional limitation in that the accused may waive what for him is a personal right. The burden rests upon him to plead and prove his former jeopardy, and in the event of a failure of plea or proof waiver follows (Article of War 40; Dig. Op. JAG, 1912-40, sec.397(4), p.243; Levin v. United States, (C.C.A. 9th 1925), 5 F (2nd) 598; Brady v. United States, (C.C.A.8th 1928), 24 F (2nd) 399; Caballero v. Hudspeth,(C.C.A.10th 1940), 114 F (2nd) 545; McGinley v. Hudspeth, (C.C.A. 10th 1941), 120 F (2nd) 523). Here, however, Wade pleaded specially at his first opportunity,

and offered competent evidence in support thereof, and no waiver of his rights under the Fifth Amendment or Article of War 40 may be presumed.

In determining when an accused has been placed in jeopardy courts have reached varying answers, but the opinions of the Federal courts, which are specially ordained to construe the Constitution, are binding as to the meaning of the language in the Fifth Amendment. It is, of course, recognized that the prohibition is not against the peril of second punishment, but against being twice put in jeopardy (Kepner v. United States (1904), 195 U.S. 100, 49 L.Ed. 114); nor is jeopardy limited to a second prosecution after verdict by a fact-finding body. Some expressions may be found in the early text books (cf. Winthrop's Military Law and Precedents (Reprint,1920), p. 260) and cases which purport to limit jeopardy to a second prosecution after verdict or findings but they have never been sanctioned by the Supreme Court. In Kepner v. United States, supra, the court held that jeopardy should not be construed so narrowly and said (195 U.S. at p.128, 49 L.Ed. at p.124):

> "* * * some of the definitions given by the text-book writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; * * * the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him* * * ".

As determined by the Federal courts, jeopardy attaches when an accused has been arraigned on a valid charge, has pleaded thereto, and a jury has been impaneled and sworn; and where a case is tried to a court without a jury, jeopardy begins when he has been validly charged and arraigned, has pleaded and the court has begun to hear evidence (McCarthy v. Zerbst (C.C.A. 10th 1936), 85 F (2nd) 640). And where jeopardy attaches, for however short a time, the trial must proceed and be prosecuted to a legal termination, or the accused will be discharged and cannot thereafter be tried again under thse same or a subsequent charge for the same offense (Cornero v. United States (C.C.A.9th 1931), 48 F (2nd) 69; United States v. Kraut (SD,NY, 1932), 2 F Supp.16; 1 Wharton's Criminal Law (12th Ed., 1932), sec. 395, p.547).

The power of the court to terminate the trial because of imperious necessity, without affording an accused the right to plead former jeopardy in a subsequent prosecution

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for the same offense, has, however, been recognized. But this doctrine of imperious necessity is based on a sudden and uncontrollable emergency, unforeseen by either the prosecution or the court, - a real emergency which by diligence and care could not have been averted. It has been held applicable to those cases where the jury is unable to agree (Dreyer v. Illinois (1902), 187 U.S. 71, 47 L. Ed. 79; Keerl v. Montana (1909), 213 U.S. 135, 53 L.Ed. 734; United States v. Perez (1824), 9 Wheaton 579, 6 L. Ed. 165; Logan v. United States (1892), 144 U.S. 263, 36 L. Ed. 429); to misconduct tainting the panel (Klose v. United States (C.C.A. 8th 1931), 49 F (2nd) 177); where inflammatory press releases may have corrupted the jury (United States v. Montgomery, (S.D.N.Y. 1930), 42 F (2nd) 254); when the relationship of a juror to an accused is discovered during trial (United States v. McCunn (S.D.N.Y.1929), 36 F (2nd) 52); where a juror becomes incapacitated during trial (Simmons v. United States (1891), 142 U.S. 148, 35 L. Ed. 968); and where a juror is discovered to have been a member of the grand jury which returned the indictment (Thompson v. United States (1894), 155 U.S. 271, 39 L. Ed. 146). It is an illusive and expansive doctrine, not susceptible of precise definition, because it is designed to apply to emergent situations, and the restraints which are reasonable today may be arbitrary tomorrow (United States v. Giles (W.D. Okla. 1937), 19 F Supp. 1009; Pratt v. United States, (App.D.C. 1939), 102 F (2nd) 275). All courts, however, have recognized that the power should be exercised with caution, and that it should be limited to the most urgent circumstances. The rule was expressed aptly by Story, J., in United States v. Perez, supra, when he said: (9 Wheaton at p.580, 6 L. Ed. at p. 165)

> "* * * the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner".

In compliance with this admonition of the highest court, the power has been charily exercised.

The rule in the Federal courts, and in most state courts, is that the absence of witnesses or the unavailability of evidence is not ground for the termination of the trial by a discharge of the jury under the doctrine of imperious necessity, so as to sanction a second prosecution for the same offense (Cornero v. United States (C.C.A. 9th 1931), 48 F (2nd) 69; United States v. Watson (1868), Fed. Cas. No 16, 651; Annotation, 74 A.

L.R. 803; cf. Wharton's Criminal Law, (12th Ed., 1932), sec. 395, p. 548 et sec). The same rule is, of course, applicable to termination by a nolle prosequi or by a withdrawal of charges (United States v. Kraut(S.D.N.Y., 1932), 2 F Supp. 16; Clawans v. Rives, (App.D.C. 1939), 104 F (2nd) 240).

The question was squarely presented in Cornero v. United States supra, where a plea of former jeopardy was sustained when a jury was impaneled but was discharged when the prosecuting attorney announced he was unable to proceed because of the absence of necessary witnesses. In holding that jeopardy attached and that the doctrine of imperious necessity did not extend to the absence of witnesses, the court said: (48 F.(2nd), at p. 71 and p. 73).

> "While their absence might have justified a continuance of the case * * *, the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial court in granting a continuance in furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy.***.
>
> * * *
>
> There is nothing in the cases cited by the government that militates against the authority of the cases we have cited, which are to the effect that mere absence of witnesses discovered after the jury is impaneled is insufficient to deprive the accused of his right to claim former jeopardy upon a subsequent trial * * *.

The court further said (48 F (2nd) at p. 71):

> "We are here dealing * * * with a fundamental right of a person accused of crime, guaranteed to him by the constitution, and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice. * * * no court has gone to the extent of holding that, after the impanelment of a jury for the trial of a criminal case, the failure of the district attorney to have present sufficient witnesses, or evidence to prove the offense charged, is an exception to the rule

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that the discharge of a jury after its impanelment for the trial of a criminal case operates as a protection against a retrial of the same case".

In the instant case Wade was arraigned on a valid charge and specification before a general court-martial duly appointed by the Commanding General of the 76th Infantry Division. Both the prosecution and the defense introduced evidence and rested, and the court stated it did not desire to have any witnesses called or recalled and closed. Applying the rule announced by the Federal courts in many cases, we have no difficulty in concluding that Wade was placed in jeopardy at that time. The court might have returned a finding of guilty or not guilty without further action by the prosecution or defense. As stated in Ex. parte Ulrich (W.D.Mo.1890), 42 F 587, 595, where a somewhat similar factual situation was presented, "The law will give him the benefit of the presumption that the first jury might have acquitted him * * * ".

We have no doubt that emergent situations, unknown to the civil courts, may arise in the administration of military justice which will call for the exercise of the doctrine of imperious necessity. The judicial process will be equal to such demands. That the absence of witnesses does not sanction the exercise of the doctrine is, however, no longer open to question. The Federal courts have spoken, and "* * * no court has gone to * * * /that/ ** * extent". The rule is applicable to all courts, whether trial be with or without a jury (Kepner v. United States, supra), and since Grafton v. United States (1907), 206 U.S. 333, 51 L. Ed. 1084, if not befofe, there has been no doubt that a general court-martial, within its special framework, is a court in the fullest sense of the word.

We see nothing which renders the absence of witnesses, as shown by the record of trial in this case, an emergent situation in exception to the rule in the Federal courts. Their witnesses may lie beyond the reach of process, if process issues witnesses may not respond, oral promises to appear may not be kept, and they may become ill during trial; but such difficulties in proof are not grounds for a termination of trial and a second prosecution. Imperious necessity means a sudden and overwhelming emergency, uncontrollable and unforseeable, infecting the judicial process and rendering a fair and impartial trial impossible.

It does not mean expediency. The absence of witnesses, as the Federal courts have uniformly held, is not an emergent condition infecting the judicial process; it is only one of the hazards of trial known to all courts.

As affirmatively disclosed by the record, the continuance of the case was prompted by the court's desire to hear further testimony, and the withdrawal of the charges and the reference of them to another court was occasioned by the absence of the witnesses from the jurisdiction of the appointing authority. This did not constitute the emergent situation infecting the judicial process required for the termination of the case so as to except the proceedings from the prohibition against double jeopardy in the Fifth Amendent. Wade's plea in bar in the instant case, being seasonably raised and supported by competent evidence, should, then, have been sustained. "American justice", as Vinson, J., said in Pratt v. United States, (App.D.C. 1939), 102 F (2nd) 275, 280, "will not countenance an accused standing trial twice for the same offense* * * ".

(b) There remains for consideration the language of Article of War 40 which provides that:

> "* * * no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case".

It was urged by the Trial Judge Advocate at the trial (R9,10) that this language precludes a plea in bar on the ground of former jeopardy until action has been taken by the reviewing authority and, if there be one, the confirming authority; but we do not agree. The language, by its own terms, is plainly limited to those cases in which findings of guilty have been reached by the court, and does not purport to apply to situations where trial is terminated prior thereto. It is plain and unambiguous , and does not permit the interpretation suggested. Congress obviously desired to provide for a rehearing upon disapproval by the reviewing or confirming authority of findings of guilty (Article of War 50), and the care it took to limit the sentence upon a rehearing and to prohibit rehearings upon findings of not guilty is evidence of the concern it entertained that the rights of an accused under the Fifth Amendment should not be frustrated. It provided for the automatic review of the findings and sentence, and the consent of the accused to such review being true in fact and presumed as a matter of law (Sanford v. Robbins, supra), a plea of former jeopardy may not successfully be interposed at the second trial (Sanford v. Robbins, supra).

This is explainable by "analogy to a mistrial for failure of a jury to agree, since the reviewing authority whose concurrence is necessary does not agree, defeating the first hearing "(Sanford v. Robbins, supra, 115 F (2nd) at p. 439); or by an analogy to the vacation of a verdict at the instance of an accused who thereby waives his protection against double jeopardy (Pratt v. United States, (App.D.C. 1939), 102 F (2nd) 275), inasmuch as the consent of an accused to review by the reviewing or confirming authority is presumed as a matter of law.

If, however, Article of War 40 were ambiguous and subject to construction, doubts and ambiguities would yield to the persuasions of the Fifth Amendment, as an interpretation consistent with the constitution is preferred to one offensive thereto (McCullough v. Commonwealth of Virginia (1898) 172 U.S. 102, 43 L.Ed. 382), and as a construction leading to absurd consequences is avoided whenever a reasonable one is possible (United States v. Katz (1926), 271 U.S. 354, 70 L.Ed. 986).

Nor can the provisions of the Manual for Courts-Martial 1928, which provide that a nolle prosequi may be entered either before or after arraignment and plea and that it is not a ground of objection or of defense in a subsequent trial (MCM, 1928, par.72, p.57), and that the appointing authority may withdraw any specification or charge at any time unless the court has reached a finding thereon (MCM, 1928, par. 5, p.4), be construed to sanction the proceedings in this case. They too must be construed in sympathy with the Fifth Amendment and Article of War 40, which are not limitations on the power of the appointing authority to direct the entry of a nolle prosequi or to withdraw charges, but are limitations on the power to again try an accused after jeopardy has attached. The appointing authority has the undoubted power to direct the entry of a nolle prosequi before or after arraignment and plea, or to withdraw the charges at any time prior to the findings, but when jeopardy has attached, and imperious necessity does not exist, a nolle prosequi or a withdrawal of the charges must necessarily bar a second prosecution in the event the accused pleads and proves his former jeopardy at the second trial.

Neither the provisions of the Manual nor Article of War 40 could confer power inconsistent with the Constitution. Executive orders and congressional acts have validity only to the extent that they are obedient to the Constitution.

6. The charge sheets show that Wade is 28 years seven months of age and was inducted 21 June 1943, and that Cooper is 31 years of age and was inducted in May 1941. Both were inducted to serve for the duration of the war plus six months. Neither had any prior service.

7. The court was legally constituted and had jurisdiction of the persons and the offenses. Except as noted herein no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that Wade's plea in bar should have been sustained, and that the record of trial is legally insufficient to support the findings of guilty and the sentence as to him.

Judge Advocate

Judge Advocate

Judge Advocate

(98) 1st Ind.

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

1. Pursuant to the provisions of the third paragraph of Article of War 50½, I transmit herewith the record of trial in the case of Private First Class FREDERICK W. WADE (39208980) and Private THOMAS COOPER (35766893), both of Company K, 385th Infantry (accused COOPER was acquitted by the court) and the holding of the Board of Review that as to accused WADE the record of trial is legally insufficient to support the findings of guilty and the sentence. I do not concur in the holding of the Board of Review and I submit for your consideration and action my dissent therefrom.

2. The Board of Review, in its opinion has accurately summarized the facts pertinent to the issue which arose on accused's plea of former jeopardy. I hereby adopt the same for purposes of my discussion. I am in accord with the Board of Review in its analysis of the principles of law applicable to the plea of former jeopardy and subscribe to the doctrine expressed in the opinion that in the trial of cases before general courts-martial, jeopardy within the meaning of the relevant provision of the Fifth Amendment to the Federal Constitution may attach prior to findings by the court and approval of the sentence by the reviewing authority. I further agree with the Board of Review that the 40th Article of War must be read in the light of the Fifth Amendment and the adjudications of the Federal Courts with respect to the "double jeopardy" clause thereof. I also believe that the doctrine of "imperious necessity" as defined and discussed in the opinion of the Board of Review is applicable to courts-martial. My difference with the Board of Review revolves about the question as to the operative effect of the doctrine in trials before courts-martial and in the administration of military justice. Stated cogently the solution of the problem largely turns upon the applicability of the principles discussed in the opinion of the Circuit Court of Appeals (9th Cir.) in the case of Cornero v. United States (C.C.A. 9th, 1931) 48 F (2nd) 69 (cited and discussed by the Board of Review) to the facts in this case.

3. I freely grant that in criminal prosecutions in the civil courts the rule of the Cornero case is not only fair and proper but also dictated by sound constitutional principles.

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The fact that the prosecutor, having entered upon the trial of an indictment and having thereby placed an accused in jeopardy, discovers he cannot sustain the same without additional evidence, presents no legitimate reason for invoking the doctrine of "imperious necessity" so that the accused may again be tried on the same charge. The denial of the application of the doctrine under such circumstances is highly necessary if the constitutional provision against double jeopardy is not to be frittered away by legalistic sophistries. There are substantial reasons for refusing to consider the absence of witnesses as an "imperious necessity" in the trials of criminal causes in the civil courts. The place of the trial and the terms of court are fixed and determined by statute. The court in advance of the commencement of the term according to usual practice sets the criminal cases for trial on stated dates and its calender become matter of public notice. The prosecution therefore knows in advance approximately when it must be prepared to go to trial and have its witnesses available to testify in court. Congress has provided by law the process whereby witnesses may be subpoened or may be held in custody pending their appearance at trial. If under these circumstances the prosecution ventures trial, participates in the selection of the jury and thereafter presents its available evidence, it does so with full knowledge of the risk it incurs by placing accused in jeopardy. It is not, however, without remedy to care for the situation caused by unforeseen absences of witnesses. A motion for continuance, validly based, affords it reasonable means to prevent a miscarriage of justice. Under these circumstances the prosecution having failed to "make a case" should not be permitted to dismiss the indictment and try again for a conviction under circumstances which may be more favorable for success. Such methods are not consonant with our juridical philosophy and offend our sense of fair dealing and fair trials.

4. However, the static conditions of the civil courts do not prevail with respect to the military courts and particularly the military courts which must function in the field of operations and combat. Courts-martial are not permanent institutions in the sense of permanency of the civil courts. They are called into being at the will of the authority holding courts-martial jurisdiction. Their membership is subject to continuous change depending upon other duties of the personnel who are eligible to be appointed members of same. They conduct their business at such times and places as general conditions in the field permit or require. They have no fixed and pre-determined places of sitting. There are no terms of courts-martial (cf: CM ETO 16623, Colby), and due

to the exigencies of the situation under which they operate they cannot arrange trial calenders in advance with the same degree of certainty and accuracy as do the civil courts. In order to perform their duties efficiently and expeditiously, they must possess a high degree of flexibility. They conduct their trials under unusual conditions primarily dictated by the military situation and the condition of the command.

5. Aside from the inherent differences between our military and civil courts there is an aspect of the actual functioning of the former which must be given proper weight and consideration. Witnesses may be compelled, under penalty of law, to attend and give testimony in the civil courts of the United States. The witnesses come to the court: the court does not go to the witnesses. In this respect there is a certainty and security upon which the prosecution and defense alike may rely. With respect to the courts-martial sitting in the United States the same condition prevails (AW 23). In the functioning of our military courts in the field, however, and particularly in foreign countries entirely different conditions exist. In England by virtue of the United States of America (Visiting Forces) Order, 1942 (SR and O, 1942 No.966) and orders of the (British) Army Council and Air Council (SR and O, 1942 No.1679), compulsory attendance and testimony of British civilian witnesses are provided. In France, the attendance of civil witnesses largely depends upon the cooperation of the French police or the voluntary action of the inhabitants. In Germany, the compulsory attendance of civilian witnesses is theoretically possible because of the overriding power of the conqueror. In the case of the latter country, however, practical considerations will weigh heavily against theoretical possibilities. At the time of the first or incomplete trial in the instant case it is a matter of notorious knowledge that the ordinary means of travel in Germany were disrupted and in some areas entirely destroyed. While it is entirely possible in spite of combat conditions then prevailing at the time of the first trial on 27 March 1945 at Pfalzfeld, Germany, the necessary additional witnesses might have been produced by the prosecution at an adjourned session of the trial, that fact remains a matter of speculation. There is nothing in the record of trial upon which to base a reasonable assurance that effective means were available to the prosecution, whereby these witnesses could be produced. The court at the first trial after deliberating in closed session opened court and expressed the desire:

> "that further witnesses be called into the case, and to allow time to secure these witnesses, this case will be continued. We would like to have as witnesses brought before the court, the parents of this person making the

accusation, Rosa Glowsky, and also the sister-in-law that was in the room who could further assist in the identification or identity of the accused. The court will be continued until a later date set by the TJA" (R60 of Defendant Wade's Exhibit "A").

Seven days later and prior to further action by the court the appointing authority, Commanding General, 76th Infantry Division, withdrew the charges from the court which had been appointed by him and to which he had previously referred the charges for trial (R9; Pros. Ex. A), and directed that no further action in the case be taken by the court. The Board of Review narrates the subsequent proceedings as follows:

"On the same day he transmitted the charges and allied papers to the Commanding General, Third United States Army, with a recommendation for trial by general court-martial, stating that the case had been continued because of the unavailability of two witnesses due to illness, and that the tactical situation made the obtainment of the witnesses impractical and precluded prompt disposition of the case.**** Thereafter, on 18 April 1945, the Commanding General, Third United States Army, transmitted the charges and allied papers to the Commanding General, Fifteenth United States Army, requesting that he assume court-martial jurisdiction because the civilian witnesses were residents of the territory under his jurisdiction***" (p.3, underscoring supplied).

6. The Board of Review has, in my opinion, most properly designated the doctrine of "imperious necessity" as

"an illusive and expansive doctrine, not susceptible of precise definition, because it is designed to apply to emergent situations, and the restraints which are reasonable today may be arbitrary tomorrow ****. All courts, however, have recognized that the power should be exercised with caution, and that it should be limited to the most urgent circumstances".

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I believe that the situation disclosed in the instant case is, in the application of the doctrine to the military courts, well within the description of "urgent circumstances", notwithstanding the general accepted limitation of the civil courts,

> "that the absences of witnesses or the unavailability of evidence is not ground for the termination of the trial by a discharge of the jury under the doctrine of imperious necessity, so as to sanction a second prosecution for the same offense***".

The bases for my conclusion are: First, the inherent differences between the civil and military courts with respect to the permanency of their places of trial and the certainty of their administrative practice and court routine. These differences I have explained above. Second, the difficulty in securing the presence of civilian witnesses who are foreign nationals at a trial when a military court sits in a foreign country of the status of Germany. I have likewise discussed this problem above. Third, the tactical situation confronting an appointing and referring authority in the field when his forces are engaged in actual combat or are performing important police and occupational duties. On this point I desire to make further comments.

It is manifest that Congress intended to provide a mechanism in the administration of military justice whereby the courts would be able to function with reasonable efficiency and competency during the course of field operations in time of war. In order to ensure this flexibility and adaptibility Congress imposed upon the appointing authority the administrative responsibility for the proper functioning of the general courts-martial of his jurisdiction. In order to permit him to meet this responsibility it was necessary to vest him with broad discretion in determining where and when the court should sit and what cases should be tried by it (cf: CM ETO 1554, Pritchard). Particularly when his command is engaged in the field in a foreign country under combat conditions or in occupancy of the country of a conquered enemy, his power and authority in this respect is of the utmost importance in the maintenance of discipline of his subordinates and in the performance of duties placed upon his command.

In the instant case the Commanding General of the 76th Infantry Division determined, in the exercise of this discretion that:

> "the tactical situation made the obtainment of the witnesses impractible and precluded prompt

disposition of the case" (p.3).

When he learned of the request of the court that certain witnesses whose testimony it considered of importance should be produced, he was faced with a problem peculiarly within the scope of his authority. It involved something more than the problem which would confront a district attorney in the trial of a similar case in a civil court. The Commanding General was called upon to determine not only how these witnesses would be produced but also whether it was advisable to bring them to the place of trial. Consideration of the last question involved many factors of which he was the best judge, among which were the expediency and desirability of transporting German witnesses from their homes to the place of trial when the witnesses must be moved a considerable distance in time of combat; the methods and means of feeding and billeting them while they were absent from their homes, and the time and effort of his personnel consumed in this effort. My difference with the Board of Review centers at this point. I cannot believe that the doctrine of "imperious necessity" when applied to our military courts is so limited as not to encompass this situation. I recognize it as a doctrine of limited application, but I believe that it does include the right of the appointing authority to stop the trial of a cause and withdraw the charges when there is presented to him for decision a problem possessing the complexities here involved. When he determined that the tactical situation of his troops requiredthat the trial be taken to the witnesses rather than the witnesses be brought to the trial, he decided a question which involved the military necessities of his command. It is not an unreasonable expansion of the doctrine of "imperious necessity" to include tactical situations which the appointing authority deems of sufficient seriousness as to prevent the production of necessary witnesses at the trial where the court then sat.

7. I have elected to discuss the legal problem here presented within the ambit of the opinion of the Board of Review rather than place my dissent upon the literal interpretation of the Manual for Courts-Martial which directs:

> "[an appointing authority] may withdraw any specification or charge at any time unless the court has reached a finding thereon" (MCM, 1928, par.5 p.4).

I adopt this method of approach because I recognize that if the quoted provision of the Manual be given a literal application its validity is immediately called into question as a result of the interpretation of the "double jeopardy"

clause of the Fifth Amendment by the Federal courts. Well defined constitutional principles appear to deny the right of the approving authority to withdraw the charges once jeopardy has attached to accused if such withdrawal is prompted solely by the fact that the prosecution has failed in its proof and the appointing authority capriciously desires to afford the prosecution another opportunity to secure a conviction. Under established canons of statutory construction the quoted provision of the Manual should be construed so as to uphold its constitutionality rather than to construe it so that it will run afoul of constitutional prohibitions. The power vested in the appointing authority to withdraw charges is a valuable and necessary administrative device and it may be preserved to him if its exercise is based upon the doctrine of "imperious necessity" as such doctrine is adjusted to meet the needs peculiar to the functioning of courts-martial.

A frank recognition of the legal principle that jeopardy may attach before findings by a courts-martial seems imperative under the approved construction of the "double jeopardy" clause of the Fifth Amendment. On this major premise I believe that the doctrine of "imperious necessity" may for the reasons herein set forth, be expanded to include tactical situations which in the opinion of the appointing authority makes impractical the production of necessary witnesses. With that determination he may then exercise the power of withdrawal of the charges in accordance with the provisions of the Manual. Under such process of reasoning the Manual provision is valid. Stated otherwise: The appointing authority may withdraw any specification or charge at his direction at any time before jeopardy attaches (CM ETO 9986, Goldberg), and he may withdraw any specification or charge after jeopardy attaches when "imperious necessity" dictates and "imperious necessity" in the functioning of military courts includes military necessity and tactical considerations.

8. I therefore conclude that the Commanding General of the 76th Infantry Division was authorized to withdraw the charge in the instant case from the court sitting at Pfalzfeld, Germany on 27 March 1945 and transmit the same to another jurisdiction for trial and that his action did not afford the accused the right to plead former jeopardy at the trial now under review.

9. I concur with the Board of Review in its conclusion that accused in the present trial was proved guilty of the crime charged. No errors prejudicial to the substantial rights of accused were committed at the trial, and the court had jurisdiction of the person and the offense. In my opinion the record of trial is legally sufficient to support the findings of guilty and the sentence.

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10. I transmit herewith forms of action in the alternative; one for use in the event you are in accord with the conclusion of the Board of Review that the record of trial is legally insufficient to support the findings and the sentence and one for use in the event you agree with the conclusion set forth in this, my dissent, that the record of trial is legally sufficient to support the findings of guilty and the sentence. Alternative drafts of appropriate orders promulgating your conclusions are also transmitted herewith.

11. When copies of the published order are forwarded to this office, they should be accompanied by the record of trial, the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15320. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15320).

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

3 Incls:

Incl 1. Record of Trial.
Incl 2. Alternative drafts of action.
Incl 3. Alternative drafts of court martial orders.

AG 201-Wade, Frederick W. (Enl) AGPE-4 2nd Ind.

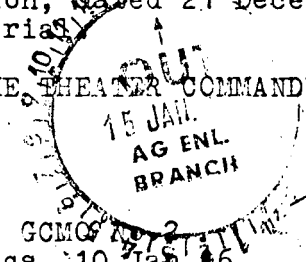
Hq US Forces, European Theater (Main) APO 757, 15 Jan 46.

TO: Branch Office, The Judge Advocate General, with the US Forces in the European Theater, APO 887.

1. Returned herewith is record of trial, holding by Board of Review and the dissent of the Assistant Judge Advocate General, together with twelve copies of the General Court-Martial Orders in the case of Private First Class Frederick W. Wade, 39208980, Company K, 385th Infantry (CM ETO 15320).

2. Under the provisions of Article of War 50 1/2, the Commanding General, United States Forces, European Theater, took action in this case in conformity with the dissenting opinion of the Assistant Judge Advocate General, contained in the 1st Indorsement to the Board of Review's holding, confirmed the sentence as approved and designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct, as the place of confinement. His action, dated 21 December 1945, has been bound in the record of trial.

FOR THE THEATER COMMANDER:



2 Incls:
Incl 1-12 cys GCMO No 2, this hqs, 10 Jan 46.

C. A. MIXON,
Captain, AGD,
Asst Adj Gen

(As to accused Wade, sentence confirmed and ordered executed. GCMO 2, USFET, 10 Jan 1946).

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

BOARD OF REVIEW NO. 2

25 SEP 1945

CM ETO 15333

U N I T E D S T A T E S	CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Corporal JAMES SMITH (36393396), and Private First Class ANDERSON LAND (39109002), both of Company E, 354th Engineer General Service Regiment	Trial by GCM, convened at Mannheim, Germany, 17 May 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

SMITH

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal James Smith, Company E, 354th Engineer General Service Regiment, did, at Bretten, Baden, Germany, on or about 4 May, 1945, forcibly and feloniously, against her will, have carnal knowledge of Gertrud Geist.

LAND

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Anderson Land, Company E, 354th Engineer General Service Regiment, did

at Bretten, Baden, Germany, on or about 4 May, 1945, forcibly and feloniously, against her will, have carnal knowledge of Amalie Veizhans.

Each accused pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, each was found guilty of the Charge and Specification preferred against him. Evidence was introduced of one previous conviction by summary court-martial against Land for absence without leave for two hours in violation of Article of War 61. No evidence of previous convictions was introduced against Smith. All of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be shot to death with musketry. The reviewing authority the Commanding General, Continental Advance Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentences, but owing to special circumstances in each case, commuted each sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for each accused, and withheld the order directing execution of the sentences pursuant to Article of War 50½.

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

Both accused are members of Company E, 354th Engineer General Service Regiment (R30). About 2230 or 2300 hours on 4 May 1945, someone knocked on the door of the residence of Gustav Itte, Golshauser Strasse 31, Bretten, Germany. When no one answered, the glass in the upper part of the door was smashed and three or four shots were fired through the broken window into the kitchen (R8,13). Mr. Itte went upstairs to his apartment, opened the window and called outside for help. Three or four soldiers, who were outside in the garden, shot at him. Every time he went near the window these soldiers would shoot at him (R8,9, 10). Both accused entered the kitchen and found Amalie Veizhans, 54 years of age alone in that room. A son of the family who "is not quite right" soon came into the kitchen and sat on a wooden box and accused Smith left the kitchen. At first Land stood quietly by but suddenly he appeared to be drunk and turning around he slammed the window down. The boy was grinning at him and Land pointed his gun at the boy (R12,13,14,17). In order to protect the boy Mrs. Veizhans went towards Land, who told her he loved her and then she went into a bedroom with him, because she was afraid he would shoot the boy. She sat on the edge of the bed and Land undressed himself and put his gun at the end of the bed. He then pulled her all the way on to the bed, pulled her legs apart "to see whether I was healthy", kissed her and put his penis into her vagina (R14,15,19,20). Accused Land then insisted that she take his "limb" into her mouth and, when she refused, he demanded that she fondle his penis. Because she was so scared she complied with the latter demand. Next he demanded that she "should again take him upon

the bed" and he lifted her legs, hurting her "very much". While accused was in the bedroom with her she did not resist because she was afraid he might strangle her and she could hear another girl moaning in the next room (R15,16,19,33). At this point a French officer entered the room and saw Land holding his trousers with one hand, his gun in the other hand and his shirt rolled up. An elderly lady was lying on her back, with her clothes pulled up to her breasts and "She couldn't talk. She couldn't talk because she was completely knocked out". This woman could not walk and had to be carried from the room (R26,27,28).

When accused Smith left the kitchen he went into a bedroom (R14,17,21), where he found a twenty-one year old girl named Gertrud Geist (R20,21). She had heard the shooting outdoors, the breaking of a kitchen window and a shot was fired into her room. She attempted to leave the room but Smith said to her "come" and when she did not immediately comply, he beat her upon the face with his hand. He told her to take off her pants and pushed her towards the bed. Because she has heart trouble she became very frightened and by gestures told him she was sick. He put his hand inside her pants, noticed she was "not well" and beat her again, this time behind the ears. He then pushed her on the bed, pulled down her pants and lay upon her (R21). He kissed her, excitedly moved his body up and down and asked her to put his "sexual parts into myself". At first she refused but he forced her to take his "sexual part" into her (R22). After completing the sexual act he gave her a chocolate bar and left the room. She ate a "trifle" of it to gain time and Smith re-entered the room and again laid her down on the bed (R22,23). Because she has heart trouble, "was terribly afraid" and accused Smith "was pressing me very hard", she could not resist him (R23). A French officer entered the house and knocked on the bedroom door. It was opened by accused Smith, who was holding up his trousers with the other hand. His trousers were open and hanging down to about the crotch (R25,26). A woman was lying on her back in this room, with her hands on her head, her legs open, and with her clothes up above her breasts. There were spots "that look like blood" on her legs and she could not talk because "she was like being drunk" (R27).

This French officer was attracted to the house because he heard gun shots and women shouting (R25). He disarmed both accused, who were carrying rifles, and took them to a police post (R27,28).

About 1000 hours on 5 May 1945, Mrs. Veizhans identified both accused as being the men in her house the night before (R30). Accused's company commander visited her home on 5 May 1945 and found the front door broken, with several shots in it. He walked into the kitchen, saw shots all over the room and found about twenty or thirty rounds of ammunition from a thirty caliber rifle (R30). He identified rifle number 3652113, which was turned over to his administrative officer by the French, as the weapon issued to accused Land and it was received in evidence (R30,31; Pros.Ex.1).

4. Each accused after his rights as a witness were fully explained to him (R32), elected to remain silent and no evidence was introduced by the defense.

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.148b, p.165).

> "Consent, however reluctant, negatives rape; but where the woman is insensible through fright, or where she ceases resistance under fear of death or other great bodily harm * * * the consummated act is rape" (1 Wharton's Criminal Law, 12th Ed., sec.701, pp.942-943).
>
> "Where the act of intercourse is accomplished after the female yields through fear caused by threats of great bodily injury, there is constructive force and the act is rape" (52 C.J., sec.32, p.1024).

The evidence clearly established "carnal knowledge" or sexual intercourse with both victims. While neither victim consented to the intercourse yet neither resisted to any considerable degree. In lieu of proving resistance and force the evidence clearly showed that each victim was insensible with fear and robbed of her ability to resist by the display of force and threats of death or great bodily harm by the accused. Such proof is sufficient. The conduct of each accused in breaking into the victim's house at night, shooting rifles around the premises, the beating of Miss Geist by accused Smith, accused Land's conduct in menacing the feeble minded son of the family that lived in the house and the other circumstances shown, constituted sufficient evidence to characterize the intercourse that followed as being against the will and without the consent of both victims. The proof disclosed that both Miss Geist and Mrs. Veizhans offered such resistance as permitted by the existing circumstances (CM ETO 12696, Parsons). The prosecution's undisputed evidence fully establishes all the essential elements of the crime of rape as to each accused (MCM, 1928, par.148b, p.165).

6. The charge sheet shows that accused Smith is 35 years, one month of age and was inducted 10 August 1942; accused Land is 34 years, five months of age and was inducted 8 October 1942. (No places of induction indicated). No prior service is shown for either accused.

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

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

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

(112)

1st Ind.

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

1. In the case of Corporal JAMES SMITH (36393396), and Private First Class ANDERSON LAND (39109002), both of Company E, 354th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15333. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 15333).

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

pp

(As to accused Smith, sentence as commuted ordered executed. GCMO 489, USFET, 13 Dec 45).
(As to accused Land, sentence as commuted ordered executed. GCMO 491, USFET, 13 Dec 1945)

RESTRICTED

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

BOARD OF REVIEW NO. 1 6 OCT 1945

CM ETO 15340

U N I T E D S T A T E S	OISE INTERMEDIATE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private AMADEO G. LOZANO (38672721), Company F, 504th Parachute Infantry	Trial by GCM, convened at Reims, France, 20 June 1945, Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, 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 Amadeo G. Lozano, Company F, 504th Parachute Infantry, did, at Semilly sous Laon, Aisne, France, on or about 25 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Miss Irma Rohat, a human being by shooting her with a rifle in the chest.

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(114)

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 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 was substantially as follows:

At about 1730 hours on 25 April 1945, accused and Private First Class Leo Blanchette went to a cafe near their camp. They drank about a quart of cognac (R54) and left for another cafe in Semilly where they resumed their drinking. Accused appeared to be under the influence of liquor (R55). He stated that he intended to see a girl later in the evening (R56) and left the cafe at about 1900 or 1930 hours, returning about 2030 or 2045 hours (R39-40,68). He asked Privates First Class Eason, Joyce, and Kantowski if they had a gun or a knife (R40,68). Accused was "pretty full" (R40). He was drunk and staggering (R43,68). At about 2100 hours he asked Kantowski to go with him as he had a date with a girl. He stated that there were two "G.I's" at the house, one an "MP". Accused had a mustache at the cafe (R58,68).

Sometime between the hours of 2000 and 2115, accused came to the home of Madame Camille Rohat in Semilly sous Laon, Aisne, France, (R9,10, 28,36,71) and said something about wanting a girl (R10,28). Present in the home were Private First Class Charles R. Tucker, Madame Rohat, her daughter Irma Rohat, and a girl friend (R9). Private First

Class Helfrich was also present. Accused asked Irma Rohat, the victim, "How do you get along with these people". He then remarked to Tucker "As long as I have this .45" (R71). Accused had a thin mustache (R28,33,75). He was drunk, staggered and did not speak distinctly (R19). He was induced to leave the home and upon leaving said, "me come back" (R10,33). He appeared to understand that he was to leave (R21).

At about 2130 hours, Tucker (a member of an airborne division), who was on a chair and pulling the blind down at the window, saw accused return and come up the yard, "his rifle pointed" at port arms (R71,76,78,82). He was stumbling along as if he had too much to drink (R76). Tucker closed the door and, as he did, a shot came through the door (R72). Irma Rohat, the victim, screamed and fell to the floor (R72,73). She was shot above the heart (R74). The shots sounded as if they came from an M1 rifle (R76). Five or six shots were heard (R73). When Tucker was on the chair to pull the shade down, he saw no one but accused in the immediate vicinity of the front door (R73,82). About two seconds elapsed between the time Tucker got off the chair and the time he heard the first shot (R82).

Between 2100 and 2130 hours, Private First Class Majestik heard three shots, like rifle shots from an M1 rifle, and then saw accused with an M1 coming down the street (R60,61,66). This was about 50 to 60 yards from the victim's house (R66). Accused was staggering and seemed pretty drunk (R61, 64). Majestik took the rifle away from accused and threw it over the fence. Later, back at camp, accused said he had cleaned his gun already (R62). He spoke distinctly and appeared to know what he was talking about (R63).

At about 2300 hours accused was in his room (R40,46). When told that a girl had been shot, he denied the killing (R41,46), but said he was going to clean his rifle as they might think he did it (R41,47). He appeared to be sober (R46) and did not seem to be drunk (R52). On 24 April, accused had talked to the victim (R50) and had told a friend that he had a date with her for the 25th of April (R42). 15340

Accused, after due warning of his rights in so doing, gave an agent of the Criminal Investigation Division on 29 April a signed sworn statement (R88; Pros.Ex.G) in which he stated that at about 1700 hours on 25 April 1945, he left camp with Blanchette, that they drank at a couple of cafes, and that Blanchette left him about 1930 or 1945 hours. He was drunk at this time and did not remember anything until he ran into Majestik on the road leading from camp. Majestik asked him if he was crazy and took his M1 rifle away from him. Later in Majestik's room, he was told that a girl had been shot and killed in town by a soldier with a mustache. He told Majestik that he had cleaned his gun, but actually he did not clean it until the next morning. He shaved his mustache off just previous to going to bed. He remembered that on 24 April, he met a girl in the town of Semilly and went to her home. He did not remember shooting at any one. His mind was a blank at that time because he was intoxicated.

It was stipulated that Dr. Pierre Augeix, if present, would testify that he examined the body of Irma Rohat and that such examination disclosed gun shot wounds principally of the chest and that in his opinion she died on 25 April 1945 as a result of gun shot wounds in her chest (R88,89; Pros.Ex.H).

4. After his rights were explained to him (R89-90), accused elected to testify under oath (R91). He testified that he had a fifth grade education, was 27 years of age, married, and had four children (R91,92). On 25 April 1945, he and Blanchette left camp and went to a cafe where they had about four drinks apiece from a bottle of cognac (R92). Majestik came in and the three of them finished a quart and bought another bottle (R92,93). Majestik left, and accused and Blanchette went to another cafe and continued drinking. Blanchette left. Accused testified "I don't remember now where I was or what I was doing". The next thing he remembered, he was in his room (R93) at the barracks. Majestik told him that a girl was killed by a paratrooper with a mustache. He told Majestik that he had cleaned his rifle, although he had not. He shaved off his mustache because Majestik told him to do it (R94). He ran a patch through the rifle the

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next morning (R95). He had seen the victim once and that was on 24 April (R97,98). She told him of her boy friend, a paratrooper, who was jealous. He denied dating her or ever seeing her again and denied shooting her (R98). He stated that he did not understand the statement which he gave to the Criminal Investigation Division Agent (R97).

For the defense, it was stipulated that Private First Class Helfrich, if present, would testify that at about 2000 hours on 25 April, accused came to the Rohat home, stayed about 10 or 15 minutes and departed. He next saw accused, after the shooting, on the road toward Camp Laon. Accused said,

> "Take a good look at the moon because you'll probably never see it again if you are trying to put something over".

They walked to camp and accused went towards the barracks (R107).

5. Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par.148a, pp.162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (1 Wharton's Criminal Law (12th Ed., 1932), sec. 426, pp.654-655), and an intent to kill may be inferred from an act of accused which manifests a reckless disregard of human life (40 CJS, sec.44, p.905, sec.79b, pp.943-944).

The evidence in this case, in the opinion of the Board of Review, establishes beyond a reasonable doubt that the shot which caused the death of Irma Rohat was fired by accused. There is no other reasonable hypothesis. The only serious question raised by the record is whether the evidence sufficiently shows that accused shot the girl with malice aforethought.

The law does not require that an accused shall have had an intention to kill the particular 15340

person killed, under circumstances like those in the present case, in order for the homicide to constitute murder. It is enough that the act of accused, unlawful in itself was done with deliberation, and with the intention of killing, or inflicting grievous bodily harm, though the intention be not directed to any particular person (1 Wharton's Criminal Law (12th Ed.,1932), sec.444, p.683).

The evidence shows that shortly before the shooting accused had been in this same house and five other persons were also present therein. The open door was closed just before he fired through it. Under these and the other circumstances of the case, accused was charged with knowledge that his indiscriminate shooting through the door and into the house would "probably cause the death of, or grievous bodily harm to" one or more persons in the house (Cf: CM ETO 4292, Hendricks: CM ETO 5764, Lilly et al; CM ETO 7815, Gutierrez).

In addition to the malice implied from accused's acts, there was also evidence in the record of express malice. Earlier that evening he had asked his friends in the cafe for a gun or a knife. He had had a date the day before with the deceased girl, who had told him of her boy friend, a paratrooper, who was jealous. When accused was in the house shortly before the shooting, the deceased and Tucker, a member of an airborne division, and other persons were present. He was induced to leave the house, and, when he left, he said "me come back". Tucker was standing on a chair at the window pulling down the blind when accused approached the door just before the shooting. He fired five times.

A final question arises with respect to malice aforethought - - the question of the effect of the evidence of intoxication. The evidence established that accused had been drinking prior to the shooting. While much of the evidence indicates that he was drunk at or about the time of the homicide, there is also substantial evidence

in the record from which the court could properly draw the inference that he was not at such time in such a state of drunkenness as to be unable to entertain malice. He was able to return to the house which he had previously left saying "me come back". He was able to carry his rifle at port arms. Later when he returned to camp, he spoke distinctly and seemed to know what he was talking about. At 2300 hours when told about the shooting, he said he was going to clean up his rifle as they might think he did it, and appeared to be sober at this time. In his pretrial statement, he said he remembered meeting Majestik -- and this was just after the shooting and at a distance but 50 to 60 yards away from the house. Told that a girl had been shot by a soldier with a mustache, he said in his statement that he shaved off his mustache before going to bed.

This evidence, together with the other circumstances shown, constitutes a sufficient body of substantial evidence to support the court's implied finding that accused's intoxication was not of such severe or radical quality as to render him incapable of possessing the requisite malice and to support the court's finding that he was guilty of murder under Article of War 92 (CM ETO 1901, Miranda; CM ETO 11958, Falcon; CM ETO 12855, Minnick; CM ETO 16581 Atencio). It was the function and duty of the court and the reviewing authority to weigh the evidence and determine the findings and sentence and since there is sufficient evidence to sustain the sentence, the Board of Review is without power to disturb such determination (Stevenson v. United States, 162 U. S. 313, 16 S. Ct. 839, 40 L. Ed. 980 (1896); CM ETO 6682, Frazier; CM ETO 11958, Falcon: CM ETO 16581, Atencio). However, in view of the mitigating circumstances of drunkenness, the case is a fit subject for subsequent clemency.

6. The charge sheet shows that accused is 27 years old and was inducted 29 March 1944 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

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

8. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 300, 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).

Wm. F. Burrow Judge Advocate

Edward L. Stevens Jr. Judge Advocate

Daniel K. Cissel Judge Advocate

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

BOARD OF REVIEW NO. 1

8 SEP 1945

CM ETO 15343

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private First Class WALTER B. DEASON (39406920), Headquarters Company, Headquarters Command, European Theater of Operations	Trial by GCM, convened at Paris, France, 12 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private First Class Walter B. Deason, Headquarters, Company, Headquarters Command, European Theater of Operations, United States Army, did, at Paris, France on or about 25 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended on or about 28 October 1944, at Paris, France.

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CHARGE II: Violation of the 96th Article of War. (Finding of guilty disapproved by the confirming authority)

Specification: (Finding of guilty disapproved by the confirming authority)

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of 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 hanged by the neck until dead. The reviewing authority, the Commanding Officer, Seine Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, disapproved the findings of guilty of the Specification of Charge II and of Charge II, confirmed the sentence but, owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence of the prosecution shows substantially the following: Accused was absent from his organization without authority from 25 September 1944 until he was apprehended 28 October 1944 (a period of 33 days). The commencement of this period was established by both a duly authenticated extract copy of the morning report of accused's organization (Pros.Ex.1) and accused's written confession (Pros.Ex.2); the termination of the period was established by this confession and the testimony of the apprehending agents (R10-11,13-14). At the time of his apprehension, accused was wearing civilian clothes (Pros.Ex.3,4, 5 and 6). The apprehending agents became suspicious of him in a cafe and followed him. When they apprehended him he "made a pass for his pocket", and was found to have an automatic pistol, loaded and with one round in the chamber, in his pocket. While walking between the two agents he hit one agent and had to be subdued by force (R11-14). The confession established that during the period of unauthorized absence accused participated in large-scale black market operations with six other soldiers in selling gasoline belonging to the United States Government to French civilians; accused's share in the proceeds of such sales amounted to 214,000 francs, of which he had 52,475 francs on his person when apprehended (Pros.Ex.7).

4. One witness was called by the defense, a girl who testified

that one day accused shook hands "with us" and said he was going back to his unit even though he would die for what he had done (R15-16). After having been fully warned of his rights, accused made an unsworn statement in which he said that he left his unit because he thought that was one way to be transferred to a combat organization. He didn't care much for "the deal about the gas", but went ahead and helped because he was about out of money. Later, he decided to return to his unit and started back on a motorcycle,but had an accident in which he injured his foot. The injured foot kept him in bed until the day of his apprehension; on that night he left the cafe because he recognized the agents (R17-18).

5. The confession of accused was shown to have been made voluntarily without improper inducement and was received without objection. The findings of guilty of Charge II and its Specification were disapproved because based solely on the confession, but there is adequate corroborative evidence of the corpus delicti of the desertion (CM ETO 9469, Alvarez). Even though he could not be legally convicted on this record of the black market charges, the court could properly consider these activities and the income therefrom in determining his intent. Other proper considerations on this point include his continual proximity to American forces to which he could have surrendered, the military situation at the time, his wearing of civilian clothes, possession of a gun and a large sum of money when apprehended, his departure from the cafe on recognizing the apprehending agents, and his violent attempt to break arrest (MCM, 1928, par.130a, p.142-144). Conviction for desertion on similar facts for an identical period of unauthorized absence was approved in CM ETO 952, Mosser. (See also CM ETO 1629, O'Donnell; CM ETO 2216, Gallagher).

6. The charge sheet shows that accused is 20 years six months of age and was inducted 8 January 1945 at Sacramento, California, for the duration plus six months. 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. 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). 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).

Wm. F. Burrows Judge Advocate

Edward C. Stevens, Jr. Judge Advocate

Donald R. Campbell Judge Advocate

(124)

1st Ind.

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

1. In the case of Private First Class WALTER B. DEASON (39406920), Headquarters Company, Headquarters Command, European Theater of Operations, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty 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 15343. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15343).

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

(Sentence as commuted ordered executed. GCMO 428, USFET, 21 Sept 1945).

15343

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

15 September 1945

BOARD OF REVIEW NO. 1

CM ETO 15346

UNITED STATES	)	XXIII CORPS
	)	
v.	)	Trial by GCM, convened at Idar-Oberstein,
	)	Germany, 29 June 1945. Sentence: Dis-
Private First Class ARCHIE	)	honorable discharge (suspended), total
L. FONDREN (34987915),	)	forfeitures and confinement at hard
Company B, 1263rd Engineer	)	labor for two years. Dalta Disciplinary
Combat Battalion	)	Training Center, Les Milles, Bouche
	)	de Rhone, France.

OPINION by BOARD OF REVIEW NO. 1
BURROW, STEVENS AND CARROLL, Judge Advocates

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1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater and there found legally insufficient to support the findings and the 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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Archie L. Fondren, Company "B", 1263d Engineer Combat Battalion, did, at Wipperfurth, Germany, on or about 0400 9 June 1945, with culpable negligence kill Private Lester W. V. Covington, Company "B", 1263rd Engineer Combat Battalion, by shooting him in the chest with an automatic pistol, caliber .32.

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

due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement. The proceedings were published in General Court-Martial Orders Number 76, Headquarters XXIII Corps, APO 103, U.S. Army, 23 July 1945.

3. The undisputed evidence showed substantially the following: Between 0300 and 0400 hours on 9 June 1945 accused and two other soldiers met deceased and another soldier on the street and stopped to talk (R7, 10,21). Accused showed deceased a pistol which he had obtained from one of the members of his platoon the preceding evening (R23). While it was flat on his palm, not pointed toward deceased (R8,21,24), deceased reached over to take the gun and it discharged (R7,17,21); Pros.Ex.1) after deceased had touched it (R25). The bullet passed through deceased's wrist and entered his chest (R14). He died in an ambulance en route to the hospital (R12,16). After the shot, accused was "scared to death" (R21; Pros.Ex.1), ran to his quarters and threw the gun into a vacant lot as he ran (R14, 15,21,22,24). Deceased was a close friend of accused (Pros.Ex.1). They had been drinking beer together earlier that evening (R21). Accused did not know that the pistol was loaded or whether it was cocked (R23,25; Pros. Ex.1). A short time after the shooting he was confused, had an extremely alcoholic breath and appeared to be in a dazed condition (R14).

4. For the defense, accused's platoon leader testified that his efficiency rating and character were excellent, and that he would like to have him back in his unit (R19). After being fully advised of his rights (R19-20), accused testified as a witness in his own behalf; his testimony is in agreement with that of the prosecution (R21-26).

5. The sole question presented by this record for determination is whether any set or actions of accused constituted culpable negligence. Involuntary manslaughter, the offense charged, can only have occurred if culpable negligence were present or if death resulted from the commission of an unlawful act (MCM, 1928, par. 149a, p. 165), and commission of an unlawful act is neither alleged nor proved. Ordinarily, the presence of culpable negligence is a matter for determination by the court-martial as the fact finding body, but it becomes a proper subject of appellate inquiry as a question of law when the negligence is so slight as not to meet the required standard (CM ETO 15217, Nolan; CM ETO 1414, Elia, citing People v. Angelo, 246 N.Y. 451, 159 N.E. 394). If the conduct of accused, as a matter of law, did not amount to culpable negligence, the conviction must be disapproved and the sentence vacated.

"Culpable nelgigence" is synonomous with "criminal negligence", and encompasses a reckless and wanton disregard for the safety of life or limb (People v. Brucato, 32 N.Y.S. (2nd) 689,691). "Culpable" is equivalent to criminal, reckless, gross, such negligence as is worthy of punishment and means disregard of consequences which may ensue from an act and indifference to the rights of others (People v. Grogan, 260 N.Y. 138, 183 N.E.

273, 275, 86 A.L.R. 1266 (1932)). "Culpable" means criminal, deserving punishment; guilty; blameworthy, or in popular meaning, deserving blame or censure (Cain v. State 55 Ca.App.376, 190 S.E. 371, 374).

Approval of the findings and sentence requires a determination that the record contains substantial evidence that the conduct of accused was culpable within these definitions. There being no direct evidence of negligence, consideration must be given such inferences as may be ligitimately drawn from the competent evidence adduced. No inference of even ordinary negligence can be made from the evidence of accused's handling of the weapon. The only evidence which could possibly bear on this point is that immediately prior to the discharge it lay flat on the palm of his open hand, not pointing toward deceased. Indeed, the more legitimate inference is that the discharge was actually caused by deceased's seizing the gun, since it did not go off until he touched it.

Accused's negligence, if any, must thus be inferred from his possession and display of a weapon which he did not know to be loaded or cocked, and from the fact that such display was between three and four in the morning to a soldier whom he knew to have been drinking. While this may constitute a lack of foresight or ordinary negligence, which need not here be determined, it has been held:

> "Mere lack of foresight, stupidity, irresponsibility, thoughtlessness, ordinary carelessness, however serious the consequences may happen to be, do not constitute 'culpable negligence', but for culpable negligence there must exist in the mind of accused, at the time of act or omission, a consciousness of probable consequences of act and a wanton disregard of them" (People v. Carlson, 26 N.Y.S. (2nd) 1003,1004) (Underscoring supplied).

Judged by these tests it becomes apparent that the record of trial does not contain any substantial competent evidence of culpable negligence, nor of any facts from which it can legitimately be inferred, and that the death of deceased falls within the classification of accidental (See CM 240043, Vislan, 25 B.R. 349 (1943); CM ETO 1414, Elia, CM ETO 15217, Nolan).

6. The charge sheet shows that accused is 19 years four months of age and was inducted 15 April 1944 at Camp Shelby, Mississippi, 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. For the reasons hereinabove 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.

WM. F. BURROW, Judge Advocate

EDWARD L. STEVENS, JR., Judge Advocate

DONALD K. CARROLL, Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 15 September 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private First Class ARCHIE L. FONDREN (34987915), Company B, 1263rd Engineer Combat Battalion.

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

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

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

(Findings and sentence vacated. GCMO 498, USFET, 20 Oct 1945).

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

BOARD OF REVIEW NO. 3

13 OCT 1945

CM ETO 15393

U N I T E D S T A T E S	XXIII CORPS
v.	Trial by GCM, convened at Idar-Oberstein, Germany, 7 July 1945. Sentence as to Lewis, Jones and Keyton: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. Acquittal as to Dale.
Technicians Fifth Grade JAMES R. DALE, 35706877, and J.C. JONES, 34746700, Private First Class SPENCER LEWIS, 33653601, and Private EDWARD L. KEYTON, 34069060, all of Company "A", 1700th Engineer Combat Battalion	

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

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

2. The accused were tried upon the following charges and specifications:-

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

Specification: In that Technician Fifth Grade James R Dale, Technician Fifth Grade J C Jones, Private First Class Spencer Lewis, and Private Edward L. Keyton, all of Company "A", 1700th Engineer Combat Battalion, acting jointly, and in pursuance of a common intent, did, at Kellenbach, Kreis Simmern, Regierungsbezirke Koblenz, Germany, on or about 1 June 1945, forcibly and feloniously against her will, have carnal knowledge of Elizabeth Gellweiler.

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

Specification: In that * * * did, at Kellenbach, Kreis Simmern, Regierungsbezirke Koblenz, Germany, on or about 1 June 1945, by force and violence, and by putting her in fear, feloniously take, steal, and carry away from

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the person of Elizabeth Gellweiler, two rings, the property of Elizabeth Gellweiler, value about $15.00.

Each accused pleaded not guilty. Dale was found not guilty of the charges and specifications and Jones, Lewis and Keyton each were found guilty of the charges and of the specifications, except, in each instance, the words "Technician Fifth Grade James R. Dale". No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the votes were taken concurring, Jones, Lewis and Keyton each were sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution summarizes as follows:-

On the afternoon of 1 June 1945, as Heinrich Klein and his brother-in-law Heinrich Jung were driving a horse and wagon along the road toward the town of Kellenbach, Germany, the prosecutrix, Frau Elizabeth Gellweiler, also en route to Kellenbach, overtook them on a bicycle and stopped to speak with them for a moment. While she was conversing with them a jeep containing four colored soldiers approached from the rear, slowed down for a moment, and then continued on. Frau Gellweiler completed her conversation with Klein and Jung and resumed her journey, continuing along the road in the same direction as that taken by the jeep (R6,12,16,16½).

After proceeding along the road a short distance, she encountered the jeep approaching from the opposite direction. As it neared her it was brought to a stop and its occupants immediately dismounted. One started to work on the vehicle at once, feigning motor trouble, two approached her, and, taking her by the arm, demanded schnapps, while the fourth took her bicycle from her and dragged it to the side of the road (R16½). Then, after being threatened with a pistol and a knife, she was carried bodily into a grain field adjoining the road by two of the soldiers with the third following immediately behind. The fourth remained at the jeep (R16½, 25, 26, 114). During this time one or more of the soldiers held their hands over her eyes and mouth (R16½).

At about this time the wagon she had passed a few minutes earlier came along but the soldiers concealed themselves in the tall grain and prevented her from attracting attention by holding her tightly and covering her mouth to keep her from screaming (R16½,22,25,26). This portion of Frau Gellweiler's testimony was corroborated in part by the testimony of both Klein and Jung who stated that after they had proceeded a distance of about one kilometer beyond the location where they spoke with her they

noted a jeep parked at the side of the road with the motor running and also noted a women's bicycle lying in the field on the opposite side of the road. A colored soldier was standing near the vehicle, apparently working on the motor, and another colored soldier was seen running through the underbrush (R6,7,11,13,14). Thinking that some unusual event might have taken place, they undertook to remember the number of the jeep. Klein testified that the number of the vehicle was 2A-17000 while Jung testified that the vehicle number was 2A-1700-E (R7, 13).

Frau Gellweiler testified that after the wagon had passed, one of the soldiers held her shoulders, at the same time covering her mouth with one hand, a second soldier held her legs apart, and the third started to remove her pants. When she attempted to struggle, he cut or ripped them off with his knife. Then, while the other two soldiers were still holding her, the third soldier had intercourse with her (R17). When he finished, the men shifted positions and a second soldier had intercourse with her while the other two held her (R17). When he finished, one of the men "left and went in the direction of the automobile and another came back" (R17,30). Before the episode was over, Frau Gellweiler had been "used" five times by the same means.

> "Always 3 were with me * * * One was lying on me, one was kneeling in front of me and one behind me * * * One of them always held my eyes closed. The one that was lying on top of me would hold my mouth and the other one was holding my legs. They were always with me by threes" (R23,115).

Although at one point on cross-examination Frau Gellweiler conceded that it was possible that only three of the men participated in the acts of intercourse (R24), she testified that, although prevented from seeing most of the time because the men covered her eyes, she was positive that each of the four soldiers had intercourse with her and that one had intercourse with her twice (R18,22,24,29,30). However, she could not say that all four soldiers ever were with her at any one time (R29). During the acts of intercourse, she attempted to kick and scream but was prevented from doing so by the men. She submitted only because forced to do so and because she was afraid of the weapons which the soldiers were carrying (R114).

When she was asked if any of the soldiers who attacked her on 1 June were present in the court room she stated "I only recognize one definitely and two possibly, but the fourth one I am not sure about at all" (R31). The man of whose identity she was positive was the accused Lewis and the other two men whom she recognized but of whose identity she was somewhat doubtful were Jones and Keyton. She did not identify Dale as one of her assailants (R21,24,31,32).

Frau Gellweiler further testified that "practically at the end" of the various acts of intercourse two rings were taken from her, one

"on one occasion and one at a little later time" (R17,23,27). One of the rings was pulled from her finger with such force that "when it got to the knuckle it ripped some of the flesh away as it was torn over it" (R28). She was not certain whether the same soldier took both rings or whether the rings were taken by two different soldiers (R17,18,23). However, either one or two of the same soldiers who had intercourse with her also removed her rings (R17,18,23,27,28).

The testimony of the prosecutrix was corroborated in that Dale, Jones and Keyton were seen around their company area later that same day, in a jeep bearing the number 2A-1700-A (R37), that the rings taken from her were found in the possession of Keyton (R39,50), that a pistol which had been in the possession of Jones, a knife belonging to Keyton and the torn pants of the prosecutrix were found at the location where the rapes were alleged to have taken place (R19, 38,39,41,42,54), by the physical appearance of the prosecutrix on the evening of the day of the incident (R34,35) and by the disturbed condition of the terrain at the scene of the crime (R38).

4. Each accused after being advised of his rights as a witness, elected to testify in his own behalf. Jones testified that he, Lewis and Keyton passed the prosecutrix on the Kellenbach road on the afternoon of 1 June 1945, and that when he held up a piece of chocolate the prosecutrix responded with a smile. They accordingly stopped the vehicle farther up the road and, when the prosecutrix overtook them on her bicycle, they solicited intercourse in return for chocolate. She at first demurred but ultimately agreed to have intercourse with one soldier only. Jones thereupon went with her into an adjoining field and engaged in intercourse with her consent and for the consideration suggested. When he finished, he returned to the jeep (R71).

Keyton testified that in the meantime he and Lewis flipped a coin to determine who would be next, and having won, he went into the field to wait for Jones to finish. When Jones had completed his intercourse, he, Keyton, went to the prosecutrix and had intercourse with her as well, also with her consent and in return for chocolate. When he finished, he asked her about his friend but she replied "Nichts kamerad, she was 'kaput'". At about this time he noted that she was wearing two rings. After first attempting to trade her chocolate for them, which she refused to do, he "grabbed her hand and pulled the two rings off" (R98). Upon returning to the vehicle, he told Lewis that she was unwilling to engage in further intercourse (R90)

Lewis admitted that he was with Jones and Keyton on the afternoon in question but denied that he had intercourse with the prosecutrix, stating that while he would have liked to have done so, after Keyton "told me she wouldn't give me none" there was nothing further he could do (R109,111,112). He remained at the jeep during the time Jones and Keyton were in the field (R111).

Both Jones and Keyton testified that on the trip back, Jones noticed that Keyton had some rings and asked him where he got them. When Keyton told him he had taken them from the prosecutrix, Jones told him to return the rings and they turned back in an attempt to find the prosecutrix in order to do so. However, they were unable to find her an

ultimately returned to their battalion area (R72, 90, 91).

Dale's testimony was to the effect that he did not accompany the other three men on the afternoon in question, but spent the afternoon at his company area playing ball and writing letters (R104). The only time he was with any of the other accused on 1 June 1945 was in the evening when he accompanied Jones and Keyton to battalion headquarters in a jeep marked A2-1700 (R108).

5a. It was here charged that Dale, Jones, Lewis and Keyton, acting jointly and in pursuance of a common intent, committed rape on Frau Elizabeth Gellweiler. While it appears to have been held that rape cannot be committed "jointly" in the strict sense of the word, the form of allegation employed was not improper under the circumstances of the instant case in view of the recognized rule of law that all who aid or abet in the commission of an offense are chargeable as principals CM ETO 10857, Welch and Dollar; CM ETO 10871, Stevenson and Stuart; CM ETO 13824, Johnson Young and Bailey; CM ETO 14596, Bradford et al; (CM NATO 643, III Bull Jag. 61; CM NATO 1242, III Bull Jag. 62; CM NATO 1121, idem).

b. The record of trial contains evidence showing that four colored soldiers forced Frau Gellweiler to submit to five acts of sexual intercourse on the afternoon in question. It is usually said that when one act is alleged by the specification and the evidence disclosed two or more the prosecution will be presumed to have elected to stand on the first act shown (CM ETO 7078, Jones; CM ETO 8542, Myles). In CM ETO 10446, Ward and Sharer, it was held that, where two or more accused are involved

> "the prosecution may be deemed to have relied for its establishment of the guilt of each accused, either upon the first act of intercourse engaged in by him or upon the first act of intercourse of his companion in which he aided or abetted"

Here there is ample evidence to show both that the first act of intercourse constituted rape and that while one of the soldiers actually engaged in this act of intercourse, two of his companions actively assisted him in accomplishing his purpose while the fourth acted as a look-out. Under these circumstances the court clearly could find that the men shared an unlawful community of purpose to accomplish the rape of Frau Gellweiler and that, being actually or constructively present at the scene of the crime, each participated in its commission either as a principal or as an aider and abettor. Under these circumstances, each could properly be found guilty of rape, as a principal, of the first act of intercourse shown (cf. CM ETO 3740, Sanders; CM ETO 3933, Ferguson). The evidence beyond doubt established that the victim, Elizabeth Gellweiler, was raped by Jones, Lewis and Keyton, at the time and place alleged (CM ETO 4172, Freeman Davis et al and authorities therein cited).

c. The prosecution's evidence also showed that one of the soldiers who attacked Frau Gellweiler forcibly took two rings from her under circumstances amounting to robbery, as alleged (CM ETO 78, Watts; CM ETO 9301, Flackman). Taken as a whole, the record rather clearly establishes that Keyton was the soldier who actually committed the robbery. The court also found Jones and Lewis guilty of this offense, apparently on the theory that they aided and abetted Keyton in its perpetration. In order that one may be held responsible as an aider and abettor for an offense committed by another, it must be shown that the crime committed was within the common purpose and design for which the parties combined together (see Miller on Criminal Law (1934), sec. 75, pp.229, 232; 14 Am. Jur., sec. 80, p.823). While there is abundant evidence to show that the men were acting in concert and that at least one of the objects for which they combined together was rape, it is somewhat less clear that robbery was also part of the common design. If it was not, and the act of Keyton was an independent act foreign to the common objective, a substantial question is raised as to the guilt of Jones and Lewis of the robbery in question (cf; CM ETO 4294, Davis and Potts). This is true because, even according to the prosecution's evidence, one of these two soldiers may have been at the vehicle at the time the robbery was committed and if the man who was absent had merely agreed to act as lookout for the purpose of rape and did not share the common purpose to rob, he ofcourse may not be held responsible for the latter crime. However, the intent for which men combine together may be gathered from their acts and the circumstances that one of the men in fact took the rings in the presence of and without interference by the other two soldiers in itself constitutes some substantial evidence from which the court could find that all combined not only for the purpose of committing rape but for the purpose of committing robbery as well. Under these circumstances, all who were actually or constructively present at the scene of the crime and who participated in its commission in any way may be held guilty as principals. It follows that Jones and Lewis, as well as Keyton, could properly be found guilty of robbery, as alleged (cf; CM ETO 1453, Fowler).

d. Each accused made a pre-trial statement substantially to the same effect as his testimony at the trial and these statements were introduced into evidence by the prosecution over the objection of the defense that the statements were not voluntarily made. Except for certain recitals made by Keyton tending to show that he was guilty of robbery, these pretrial statements tended to exculpate rather than incriminate the accused and therefore, at least as to the rape charged, may probably be regarded as admissions against interest rather than as confessions (cf: CM ETO 3933, Ferguson; CM ETO 4945, Montoya). In any event, even if the statements are regarded as confessions, in view of the compelling nature of the evidence exclusive of the statements, their admissions even if improper did not injuriously affect the substantial rights of the accused within the meaning of Article of War 37 (see CM ETO 9128, Houchins, et al).

6. The charge sheet shows that accused Jones is 21 years three months of age and was inducted 2 April 1943 at Fort Benning, Georgia, that Lewis is 22 years one month of age and was inducted 25 June 1943 at Roanoke, Virginia and that Keyton is 25 years of age and was inducted 22 February 1942 at Fort Benning Georgia. None had prior service.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape and robbery by Article of War 42 and section 278 and 330 and 284, Federal Criminal Code (18 USCA 463, 457, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (AW 42; Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

B R Sleeper Judge Advocate

Malcolm C. Sharman Judge Advocate

B K Sevey Jr Judge Advocate

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

BOARD OF REVIEW NO. 2

20 SEP 1945

CM ETO 15416

U N I T E D S T A T E S	3RD ARMORED DIVISION
v.	Trial by GCM, convened at Darmstadt, Germany, 10 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private GEORGE D. RADCLIFFE (31064047), Battery A, 391st Armored Field Artillery Battalion	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private George D. Radcliffe, Battery A, 391st Armored Field Artillery Battalion, did, at Neu-Isenburg, Neu-Isenburg, Germany, on or about 2345 hours 22 June 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Ludwig Bretsch, 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 two previous convictions by summary court-martial (1) for wrongfully appearing in town when off duty in violation of Article of War 96, and (2) for absence without leave for two 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 United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the Prosecution:

Every evening for seven or eight weeks the accused called upon Marie Bretsch at 110 Poststrasse, Neu-Isenburg, Germany, where she, her father, mother, and four sisters lived. They planned to be married (R14,27-28). The parents had no objection to his visits (R17). He had called on Marie during the afternoon of 22 June 1945 and appeared angry about something which Marie could not understand (R28). He later was gay again. During the same afternoon he reported to a medical officer that he had an urethal discharge. The officer found no evidence of it (R8). That same afternoon he borrowed a pistol from T/5 Howard G. Jenkins (R11-12; Pros.Ex."A"). He had borrowed it several times previously. It was a common custom in that organization for a member to carry a weapon for protection whenever he went outside of the area (R32). At that time the Bretsch home was "off-limits" (R10). Early the following morning accused returned the weapon to Jenkins. The pistol had been fired. He seemed excited and said something about being in some kind of trouble (R12).

About 11:30 P.M. on the moonlighted night of 22 June 1945 (R19) when the entire Bretsch family was asleep (R35), accused knocked on the door of the kitchen of the Bretsch home (R13) which is adjacent to the Friedrich home (R15). Frau Bretsch went to the door and asked who was there. No one answered but accused appeared at the window of the bedroom adjoining the kitchen and opened it. He had a pistol in his hand and "looked mean". Mrs. Bretsch told him to wait and she would call Marie. She called Marie. Her husband, Ludwig Bretsch, age 39 (R34), who was in that bedroom and was dressed in a night shirt, said to accused, "If you are not quiet, I will go call the Military Police" (R14). Frau Bretsch then in fear went through her kitchen to the Friedrich home but soon returned. She heard a shot fired as she returned to her kitchen. This occurred about ten minutes after accused had arrived at the house (R15-16). She testified that no other soldiers visited the Bretsch home, but a colored soldier named Walter Truman did visit the Friedrich home where he had his laundry done (R17,22). The witnesses were not certain whether the lights were turned on in the house at the time accused was there (R19,31,33,34). Two of the daughters testified that the accused came through the window and threatened the father by pointing a "gun" at him. One daughter intervened. He "put" the pistol to her chest. That daughter ran out of the room in fear and heard a shot fired 2 or 3 minutes later (R24). She described the accused as "going like drunk, swaying and zig-zag" (R25). The daughter, Marie, saw accused standing at the window with a pistol and she went out of another window with

two of her sisters and fled to the Friedrich home (R26,51). While there, she heard her father say, "George, let me at peace because I do not do anything to you" and then some tables moving and chairs knocked to the floor (R26-27). The 15 year old daughter, Suzie, saw accused come through the window, heard her father threaten to call the police, and saw accused push the father against the wall and hit him twice. She then ran out for the police. She heard the shot fired (R29-30). Shortly after the shot was fired, Mr. Bretsch came in to Friedrich's kitchen bleeding at the neck. In two minutes he was dead (R21). He died as a result of a bullet wound through his neck (R7). About five minutes later accused came in to the Friedrich home. He had a pistol in one hand and a dog in the other (R21). It was shown that the bullet imbedded in the door of the home and the shell found outside was fired by the pistol admitted in evidence as Pros.Ex."A" (R9,19).

4. Evidence for the Defense:

One night, about three weeks prior to 22 June 1945, accused got into an altercation with a negro soldier outside of the Bretsch home and received a kick. Someone outside said, "Come outside and I will shoot you" (R36).

Private Walter Truman testified that he was at 110 Poststrasse, Neu-Isenburg the night of 22 June (R38). He saw the accused and started to leave. Accused pointed "the gun" in his direction and told him to come back. He went back and tried to talk to the accused. He was "in no condition for me to talk to him". While he stood there about 1½ yards away he saw accused looking in the window from the outside and fire the pistol through the window (R39-40). There was no light burning in that room (R41). Frau Friedrich testified that Truman had visited her home about 9 o'clock that night and remained in the kitchen (R41). She did not know where he was when the shot was fired (R42).

The accused having been advised as to his rights as a witness elected to testify in his own behalf (R42-43). He is a private, Battery A, 391st Armored Field Artillery Battalion (R43). His version of what occurred on the night of 22 June 1945 appears in his answer to that question:

> "A. Well, I went up to the house which I had been going to since we arrived in that town. When I arrived at the house that night I knocked on the door and nobody answered. Then I went to the back and heard Mrs. Bretsch in the kitchen and she wanted to know who was there. I could not understand her but I told her to open the door but she didn't understand and didn't open the door. Then I went to the window and it was shut. I opened it and I crawled through the door and saw Marie. The old lady came to the window and started talking but I couldn't understand her. Finally Marie answered me from the

other room. I then went to the other window and talked to Marie through it. We were talking back and forth and she was answering me. I told her to let me in but she said 'No or Nix' and then I told her to come outside that I wanted to talk to her. She said 'No'. I kept on talking to her and saying 'Come here' and saying everything was all right that there was nothing wrong and that I was sorry for what happened that afternoon and wanted to explain to her. She did not understand what I was talking about. Then I said, 'Come here' again. I said that just before this colored soldier sounded off. He said, 'Get your ass out of here because these people don't want you around here'. I called him a Niger and he said, 'You can't talk to me like that' and then he said, 'I'll kill you'. I heard him coming through and I heard the other man say something to him. The old man tried to stop him. He started out of there and I heard a click in the door. When I heard that I thought of what he told me and I got my gun and turned around facing him. He swung around me, and I can't say just how far. I cannot remember what happened next but I told him to stay where he was. I told him I would shoot him if he tried anything. He said something else to me and as he did he reached for his gun and when he did, that's when I shot" (R43-44).

On cross-examination, he stated that he shot at the colored soldier's arm to injure him as he stood between him and the window. He denied that he was in any room (R44). The colored soldier cursed him as he was coming out of the door of the house (R46). He further explained that earlier that day he thought he had a venereal disease and told Marie about it. He borrowed the gun and said he was going to see "this colored soldier". Marie denied having relations with anyone else. He visited a doctor and discovered that there was nothing wrong. He told Marie he would call at 10 o'clock that night and let her know the result of the medical examination. At that time he was in the beer hall with a "bunch of fellows" and was therefore late getting to Marie's house. He borrowed the gun because he had to pass through some woods where some colored soldiers were and wanted protection (R47-48).

5. Three of the Bretsch daughters were recalled in rebuttal and testified that there was no colored soldier in their house or bedroom that night (R49,50). None heard any colored soldier talk to the accused (R50-51). Truman denied that he was in the Bretsch home or that he talked to the accused (R52). Accused did not aim the gun at him when he fired. He was not between the accused and the window. He did not curse the accused (R53). He himself was not armed (R54).

6. Discussion:

The accused has been convicted of the murder of Ludwig Bretsch. Murder is the unlawful killing of a human being with malice aforethought. Malice may be presumed from the deliberate use of a deadly weapon in a way which is likely to produce, and which does produce, death (Underhill's Criminal Evidence, 4th Ed.1935, sec.557, p.1090). An eye witness described how the accused deliberately aimed his pistol in an open window and fired it. As a result the deceased met his death. Other witnesses for the prosecution related how the accused armed with a pistol appeared at the Bretsch home in such a manner as to cause most of them to flee in fear, dressed in their night clothes from their beds, and that after a few words from the deceased asking the accused to let him be in peace, a shot was fired which pierced his neck and caused his death. There is, therefore, ample competent evidence to support the findings of guilty of the charge. As against this evidence, the accused testified that he fired in self defense at a negro soldier whom he thought was about to fire at him and accidentally struck the deceased. Neither drunkenness nor insanity was interposed as a defense. Assuming, without deciding, that the story accused told, if true, constituted a defense to the charge of murder by justifying or excusing the homicide in self defense, nevertheless, the issue that he thus raised was purely a factual one and within the exclusive province of the court to determine. Having determined it against the accused the findings of guilt thus supported by substantial evidence will not be disturbed by the Board of Review (CM ETO 4194, Scott; CM ETO 13139, Ridenour).

7. The charge sheet shows that accused is 25 years of age. Without prior service he was inducted 11 February 1942.

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

9. The penalty for 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).

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

10 OCT 1945

CM ETO 15419

UNITED STATES	5TH ARMORED DIVISION
v.	Trial by GCM, convened at Eschwege, Germany, 10 July 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for three years. Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France
Private First Class MERCHEL GREEN (35792949), 81st Tank Battalion, Armored	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Merchel Green, Company "D", 81st Tank Battalion, at or near Jembke, Germany, on or about 3 May 1945, by his culpable negligence in handling, while scuffling, a revolver, did unlawfully, feloniously, and wrongfully kill one Technician Fourth Grade John R. Axline, Company "D", 81st Tank Battalion, by shooting him in the chest.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification except the word "feloniously". No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing

authority may direct, for three years. The reviewing authority approved the sentence, ordered it executed, but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as the place of confinement.

The proceedings were published by General Court Martial Order No. 67, Headquarters 5th Armored Division, APO No. 255, U. S. Army, 23 July 1945.

3. Evidence for prosecution:

On 3 May 1945 at Jembke, Germany (R8,12), accused, Technician Fifth Grade Virgil N. Harris and Private First Class Andrew P. Martinez, all of the same organization, were standing by a barn (R8). Accused was playing with a sword or saber (R8,13).

Harris testified that deceased, Technician Fourth Grade John R. Axline, of accused's company, came up and engaged with accused in a friendly tussle for about five minutes. No blows were struck and the two were laughing all the while. They were "buddies". It started with deceased's grabbing accused around the waist. Accused then put his arm or arms around deceased and somehow in the scuffle the sword dropped to the ground. Deceased then moved about three steps to his right and accused stepped back and one step to the right. Deceased next grabbed accused by the arms. Accused "pulled a gun out of his belt * * * just yanked it out, he didn't aim it, it just went off" (underscoring supplied). (In cross-examination when asked "You remember seeing him point the gun?", the witness replied, "Yes sir"). Harris saw no reason for accused's drawing the weapon and did not remember in which hand accused held it. At the time the gun went off, deceased's right hand was on accused's stomach or waist. Their bodies were not touching - their chests were "about a foot or a foot and a half" apart. When the gun went off, deceased fell to his knees and accused dropped the pistol and said, "What have I done, I am sorry". Harris also testified that deceased's right hand was somewhere on accused's left side but deceased did not pull accused around to face him. While further testifying that accused got the pistol "about a foot or so" from his belt, he almost immediately added, "I didn't actually see him fire it, I heard the report * * * I could not tell [how he was holding it], it all happened so quickly", "just as he yanked it out of his belt it went off". This happened about two minutes after the sword dropped to the ground. Harris thought the gun was a "44". Orders had been issued that all weapons of foreign manufacture were to be stored in tanks. Accused had just taken his gun from the tank when deceased came up (R7-12,16-17).

Martinez confirmed that it was a friendly scuffle. According to him, deceased approached accused from the rear, grabbed accused's saber "and twisted it around in back of him". During the scuffle accused dropped the saber. Then "I saw him reach into his belt for it [the pistol], I

don't know whether he was doing it to keep the pistol from falling out or not". At this point the witness' testimony becomes conflicting. In direct examination he testified that accused "took it [his gun] out of his belt" but did not point it at accused and that deceased came into its line of fire as "he came around and caught ahold of Green's arm and was standing to Green's side". However, in the court's examination, he testified that he did not see the gun from the time accused reached for it until the explosion and that he knew accused was reaching for the gun because "he had it in his belt when they started scuffling". Before the gun went off deceased was holding accused "from the side". He did not know whether deceased was holding accused's arms. At the time the gun discharged, deceased's body was against accused's side, with accused's left elbow touching deceased's chest. When the gun discharged, deceased took a step backward and sank to his knees. Accused said, "Jesus Christ, what have I done, I am very sorry". The gun went off about three minutes after the sword was dropped (R12-16).

That day a medical officer pronounced deceased dead "from a gunshot wound of the chest" (R7).

4. Evidence for defense:

After his rights as a witness were explained to him (R18), accused testified, in part, as follows:

> "Pvt Martinez, Cpl Harris and I were standing by a barn, I had taken the gun out of the tank to see if a different size shell would fit and was about to put it back when I saw this saber lying around, I picked it up and was fooling with it when T/4 Axline came up behind me and grabbed me around the waist. We started scuffling and I put my hand to my belt to keep the gun from dropping out, it came out in my hand. Just then T/4 Axline was coming from my back on the left side, he grabbed the wrist holding the gun and pulled my hand toward his body, his other arm was around my neck, while he was holding the hand, my right hand, with the gun in it, it went off. He stepped back and went down to his knees, I dropped the gun and went to look for Lt. Werner, who was company commander at the time. He was not there but Lt. Stofflet was there and he came back with me. Then they took T/4 Axline to the hospital".

He further testified it was a foreign-make revolver. It was fully loaded - "that's the way I got it and I never used it". It did not require a hard pull to discharge, did not need to be at full cock to fire, did not have a

safety, and was not at full cock in his belt. Orders had been issued to store such weapons but no permission was necessary to remove it after it was stored (R19-21).

Accused's company commander testified accused became a member of the company in September, was wounded in September, returned in November, and had been with the unit ever since. He was a good soldier, caused no trouble and was a good friend of deceased (R17-18).

5. Accused was found guilty of the Specification except the word "feloniously" of which he was found not guilty. At common law manslaughter is a felony (1 Wharton's Criminal Law (12th Ed.), sec. 26, p.38), and an indictment therefor which omits the adverb "feloniously" is fatally defective (ibid., sec.651, p.883). Under Federal Law, manslaughter is a felony (18 USCA, sec.453-454, 541). However, since Congress defined manslaughter without using the adverb "feloniously" (18 USCA, sec.453), a manslaughter specification which omits the adverb "feloniously" is valid if the allegations, in fact, allege felonious conduct (CM ETO 6235, Leonard). Here the court deleted the adverb. If, in so doing, it meant to acquit accused of felonious conduct, then, in effect, it would have acquitted accused of an unlawful homicide for all unlawful homicides are felonious (18 USCA, sec. 452-454, 541). However, the court's deletion cannot be so construed for the remaining allegations of which accused was found guilty allege a felonious homicide - involuntary manslaughter - and the court imposed the maximum sentence for involuntary manslaughter. The effect of the deletion need not be considered other than to say it did not operate to acquit accused of involuntary manslaughter.

At common law to sustain a conviction of involuntary manslaughter based upon negligence

> "The homicide must be occasioned by 'criminal', or 'gross', or 'culpable' negligence. * * * The terminology indicates, and the courts are practically unanimous in holding, that this type of negligence is of a higher degree than that required to sustain civil liability for negligence. They have declared that criminal, gross or culpable negligence must be of such a character as to show an utter disregard for life or limb, or a total disregard for the consequences, or conduct indicating such wilful disregard for the rights of others as to show a wanton recklessness as to the life and limb of other persons * * *" (CM ETO 1317, Bentley, Dig. Op. JAG ETO, p.529).

"The test is not what a reasonably prudent man would or would not do * * *" (CM ETO 1554, Pritchard, Dig.Op.JAG ETO, p.530).

"A proper understanding of the meaning of 'culpable negligence' of necessity rests upon the assumption that accused knew the probable consequences but was intentionally, recklessly or wantonly indifferent to the results" (CM ETO 1414, Elia, Dig. Op. JAG ETO, p.530).

Accused had on his person a foreign revolver which he knew to be fully loaded and without a safety device. Deceased came upon and engaged in a friendly scuffle with accused. Though deceased initiated the scuffle, the evidence discloses that accused voluntarily participated therein. According to the prosecution testimony, after the scuffle had lasted for a few minutes accused reached for the revolver and "yanked it out". Thereupon, without being pointed or aimed, the revolver exploded and deceased sank to his knees. Thus the prosecution's evidence shows that accused chose to inject into their friendly horseplay a revolver which was fully loaded and without a safety device. Scuffling as he was with deceased, accused's control of the revolver was limited. Only a minute or two before, he had been disarmed of a sword. Accused should have known that at any instant forces not of his volition might come into operation. In drawing the revolver accused created a situation charged with danger and of which he was not and could not be the complete master. From the evidence, the court could infer that accused knew the probably consequences of his act but was recklessly indifferent to the results. To draw a fully loaded revolver, without safety, under such circumstances constituted culpable negligence.

The instant case is not governed by CM 240043, Vislan, 25 B.R. 349 (1943). There

"accused walked toward the appointed place for infantry drill, * * * he removed his rifle from his shoulder, was swinging it from side to side in a position of port arms, and as he turned around the rifle 'went off' in some unexplainable manner. According to accused he did not turn around, the rifle slipped from his hand as he was swinging it, and it was fired as the butt struck the ground. It is not shown that accused knew that the rifle was loaded, and he testified that he had unloaded it at six o'clock the previous evening when he was relieved from guard duty, and therefore 'knew' it was not loaded. The bullet from the rifle struck and killed Private Leonard Sutton, who was walking behind accused at the time".

While holding there was no showing of culpable negligence, the court had this to say by way of dictum:

> "Had it been shown that he knew the gun was loaded it is possible that careless handling in the manner proved might have amount to criminal negligence, but not so when accused was without such knowledge".

In the instant case accused knew the revolver was loaded.

In holding that accused's conduct constituted culpable negligence, the Board has not been unmindful of accused's testimony. The court was the finder of facts. The evidence is clearly distinguishable from CM ETO 15217, Nolan, CM ETO 15346, Fondren and CM ETO 16278, Adamcheck. In the Nolan case accused was replacing a pistol in his hip pocket when it fired wounding his hand. The bullet was thereby deflected and entered the deceased's abdomen. In the Fondren case, accused was displaying a pistol which lay flat in the palm of his hand pointing away from deceased, who had reached over to take and had already touched it when it discharged. In the Adamcheck case, accused was removing a clip for the purpose of rendering the weapon harmless, when it accidently discharged. In the instant case accused, in the midst of a friendly scuffle, wherein deceased was striking, seizing and intermittently grappling with him, withdrew from his belt without warning a loaded revolver and was holding it in his hand when deceased grabbed him and the firearm discharged. To inject without warning such a dangerous agency as a loaded revolver, no matter for what purpose, into the "rough-and-tumble" horseplay of a friendly scuffle may very reasonabley be construed as gross negligence.

6. The charge sheet shows that accused is 21 years of age and was inducted, without prior service, 9 March 1943, at Fort Thomas, Kentucky.

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 involuntary manslaughter is such punishment as the court-martial may direct (AW 93), not to exceed dishonorable discharge, total forfeitures and confinement at hard labor for three years (MCM, 1928, par.104c, p.99). The designation of Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, is authorized (Ltr. Hqs. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 Aug. 1945).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B K Leavy Jr. Judge Advocate

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

BOARD OF REVIEW NO. 2

28 SEP 1945

CM ETO 15425

U N I T E D S T A T E S	) CHANOR BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	)
Private First Class WESLEY LEMONS (38531359), 3174th Quartermaster Service Company, Quartermaster Corps	) Trial by GCM, convened at Le Havre, France, 28 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Wesley Lemons, 3174th Quartermaster Service Company, did, at Le Havre, Seine Inferieure, France, on or about 13 April 1945, with malice aforethought, willfully deliberately, feloniously, unlawfully, and with premeditation kill one Huguette Helie, a human being, by shooting her with a carbine.

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 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.

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

Accused was a member of 3174th Quartermaster Service Company in the military service (R7). On 13 April 1945, about 2115 or 2120 hours, a large group of German prisoners of war marched in an eastward direction on Rue des Chantiers, Le Havre (R8-11). Accused came out of an alley at No. 49 Rue des Chantiers wearing a helmet liner, leggins and belt, with a carbine in his hand. M. Henri Daubenfeld had just come to the street from No. 49 Rue de Chantiers where he lived. Ten minutes prior to his appearance on the street, from the window of his house he witnessed a street fight. The accused asked him, "Where is my friend". M. Daubenfeld replied, "I don't know" (R9,15,16). Accused then readied his weapon, informed Daubenfeld "to run away because he would shoot on /him/", and holding the carbine with the butt on his hip, shot it in a westerly direction not toward Daubenfeld (R16). M. Henry Pain with his niece, Huguette Helie, on his left arm at that moment walked in a westerly direction about 10 meters from the alley (R9,10). The girl looked to the left and fell when the shot was fired (R10,16).

Pain fearing that he would be shot too ran through the column of prisoners without looking back (R10,13). Huguette Helie was shot through the head (R10,22,23). An autopsy was performed on her body (R22). Pain attended her burial (R11). She did not know the accused (R14), but Pain was his good friend (R12).

In investigating the scene at about 2200 hours, a Criminal Investigation Department agent found in front of No. 49 Rue des Chantiers a .30 calibre carbine shell case (R19,24), which was admitted in evidence as Pros. Ex. 2 (R20,35). The carbine assigned to accused (R26) which he was carrying on 15 April 1945 (R25) was admitted in evidence as Pros. Ex. 3 (R26). A ballistics expert (R33,34) fired Pros.Ex.6 (shell case) (R39) in the carbine (Pros.Ex.3) and made a microscopic comparison of this with Pros.Ex.2 (R34,35). Based on this comparison, in the witness' opinion, the same carbine fired both shell cases (R38). Photographs taken of these shell cases and the carbine were admitted into evidence as Pros.Ex.7 (R35) and 8 through 14 (R38).

Two identification parades were held. In the one on 15 April 1945, M. Daubenfeld identified accused (R21,22). In the one of 5 May 1945 both Pain and Daubenfeld identified accused (R28,29,32).

4. The evidence for the defense may be summarized as follows:

After supper on 13 April 1945 a crap game was started and accused was present until about 2130 (R39,41), when Sergeant Smalls the corporal of the guard, came in and told him to go on guard (R42,45). Sergeant Smalls testified that he found accused in a crap game about 2130 and told him to get his equipment ready (R47,49). Accused went out with him, and was directed to wait until the corporal got another man; then Private Freeman came along, "saying he was shot at by a Frenchman" (R50). The company area is about 150-200 yards away from 49 Rue des Chantiers (R49).

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Smalls was with accused when the first shots were fired, and was walking with accused, Freeman and Private Shephard when the second shots were fired (R52,53). Accused's first sergeant testified that an inspection was held of all men in the company on the night of 13 April 1945 to see if any weapons had been fired (R53,54). Accused's weapon was inspected by looking down the bore, checking the chamber, feeling around the barrel and smelling it. No rifles inspected had been fired (R53-57).

Two officers and a non-commissioned officer, who were guarding the German prisoners marching along the Rue des Chantiers, heard shots but saw no soldiers in the vicinity except their guards (R58,61,62). Only one saw the body of the girl (R59,60,63).

After his rights were explained to him, accused elected to be sworn as a witness in his own behalf and testified in material substance as follows:

He was shooting dice on the evening of 13 April 1945 until about 2130 hours when the corporal of the guard came in and told him to fall out for guard. At about that time Private Freeman came along and said that he had been shot, but nothing was found to be wrong with him. Accused then went upstairs to get his blankets and was about to get on the guard truck when the rifle inspection was held. He then got on the truck and went to the guardhouse and was later sent for and questioned by the CID. During the time he was gambling, his weapon was in the 1st platoon and he was in the second platoon (R64,65). He has known M. Pain for seven or eight months; didn't know Daubenfeld by name but had "seen him in the area" (R66)Pros.Ex.3 is his weapon, and he had it the night of the homicide when he went on guard; however, he had not fired a weapon during the year 1945, and he did not fire any shots that night (R67). He did not shoot the deceased (R65).

5. Murder is the unlawful killing of a human being with malice aforethought (MCM, 1928, par.148a, p.162), and malice may be presumed from the use of a deadly weapon (MCM, 1928, par. 112a, p.110). "Malice aforethought" includes the state of mind which knows "that the act which causes death will probably cause the death of, or grievous bodily harm to, any person,... although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not..." (MCM, 1928, par.148a, pp163-164).

> "A specific intent to kill does not enter into the definition of murder at common law or under statutes declaratory thereof; it is sufficient if the unlawful killing is with malice aforethought either express or implied, and a homicide may be malicious, and hence may be murder, although there was no actual design to take life. If an unlawful act, dangerous to, and indicating disregard to human life, causes the death of another, the perpetrator is guilty of murder, although he did not intend to kill" (29 C.J. par.69, p.1095).

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In keeping with this thought the Board has often held that reckless disregard of human life may be the equivalent of the specific intent to kill (CM ETO 2899, Reeves; CM ETO 4149, Lewis; CM ETO 5764, Lilly et al).

The evidence for the prosecution shows that the accused went to the street corner where his friend Private Freeman had said he was shot, or shot at, and, in total disregard for human life, fired his deadly weapon on the public street within a short distance of numerous persons. Whether he specifically intended to kill the deceased is immaterial. His reckless conduct was the equivalent of that intent and his conviction of murder should be sustained.

The accused denied that he was present at the scene of the murder or that he fired the shot. The prosecution's witnesses identified the accused as the soldier who fired the shot which killed the deceased, and there is substantial evidence in the record to establish his connection with the crime. The determination of the issue of fact thus raised was within the exclusive province of the court, and will not be disturbed by the Board upon appellate review (CM ETO 4194, Scott; CM ETO 895, Davis et al).

6. The charge sheet shows that accused is 28 years and eight months of age. Without prior service, he was inducted 2 July 1943, at Dallas, Texas.

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

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

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

(153)

Branch Office of The Judge Advocate General
with the
European Theater

BOARD OF REVIEW No. 3

26 OCT 1945

CM ETO 15433

U N I T E D S T A T E S	80th INFANTRY DIVISION
v.	
Private RALPH E. BURNS, (35408908), Company C, 317th Infantry.	Trial by GCM, convened at APO 80, U.S. Army, 5 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING BY BOARD OF REVIEW No. 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 charges and specifications:

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

Specification 1: In that Private Ralph E. Burns, Company C, 317th Infantry, did, in the vicinity of Atton, France, on or about 26 October 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself at or near Diekirch, Lumembourg, on or about 5 February 1945.

Specification 2: In that * * * did, in the vicinity of Bollendorf, Rhine Province, Germany, on or about 18 February 1945 desert the service of the United States and did remain absent in desertion until he surrendered himself at or near Nusbaum, Germany on or about 24 March 1945.

(154)

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

Specification 1: In that * * * did, in the vicinity of Millery, France, absent himself without proper leave from his organization and place of duty from about 23 September to about 30 September 1944.

Specification 2: In that * * *, did, in the vicinity of Jeandelincourt, France, absent himself without proper leave from his organization and place of duty, from about 12 October 1944 to about 25 October 1944.

Specification 3: In that * * *, did, in the vicinity of Biebrich, Hessen State, Germany, absent himself without proper leave from his organization and place of duty, from about 28 March 1945 to about 30 March 1945.

Specification 4: In that * * *, did, in the vicinity of Bruheim, Thuringen State, Germany, absent himself without proper leave from his organization and place of duty, from about 6 April 1945 to about 23 April 1945.

Specification 5: In that * * *, did, in the vicinity of Reut, Bayern State, Germany, absent himself without proper leave from his organization and place of duty, from about 3 May 1945 to about 29 May 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, as to Specifications 1 and 2 of Charge I, was found guilty of respective substituted specifications alleging absences without leave from about 26 October 1944 to about 31 Octpber 1944, and from about 18 February 1945 to about 13 March 1945, and not guilty of Charge I but guilty of a violation of the 61st Article of War. He was found guilty of Charge II and Specifications 1, 2, 3 and 5 thereof, and as to Specification 4 was found guilty of a substituted specification alleging absence without leave from about 6 April 1945 to about 11 April 1945. Evidence was introduced of two previous convictions by summary court, one for careless discharge of a weapon and being drunk and disorderly in violation of Article of War 96 and one for absence without leave for four 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 pursuant to Article of War 50½.

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

a. Specification 1 of Charge I: A lieutenant of accused's company, to whose platoon accused was originally assigned, testified that on 26 October 1944 he was called on the telephone and told that accused was to report to his platoon, which was then in a defensive position. Accused did not report and was not present for duty from that day until 26 December 1944 to his knowledge (R6-7). A duly authenticated extract copy of the morning report of accused's organization for 26 October 1944, signed by "Leslie E. Dickson, CWO, USA, Asst. Pers. Off.", shows accused from arrest in quarters to absent without leave, and the record of events shows that his company was near Benicourt, France, on that date (R10-11,17, Pros. Ex. E). Other entries show that accused absented himself without leave on 3 December 1944 and was placed in arrest in quarters on 5 February 1945 while the company was at Diekirch, Luxembourg (R11,16-18, ProsExF,G,R).

b. Specification 2 of Charge I: A staff sergeant who was in charge of prisoners of accused's regiment testified that on 18 February 1945, accused, who was "in arrest and restricted to the area", was missing at roll call and, although a search of the area was made, could not be found (R8-9). A duly authenticated extract copy of the morning report of accused's organization for 18 February 1945, submitted four miles north of Bollendorf, Germany, signed by "Frank J. Watson, Capt, Inf, Personnel Officer", shows accused "Fr arr in qrs to AWCL 0830" (R11-12,18,Pros. Ex. H). It was stipulated that accused surrendered himself to military control on 13 March 1945 at Diekirch, Luxembourg (R19). A morning report entry shows accused from absent without leave to arrest in quarters on 24 March 1945 (R12,18,Pros. Ex. I).

c. Specification 1 of Charge II: Absence without leave of accused from 23 September 1944 to 30 September 1944 was established by duly authenticated extract copies of the morning report of his organization, dated 28 and 30 September 1944, signed by "Leslie E. Dickson, CWO, USA, Asst Adj", and submitted one mile north of Morey, France (R10,17,Pros. Exs.A,B).

d. Specification 2 of Charge II: Absence without leave of accused from 12 October 1944 to 25 October 1944 was established by duly authenticated extract copies of the morning report of his organization, dated 14 and 26 October 1944, and signed by "Leslie E. Dickson, CWO, USA, Asst Pers Off." (R10-11,17,Pros. Exs.C,D,E). The company record of events shows that on 12 October 1944, accused's organization

was in the vicinity of Jeandelcourt, France (R16,Pros.Ex.P).

e. Specification 3 of Charge II: A staff sergeant who was in charge of prisoners of accused's regiment testified that on 28 March 1945, accused was missing at roll call without permission to be absent, and could not be found in the area or the house to which he was assigned (R8-9). A duly authenticated extract copy of the morning report of accused's organization for 31 March 1945, shows accused "Fr arr in qrs to AWOL 0600 28 Mar 45" and "Fr AWOL 28 Mar 45 to arr in qrs 30 Mar 45" (R12, 18, Pros. Ex. J).

f. Specification 4 of Charge II: A private first class who was in charge of prisoners of accused's regimental stockade testified that on or about 6 April 1945, at Biersdorf, accused "got away from us", although he had no permission to leave. Witness made a search through the house and neighborhood, but was unable to find accused, who was not seen again until the latter part of April (R13-14). A duly authenticated extract copy of the morning report of accused's organization for 21 April 1945 shows accused "Fr arr in qrs to AWOL 0600 6 Apr 45" (R12,18, Pros. Ex.K). The company record of events shows that on 6 April 1945 accused's organization was near Bruheim, Germany (R17, Pros. Ex.S). A morning report entry for 24 April 1945 shows accused from absent in confinement to arrest in quarters on 23 April 1945 (R12,18, Pros. Ex.L).

g. Specification 5 of Charge II: A private first class who was in charge of prisoners of accused's regiment testified that accused left the regimental stockade without permission on 3 May 1945. Witness next saw him in Wintergarten, Austria, about 29 May 1945 (R14,15). A duly authenticated extract copy of the morning report of accused's organization for 27 May 1945 shows him "Fr arr in qrs to AWOL 0600 3 May 45" (R13,18, Pros. Ex. N). A similar entry for 29 May 1945 shows him from absent without leave to confinement (R13,18, Pros. Ex. O). The company record of events shows that on 3 May 1945 accused's regimental command post moved to Reut, Germany (R16,Pros. Ex.Q).

h. Each of the morning report entries introduced in support of Specifications 3, 4 and 5 of Charge II was signed by Captain Joe F. Radek as personnel officer. It was stipulated that after accused's regiment and division commenced combat about 7 August 1944, by direction of the Third United States Army, each company, including accused's company, prepared a morning report summary which was authenticated by the company commander and processed through battalion, regimental and division channels to the regimental personnel section at the rear echelon of division headquarters, where the original morning report, in yellow, green and white copies, was prepared from such summary and was authenticated by the regimental personnel officer, after which the yellow copy was sent through channels to the company, the green copy

was retained in the personnel section, and the white copy, after going to the machine records unit, was sent to the Adjutant General in Washington (R9-10).

4. After being warned of his rights as a witness, accused made through counsel the following unsworn statement:

> "I was in confinement at the Provost Marshall Seine Section, APO 887, U.S. Army on 31 October 1944, and the only evidence I have to show that this is true is the hearsay morning report entry dated November 7th 1944. Also, I was court-martialled at the 17th Replacement Depot and once at the 38th Replacement Depot. This is the only evidence I have to show that I was absent for a lesser period than that shown in Specification 1 of Charge I" (R19).

5. Assuming that the morning report entries introduced in evidence in support of the various specifications are competent and admissible, the findings of guilty as to all specifications and both charges are fully supported by the evidence. The entries introduced in support of Specification 2 of Charge I and Specifications 3, 4 and 5 of Charge II are signed by the regimental personnel officer between 18 February and 29 May 1945, during a period when such officer was expressly authorized to sign original morning reports (AR 345-400, 3 Jan.1945, par. 43; Cir. 119, ETOUSA, 12 Dec. 1944, sec.IV; CM ETO 6951, Rogers); and the fact that the original entries were prepared by such officer from a "summary" authenticated and submitted by the company commander under a standard operating army procedure does not render them inadmissible on the ground that they are "obviously" not based on personal knowledge of the personnel officer, since, under the Federal "shop book rule" (28 USCA 695), they are admissible as writings or records made in the regular course of business (CM ETO 4691, Knorr; CM ETO 10199, Kaminski; CM ETO 14165, Pacifici).

The entries introduced in evidence in support of Specifications 1 of Charge I and Specifications 1 and 2 of Charge II, signed between 23 September and 26 October 1944, were not admissible on the theory that the personnel officer who signed them had an official duty to know the facts and record them, because prior to 12 December 1944 a personnel officer had no authority to sign an original morning report, as distinguished from authority to prepare it (AR 345-400, 1 May 1944, sec.VI, par. 42; CM ETO 9597, Jusiak,Jr.; CM ETO 7686, Maggie and Lewandowski; CM ETO 11693, Parke). However, since the record of trial affirmatively shows that such morning report entries were made by such officer at the time of the

acts or events which they evidenced, or within a reasonable time thereafter, and in the regular course of business of the organizations concerned, they are neverless admissible under the Federal "shop book rule" as evidence of the facts recited therein (CM ETO 14165, Pacifici; 28 USCA 695; cf White v. United States, 164 U.S. 100, 41 L. Ed.365).

With respect to Specifications 1 and 3 of Charge II, the lack of, or variance with respect to, proof as to the place at which accused absented himself without leave is immaterial within the contemplation of Article of War 37 (CM ETO 13253, Bragalone). Neither did any prejudice result to accused's substantial rights from the court's finding that the absence without leave alleged in Specification 4 of Charge II terminated on 11 April, instead of 23 April, since the proof establishes a longer period of absence than that found, and accused was benefited thereby (see CM ETO 10617, Dominguez).

6. The charge sheet shows that accused is 30 years seven months of age and was inducted 9 July 1942 at Delaware Ohio. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of 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. A sentence of confinement for life is authorized for violation of Article of War 61. 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).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

(TEMPORARY DUTY) Judge Advocate

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

BOARD OF REVIEW NO. 2

20 AUG 1945

CM ETO 15441

U N I T E D S T A T E S	45TH INFANTRY DIVISION
v.	Trial by GCM, convened at Augsburg, Germany, 14 July 1945.
Private STANLEY J. ROMANOWSKI (33466095), Company L, 179th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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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 Sheet dated 4 January 1945:

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

Specification: In that Private Stanley J. Romanowski, Company L, 179th Infantry, did, at or near Wingen, France, on or about 19 December 1944, desert the service of the United States, by absenting himself from his organization with the intent to avoid hazardous duty, to wit: combat operations against elements of the German armed forces, and did remain absent in desertion until his return to military control on or about 1 January 1945.

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

Specification: In that * * * did, without proper leave, absent himself from his post and duties at Battipaglia, Italy, from on or about 26 June 1944 to on or about 14 July 1944.

Charge Sheet dated 19 June 1945:

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

Specification: (Finding of not guilty)

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

Specification: In that * * * did, at or near Oberelsbach, Germany, on or about 8 April 1945, desert the service of the United States and did remain absent in desertion until he returned to military control on or about 7 May 1945.

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

Specification 1: (Finding of not guilty)

Specification 2: In that * * * having been duly placed in confinement in the 179th Infantry Regimental Stockade did, at or near Oberelsbach, Germany, on or about 8 April 1945, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty and two-thirds of the members of the court present at the time the vote was taken concurring, he was found not guilty of Additional Charge I and its Specification, of Specification 1 of Additional Charge III, and guilty of the remaining charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the Prosecution: The accused was a private assigned to Company L, 179th Infantry (R7). The morning report of that organization, admitted in evidence without objection, showed the accused to be absent without leave from 26 June 1944 to

14 July 1944 (R6; Ex.A); absent without leave from the regimental stockade from 19 December 1944 to 1 January 1945 (Ex.B); and absent without leave from the stockade 8 April to 12 May 1945 (Ex.D and E). In an interview with an investigating officer on 18 February 1945 the accused voluntarily admitted that he had on 26 June 1944 absented himself without leave because of the fear of the return of an old heart sickness for which he had previously been hospitalized and was "picked up" on or about 14 July following, and that on 19 December 1944, he left the stockade without permission because he had heard he was being sent back "to his company—back to the lines" (R8). He wandered around France until picked up about New Year's Day in Luneville. It was shown by the executive officer of Company K, 179th Infantry that Company L, was "committed in the Siegfried Line" in very close contact with the enemy (R9).

On 8 April 1945, accused was a prisoner in the 179th Regimental Stockade, consisting of a barn with only three sides closed in, under guard at Oberelsbach, Germany, and was found to be missing when the prisoners were moved about noon time. During the morning many German prisoners were brought in and the guard and some of the American prisoners were used to guard the Germans and the guard posted on the open side of the barn was taken away (R14-15). The accused may have been used for that purpose but, if so, he in turn was guarded by an "MP" (R14-17).

4. Evidence for the Defense:- The accused elected to testify in his own defense. He claimed that he suffered from a rheumatic heart disease caused by sleeping in foxholes and for that reason he got nervous when sent back to duty from the hospital and took off about 26 June 1944 and travelled around until he was picked up about 14 July 1944 (R19). On 8 April 1945 he was not feeling any too good and wandered off to get some eggs. He was not under guard. He got "a little drink" in him and spent the night in a farmhouse. The next day, the regiment had gone and left him stranded. He became ill from malaria and turned in to the 70th Division aid station the last of April (R20). He had no intention of deserting (R21).

5. Discussion.

a. Charge I (Desertion 19 December 1944 to 1 January 1945). The accused has been found guilty of desertion under the provisions of Article of War 28. The initial absence without leave was established by the morning report (Ex.B) and the admission of the accused to the investigating officer. In support of the alleged intent to avoid the hazardous duty of combat operations against the German armed forces the record discloses (1) that the accused was in confinement at a place not named in the record and absented himself without permission from the stockade because he had heard that he was being sent back "to his company—back to the lines",

and (2) that the accused's company on that date was actually engaged in active and close combat with the enemy in the Siegfried Line.

The following elements of proof are necessary to establish guilt of desertion of this type: (1) that accused was absent without leave; (2) that he or his organization was under orders or anticipated orders involving hazardous duty; (3) that the accused was notified, or otherwise informed, or had reason to believe that his organization was about to engage in hazardous duty; and (4) that at the time he absented himself he intended to avoid that duty (CM ETO 1921, King; CM ETO 5958, Perry and Allen).

The evidence clearly showed that the accused absented himself without authority at a time when his organization was actually engaged in a hazardous duty, and at that time he intended to avoid the hazardous duty of returning to his company in "the lines". His knowledge of the tactical situation may be inferred from his admission that he knew his organization was in the lines-- which can only mean lines of battle-- and that he departed to avoid being sent there. All of the elements of proof were therefore supported by substantial evidence and the finding of guilty of the Charge and Specification should be sustained.

b. Charge II (AWOL 26 June to 14 July 1944). This offense was clearly established by the morning report of the accused's organization and his own pre-trial admission and his testimony in court.

c. Additional Charge II (desertion 8 April to 7 May 1945). The accused's absence without leave on 8 April was shown by his organization's morning report, the testimony of one witness concerning his disappearance on the date alleged, and the admissions of the accused. The only issue deserving discussion is whether he intended not to return. The accused contended that he was left unguarded and, not feeling well, he wandered down to the nearby town to get food and liquor; that his regiment moved on in his absence leaving him stranded in the town, and that he had no intent to desert. In our opinion the court's finding that he did not intend to return and was therefore guilty of desertion is based on substantial evidence consisting of (1) the fact that he was a prisoner in the stockade; (2) that he remained away for 30 days while his organization was engaged in combat operations; and (3) that his prior conduct exhibited his continuous determination not to serve his country.

d. Additional Charge III (Escape from confinement).

An element of the proof required to establish the commission of the offense is that accused freed himself from the restraint of confinement (MCM, 1928, par.139b, p.154). The evidence shows that the physical restraint of accused in this case disappeared with the removal of the guard from the open side of the barn. There was here not merely a lack of effectiveness of the physical restraint imposed, but the elimination of the physical restraint itself. The record of trial, therefore, is not legally sufficient to support the findings of guilty of the offense charged (I Bull. JAG 19,214; III Bull. JAG 58).

6. The charge sheet shows the accused to be 21 years of age and that without prior service he was inducted 16 March 1945 at Wilkes-Barre, Pennsylvania.

7. The court was legally constituted and had jurisdiction over the person and offenses. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is not legally sufficient to support the findings of guilty of Additional Charge III and its Specification 2, but legally sufficient to support the remaining findings and the sentence.

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

16 AUG 1945

CM ETO 15442

U N I T E D S T A T E S	)	45TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 45 U. S. Army, 14 July 1945.
Private GABRIEL R. BIFANO (32792077), Medical Detachment, 180th Infantry	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York

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HOLDING by BOARD OF REVIEW NO. 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 charges and specifications:

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

Specification 1: In that Private Gabriel R. Bifano, Medical Detachment, 180th Infantry, did, at or near Gerbeviller, France, on or about 13 March 1945, desert the service of the United States and did remain absent in desertion until he returned to military control at or near Dachau, Germany, on or about 10 June 1945.

Specification 2: In that * * * did, at or near Dachau, Germany, on or about 12 June 1945, desert the service of the United States and did remain absent in desertion until he returned to military control at or near Dachau, Germany, on or about 18 June 1945.

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

Specification: In that * * * having been duly placed in confinement in the 180th Infantry Regimental Stockade on or about 10 June, 1945, did, at or near Dachau, Germany, on or about 12 June 1945, escape from said confinement before he was set at liberty by proper authority.

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 specifications. Evidence was introduced of two previous convictions, one by special court-martial for breach of restriction and absence without leave for about 8 hours in violation of Articles of War 96 and 61 and one by summary court for wrongfully appearing in Nancy, France, without a prescribed pass and in improper uniform in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

On 13 March 1945, Company E, 180th Infantry, was in a rest area near Gerberviller, France. Technical Sergeant Harry M. Chazin, platoon sergeant of accused's platoon, testified that when he "fell the platoon out" on the morning of 13 March accused was not present at the formation and could not be found despite a subsequent search of the platoon area. He was not present in the company for duty between 13 March and 10 June 1945. On the latter date, the company was located in Dachau, Germany (R5-7). A duly authenticated extract copy of the company morning report shows accused from duty to absent without leave on 13 March 1945 and from absent without leave to confinement on 10 June 1945 (R4; Pros.Ex.A).

On 12 June 1945, accused, then a prisoner in the stockade at Dachau, was taken under armed guard to mess. While in the mess line, he dodged around a corner and ran out of the building in which mess was being served. Because of the proximity of other personnel, the guard could not fire on him and, although "all the road blocks were notified" and a search of the area was instituted, he was able to effect his escape (R7-9). He was not present for duty between 12 June and 18 June 1945 (R6).

On 20 June, accused voluntarily made a statement to an investigating officer (R9). In this statement, he recited that on 11 March 1945, while his company was in rest, he went to Nancy, France. After staying

there for two days, he returned to Gerbeviller to rejoin his unit but found that it had moved out. Inquiry as to its destination proved unproduction so he returned to Nancy. He stayed at various hotels in Nancy for about two months without making any effort to rejoin his organization. He kept himself informed of the news by reading the newspapers and "knew when the war was over". At one time during his absence, he was apprehended because he did not have a pass, but as he was not confined in a stockade, he "took off". Later he again was apprehended, confined in the 7th Army stockade and ultimately, on or about 10 June, was returned to the 180th Infantry. He "escaped confinement from the 180th Regimental stockade" at about 0800 hours on 12 June 1945 when he "went to eat chow and just took off". He first went to Strassburg and there got a train for Nancy. He desired to return there because he was in possession of certain funds belonging to "a civilian" and wanted to repay them. He was apprehended by the military police en route and placed in a stockade upon reaching Nancy. He was confined there for three days after which he was again returned to the 180th Infantry (R10,11). He had been company aid man with Company E, 180th Infantry, for almost three weeks prior to the time he "left the service of the United States" and for a period of approximately five months prior to that had been aid man with Company H, 180th Infantry (R11).

4. For the defense, a machine gunner who was a member of accused's former company and who had known him from and after 5 November 1944 testified that he had been "a very good soldier on the line and did his duty and lots of times he did more than his duty up there". He had conducted himself well under fire and "if a man got hit, he never had to be told to go out there, he went on anyway" (R12,13).

It was stipulated that if "Sergeant Kelly" were present in court he would testify that

> "In January, Private Bifano was an aid man with my platoon. In my opinion he did his work well. When we were on the line he was always with the platoon. We did not have many men hurt but he took care of feet and such things as that" (R13).

Accused, after being advised of his rights as a witness, elected to remain silent.

5. The evidence adduced by the prosecution in support of Specification 1, Charge I, including accused's own pre-trial statement, clearly shows that accused absented himself without leave from his organization on the date alleged. While, if his statement is to be believed, he originally

may have intended to go absent without leave for a few days only while his organization was in a rest area, he himself admits that thereafter he spent some two months in Nancy without any attempt to rejoin his unit. From this fact, together with the other circumstances shown, the court was warranted in inferring that at some time during his absence he entertained the requisite intent to constitute his offense that of desertion (CM ETO 1629, O'Donnell). The evidence also clearly is sufficient to support the court's finding that he escaped from confinement on 12 June 1945, as alleged by the Specification of Charge II. The only remaining question is whether there is sufficient evidence to support the court's finding that he was guilty of a second desertion as charged by Specification 2, Charge I. His second absence, while initiated by an escape from confinement and terminated by apprehension, lasted at most only six days. He offered as an explanation for his departure the fact that he desired to repay certain money to a civilian living in Nancy. Thus, his absence was neither much prolonged or unexplained. Further, the fact that his second absence took place after the cessation of hostilities in this theater makes it less likely that he entertained the intent to remain permanently away from the service. In general, it may be said that Americans are not now deserting in Europe. It is concluded that the evidence of record in support of Specification 2 of Charge I is legally sufficient to support a conviction of absence without leave only.

6. The charge sheet shows that accused is 22 years of age and was inducted 4 February 1943.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 2 of Charge I as involves a finding that accused did, on or about 12 June 1945, absent himself without leave until on or about 18 June 1945 in violation of Article of War 61 and legally sufficient to support the remaining findings and the sentance.

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

B R Sleeper Judge Advocate

(ON LEAVE) Judge Advocate

B K Levy Jr Judge Advocate

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

BOARD OF REVIEW NO. 3 8 AUG 1945

CM ETO 15444

U N I T E D S T A T E S	45TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 45, U. S. Army, 14 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private BENNY MARCHIONE (32212434), Company D, 179th 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 Benny Marchione, Company D, 179th Infantry, did, at or near Wingen-sur-Mode, France, on or about 13 January 1945, desert the service of the United States and did remain absent in desertion until he returned to military control at Munich, Germany, on or about 12 June 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and its 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 prosecution's evidence shows accused's initial absence without leave on 13 January 1945 and his return to confinement in the 179th Infantry stockade on 12 June 1945, by properly authenticated copies of the morning report of his organization (R4; Pros.Exs.A and B). Technician Fourth Grade Birdsey G. Palmer, a clerk in the personnel section of the 179th Infantry, testified that on or about 10 January 1945 accused was present and "more or less attached" to the personnel section which was then at Phalsbourg, France. As directed by the personnel officer, he took accused to the "S-1" section at Saverne where accused was to be given a physical examination "for return to his company". He did not see accused again "until just recently" (R5-6). Accused did not return to Company D, 179th Infantry, for duty on 13 January 1945 and was not present between the dates 13 January to 12 June 1945. He was a member of Company D when it came overseas and was with the company in Sicily (R8-9). On 13 January 1945, Company D was in the vicinity of Wingen and Wimmenau, France in defensive positions "just holding the line" (R8-9).

4. No evidence was offered for the defense. After his rights were explained accused elected to remain silent (R10).

5. The court was fully warranted in inferring from the evidence of the tactical situation of accused's unit, the length of his absence and the evidence of lack of permission that he did not intend to return to duty. The evidence supports the findings of guilty (CM ETO 5565, Fendorak; CM ETO 9257, Schewe).

6. The charge sheet shows that accused is 28 years of age and was inducted 3 February 1942 at Fort Niagara, New York. 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 proper (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. U. Levy Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

13 SEP 1945

CM ETO 15486

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, US FORCES, EUROPEAN THEATER
v.	Trial by GCM, convened at Paris, France, 2 July 1945. Sentence: Forfeiture of $100.00 and reprimand.
First Lieutenant CHARLES M. RICHTER, Infantry, (O-1308707), Detachment of Patients, in care of Surgeon's Office, Headquarters Seine Section	

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

1. The record of trial in the case of the officer named above has been examined in the Branch Office of The Judge Advocate General with the European Theater and there found legally insufficient to support the findings and the 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 the Branch Office of The Judge Advocate General with the European Theater.

2. It is the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence as approved.

3. Accused was tried for and found guilty of being drunk in his station in violation of Article of War 96, and fined $400.00 with recommendation of a written reprimand. This was reduced by the reviewing authority, who administered a written reprimand, to $100.00. The evidence presented showed that on 8 May 1945, accused (a combat casualty (R17)) drank numerous toasts prior to attending a V-E Day program conducted by Brigadier General Pleas B. Rogers, the Commanding General, Seine Section. While the general was addressing his officers

in a group of about 400, accused said, "Who in the hell is that guy?" and later, "Oh, fuck. What the hell does he know about it?" These remarks were audible only to a few persons and not to the general. Asked his name by a superior officer, accused replied "J. M. Doakes", and declined to give his AGO card to another superior officer (R4-5,7). During the playing of the National Anthem, a third officer saw him talking (R9), and after the meeting all three had occasion to observe and talk with him. In their opinion he was under the influence of intoxicating beverage (R5,7,9).

Accused was originally charged with violations of Articles of War 63,64,95 and 96, the specifications alleging disrespect to the general, two willful refusals to obey orders of superior officers (in refusing to give his name and to show his AGO card), conduct unbecoming an officer and a gentlemen (in displaying an attitude of surliness toward the V-E Day program) and conduct of a nature to bring discredit on the military service (in talking during the playing of the National Anthem). The papers attached to the record, normally in the prosecution's file during trial, show that the Staff Judge Advocate recommended an amendment of the charge sheet, alleging a single charge of drunk in his station in violation of Article of War 96, and punishment by reprimand under Article of War 104. The appointing authority (who was the general who had conducted the V-E Day program) adopted the recommendation as to amendment but directed trial by general court-martial. The amendment was made on the charge sheet by drawing a line diagonally across the original charges and specifications and adding the new charge. The record shows that when the court closed to vote on the findings, the prosecution's file, including the charge sheet, were on the trial judge advocate's desk and that when it reopened, the file was on the court's bench (R20,21).

Further facts with reference to this situation, of which the Board of Review will take judicial notice in the interest of securing to the accused due process of law (CM ETO 1981, Fraley, III Bull. JAG 220; CM ETO 15080, Lawton), came to light in the trial by the same court four days later of Private Haywood Madison (CM ETO 15487, Madison). There defense challenged the law member (who was also the president) for cause on the ground that he should not sit, in the interest of having the trial "free from substantial doubt as to legality, fairness and impartiality" (MCM, 1928, par.58e, p.45). In support of his challenge, he caused the law member to be sworn as a witness. He testified that in every case it was the duty of a law member to exclude from the court's consideration facts or physical exhibits not properly before the court (Madison, R4-5). By additional witnesses, the defense in that case established the facts with reference to the

transfer of the prosecution file of this case from the trial judge advocate's desk to the court's bench while the court was closed to vote on the guilt of this accused (Madison, R6-9). The court sustained the challenge (Madison, R12), and the law member was replaced by another officer (S.O. No. 189, Hq. Seine Sec., Com. Z, U. S. Forces, European Theater, 8 July 1945).

4. That the court did in fact in this case consider the prosecution file, including the charge sheet, is affirmatively indicated by the members of this same court, the only persons actually in a position to know this fact, by their action in the Madison case in sustaining the challenge to the law member. The charge sheet in this case contains statements not supported by any evidence presented to the court herein; for example, the Specification to original Charge II alleges that accused stated, "'I suppose I should stand at attention for this one', or words to that effect, during the playing of 'The Star Spangled Banner'", but the record contains no testimony as to such a statement. Consideration of this file was prejudicial to the substantial rights of accused. While not essential to this conclusion by the Board, it may be noted that in sustaining the challenge in the Madison case the court itself inferentially admitted that it was influenced here by consideration of matters improperly brought to its attention. The prejudice to accused was not cured by the reduction, based on a consideration of "services previously rendered", of the amount of the forfeiture imposed (CM ETO 4756, Carmisciano; CM ETO 4564, Woods; United States ex rel Innes v. Hiatt, 141 F (2nd) 664 (1944)).

5. In view of the foregoing opinion, it is unnecessary to consider other questions involved in the case.

Wm. T. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll Judge Advocate

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1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1943 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of First Lieutenant CHARLES M. RICHTER (O-1308707), Detachment of Patients, in care of Surgeon's Office, Headquarters Seine Section.

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 as approved be vacated, and that all rights, privileges and property of which he has been deprived by virtue of said findings of guilty and sentence so vacated be restored.

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

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

(Findings and sentence vacated. GCMO469, USFET, 28 Sept 1945)

Branch Office of The Judge Advocate General

with the
European Theater

BOARD OF REVIEW NO 2

CM ETO 15506

4 OCT 1945

UNITED STATES	10TH ARMORED DIVISION
v	Trial by GCM, convened at Garnisch-Partenkirchen, Germany, 23 July 1945.
Private Allen F SADDERS (35355980), Company C, 20th Armored Infantry Battalion.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

2. The accused was tried upon the following Charge and Specification.

CHARGE: Violation of the 61st Article of War

Specification: In that Private Allen F Sadders, Company C, 20th Armored Infantry Battalion, did, without proper leave, absent himself from his post and duties at Magny, France from about 1830 5 January 1945 to about 2130 19 April 1945.

He pleaded not guilty and, all of the members present at the time the vote was taken concurring, was found guilty of the Charge and its Specification. Evidence was introduced of two previous convictions by special court-martial for absences without leave of 15 days and 30 days respectively in violation of Article of War 61. All of the members present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial under Article of War 50½.

3. The evidence for the prosecution showed that the accused, a member of Company C 20th Armored Infantry Battalion, stationed at Metz, France (R7),

was entered on the morning report of that organization on 7 January 1945 as from duty to 'AWOL' 5 January 1945 at 1830 hours (Pros. Ex.2). An extract copy of this entry was admitted in evidence (R7) without objection (R8). By stipulation it was shown that accused returned to military control on 19 April 1945 (R7). The First Sergeant of the organization made a search for the accused on 5 January 1945. He could not be found, and had no authority to be absent (R10).

After his return he made a voluntary statement in writing that during the first week of January 1945 when his outfit was stationed at Magny, France, he visited Metz on a day pass, started to drink, met a girl, and did not return until about 15 January 1945. His organization in the meantime had moved away. He was told it had moved to Luxembourg. He went to Luxembourg but could not find his unit. He returned to Metz and reported to a Captain of one of the companies of the 53rd Replacement Battalion who placed him on guard duty. A few days later when told that he was to be sent to another outfit, he left and went back to 'his girl's' house in Metz where he stayed until arrested by the "MPs" in April (R12, Pros Ex 3).

4. The accused, having been advised concerning his rights as a witness, elected to make an unsworn statement (R13). He stated that he was 26 years of age and born in Indiana. He has a dependent mother and daughter. During his military career commencing 3 June 1942 when he was drafted he never received a pass or furlough. He asked for another chance to prove his worth as a soldier and fight in the Pacific Theater of Operations.

5. The evidence for the prosecution establishes that the accused, a person subject to military law, absented himself without leave from his post and duties at the time and place and for the duration alleged in the specification. All of the elements of the offense necessary to constitute a violation of Article of War 61 were proved without contradiction (MCM 1928, par 132 p 146).

6. The charge sheet shows the accused to be 26 years and 8 months of age. Without prior service he was inducted 3 June 1942 at Muncie, Indiana.

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 absence without leave is such punishment as a court-martial may direct (Article of War 61).

(Sentence ordered executed. GCMO 74, USFET, 15 March 1946).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2

4 OCT 1945

CM ETO 15507

U N I T E D S T A T E S	)	10TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Garmisch-Partenkirchen, Germany, 23 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private SAMUEL (NMI) ANDRADE (31446975), Company C, 20th Armored Infantry Battalion.	)	

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

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

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Samuel Andrade, Company C, 20th Armored Infantry Battalion, did, without proper leave, absent himself from his post and duties at Magny, France, from about 0800 8 January 1945 to about 0900 27 April 1945.

He pleaded not guilty and, all of the members 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 a special court-martial for absence without leave

Incl 1

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for 15 days in violation of Article of War 61. All of the members present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial under Article of War 50½.

3. The evidence for the prosecution shows that accused on 8 January 1945 was a member of Company "C" 20th Armored Infantry Battalion (R6). The morning report of that organization introduced in evidence without objection showed that on 31 December 1944 accused was assigned to and joined the organization (R6. Pros; Ex.1) and on 10 January 1945 was entered "Dy to AWOL 0800 8 Jan 45" (R7 Pros; Ex. 2). A search was instituted on 8 January of the company area by the First Sergeant and he could not be found. He had no authority to be absent (R8). It was stipulated that he returned to military control on 27 April 1945 (R7).

There was introduced in evidence without objection (R10) a written statement signed by the accused in which he admitted that he was stationed at Magny, France, on 8 January 1945, and went to Metz without authority, met a girl and stayed with her until 19 January 1945, when he was taken sick and went to the 24th Evacuation Hospital, was treated for a venereal disease and was discharged in 4 or 5 days and sent to the 53rd Replacement Depot. He stayed there from about 25 January to the middle of February. Having no duties to perform he went to Metz again and stayed with "his girl". He tried without success to locate his unit and was picked up by MPs on 27 April 1945 (Pros. Ex.3).

4. The accused, having been advised of his rights, offered no evidence and elected to make an unsworn statement (R11). He stated that he was 25 years of age; that he was drafted on 16 Nov. 1943 and received his training at Fort McClellan, Alabama, during which time he learned that his wife was unfaithful; that this made the performance of his military duties away from his home very difficult; and that he was sent overseas in July 1944 and joined the 10th Armored Division in December 1944

5. The evidence for the prosecution establishes that the accused, a person subject to military law, absented himself without leave from his post and duties at the time and place and for the duration alleged in the specification. All of the elements of the offense necessary to constitute a violation of Article of War 61 were proved without contradiction (MCM 1928, par.132 p.146).

6. The charge sheet shows the accused to be 28 years and 2 months of age. Without prior service he was inducted 16 Nov. 1943 at Providence, Rhode Island.

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 absence without leave is such punishment as a court-martial may direct (Article of War 61).

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. 4 OCT 1945 TO: Commanding General, 10th Armored Division, APO 260, U.S. Army.

1. In the case of Private SAMUEL (NMI) ANDRADE (31446975), Company C, 20th Armored Infantry Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15507. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15507).

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

(Sentence ordered executed. GCMO 77, USFET, 13 Mar 1945)

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

BOARD OF REVIEW NO. 2

20 SEP 1945

CM ETO 15511

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private ERNEST J. THOMAS (32342309), 463rd Amphibian Truck Company	Trial by GCM, convened at Seine Section, Paris, France, 3 April 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Ernest J. THOMAS, 463rd Amphibian Truck Company, European Theater of Operations, United States Army, did, at his organization on or about 26 November 1944 desert the service of the United States and did remain absent in desertion until he came under military control at Paris, France on or about 23 January 1945.

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

3. The prosecution introduced into evidence, without objection, a duly authenticated extract copy of the morning report of accused's unit, showing him "Fr dy to AWOL 0800" on 26 November 1944 (R5; Pros. Ex.A). As related by the two military policemen who arrested him, accused was apprehended on 23 January 1945, in an apartment in Paris, France (R6,16). At the time he was taken into custody, he was dressed in civilian clothing, bore a pass in the name of another soldier, and was without identification tags (R6,8,16,17). A woman was in the apartment with him (R6,16). He did not deny that he was a soldier, and his uniform was discovered in a closet nearby (R7,18). Evidence of army rations was also found in the apartment and additional passes and travel orders (R8,17).

4. The accused, after being first advised of his rights as a witness, elected to be sworn and testify (R9). He stated that he left his unit at Omaha Beach on 26 November 1944, having permission to be gone until the next morning, and started out to go to Renay, a place not very far away (R10,11,12,14). Enroute he "hitch-hiked" a ride with a truck driver whom he thought was going near Renay, but who took him 200 miles out of his way (R10,14). He then knew that he could not get back to his unit from so far away, and as he "wasn't doing much at this time", he decided to go to Paris (R10). He later went back to where his company had been, but it was gone and he could not find out its new location until he saw a soldier from his company

in Paris on 20 January 1945. That soldier told him that his unit was at Le Havre, and accused replied that he would return there within the next two or three days; before he did so, however, he was apprehended by the military police (R9,10; Def.Ex.A).

On cross-examination, accused admitted that he was absent without leave from 26 November 1944 until 23 January 1945 and that he had had an opportunity to rejoin his unit on 20 January but had not done so (R11,12,14). He denied that he was wearing civilian clothes at the time of his apprehension and was without his identification tags, and stated that he had not turned himself in because of his desire to rejoin his own unit (R12,13,14,15). He is married and has two children (R11).

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

Accused admitted his unauthorized absence during the period of 58 days alleged in the Specification. During a substantial part of that period he was in Paris where he had many opportunities to return voluntarily to military control, and he could also have rejoined his unit before he was apprehended. From the duration of his absence without leave, his presentation of a pass made out to another soldier, his failure to possess identification tags, and the wearing of civilian clothing, the court was justified in inferring an intent on his part not to return to the military service (CM ETO 12045, Friedman; CM ETO 9333, Odom; CM ETO 1629, O'Donnell).

6. The charge sheet shows accused to be 31 years of age. He was inducted 23 May 1942 at Fort Dix, New Jersey.

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). Confinement

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in a penitentiary is authorized upon conviction of desertion (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 20 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private ERNEST J. THOMAS (32342309), 463rd Amphibian Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15511. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15511).

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

(Sentence as commuted ordered executed. GCMO 442, USFET, 2 Oct 1945).

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

BOARD OF REVIEW NO. 1

15 SEP 1945

CM ETO 15512

U N I T E D S T A T E S	) SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)
Private First Class FRANCIS MILLER (13078920), Company B, 92nd Chemical Battalion	) Trial by GCM, convened at Paris, France, 19 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING BY BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, 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 with the European Theater.

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

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

Specification: In that Private First Class Francis MILLER, 92nd Chemical Battalion, Company B, European Theater of Operations, United States Army, did, at his organization, on or about 29 July 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Arcueil, France, on or about 8 December 1944.

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

(Finding of guilty disapproved by reviewing authority).

Specification: (Finding of guilty disapproved by reviewing authority).

CHARGE III: Violation of 94th Article of War.

(Finding of guilty disapproved by reviewing authority).

Specification: (Finding of guilty disapproved by reviewing authority).

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications (with minor exceptions and substitutions in the case of the Specification of Charge III). 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, Seine Section, Communications Zone, European Theater of Operations, disapproved the findings of Charges II and III and their specifications, approved the sentence, recommended that pursuant to Article of War 50 the sentence be commuted, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Force, European Theater, confirmed the sentence, but owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence of the prosecution shows substantially the following: Accused was absent from his organization without authority from 29 July 1944 until 22 December 1944. The commencement of this period was sought to be established by an extract copy of the morning report of his organization (Pros.Ex.A) and also by accused's written statement (Pros.Ex.C). The morning report entry was "Dy to missing", and his statement showed that on the night of 28 July he stayed overnight at a girl's house and that when he returned the next morning his company was gone, and "I thought I would only be away a few days and rest up". The Specification alleges the end of the period of desertion was 8 December 1944. On that date he was "picked up" by a military policeman (R17), but after he was taken to a detention barracks he "walked out the gate" (Pros.Ex.C). On 22 December he was stopped (while driving a jeep) by another military policeman. He displayed identification tags bearing the name "Roy F. Mailhot", and a trip ticket designating the driver as "S/Sgt Mailhot" (Pros.Ex. G); he was wearing staff sergeant's chevrons. He was taken to military police headquarters where he admitted his identity (R21-23). Other witnesses and the written statement established that he had government vehicles continually during his absence (R12,18,21).

4. For the defense, the executive officer of accused's organization testified that he was conscientious and that his performance of duty was

excellent (R25). Accused, having been advised of his rights, elected to remain silent and no evidence was introduced in his behalf (R24).

5. a. The admission in evidence of the extract copy of the morning report of Company B, 92nd Chemical Battalion, was improper. The authentication of the original morning report was by a warrant officer, junior grade, without indication of the capacity in which he signed. The Board of Review in CM ETO 14486, Marks, declined to indulge in the assumption, in the face of the inherent improbabilities, that the warrant officer in that case was in command of a company. (At the time of the authentication of the morning report in the Marks case and in the present case the commanding officer or the officer acting in command of the reporting unit was the only person authorized to make such authentication (AR 345-400, par.42, 1 May 1944). In the opinion of the Board of Review, however, the admission of this entry "Duty to missing," was not prejudicial to accused.

b. The written statement of accused was admitted by the court (without objection by the defense) after a showing that he had been fully warned of his rights prior to its making (R8). It amounted to a confession of guilt of a violation of Article of War 61, and it thus becomes necessary to determine whether there was sufficient independent corroborative evidence of the corpus delicti to justify its consideration (CM ETO 12271, Cuomo; CM ETO 15196, Nicholas. It is not required that the evidence of the corpus delicti be sufficient of itself to establish beyond a reasonable doubt that the offense has been committed, nor must it cover every element of the offense; it is only necessary that such evidence show "that the offense charged has probably been committed" (MCM 1928, par.114a, p.115; CM ETO 14040, McCreary).

It is here independently established that at the time of the alleged initial absence, accused's organization was at Lison (near St. Lo), France (R15), and that during the period of alleged absence he stayed at irregular intervals at a hotel in the Paris area, sometimes for eight days; on these occasions he had a jeep with him (R11-12). Also during this period he was seen "too much" (according to the military police) around the Rainbow Club, Paris, in the afternoons and evenings (R17,19). Further independent evidence shows that when on 8 December he was checked for a pass by a military policeman because of circumstances which aroused suspicion, he displayed a trip ticket, and said a captain had his travel orders. A further check disclosed that the jeep in his possession at the time and described on the trip ticket was carried on military police records as stolen, and accused was taken into custody (R17-18); thus his return to military control was effected by apprehension. There was sufficient evidence independent of both the morning report and the confession, to show that the offense charged was probably committed (cf: CM ETO 527, Astrella) and consideration of the confession as evidence of the charge of desertion was therefore proper. This case is clearly distinguished from CM ETO 10331, Hershell Jones, wherein it was held that although there was sufficient evidence, aliunde the accused's confession, in the first sergeant's testimony of unauthorized absence of some seven months from the battery, of an absence without leave of some three months, this was

insufficient independent evidence to render admissible the accused's confession of three separate subsequent absences without leave from different organizations during the seven month period. The corroborating evidence present in the instant case was lacking in the Jones case.

It was recently held that where a confession admitted both an unauthorized absence and black market activities for both of which he was charged, and there was not sufficient corroboration to permit a conviction of the second charge, statements in the confession as to the black market activities could nevertheless be considered by the court insofar as they bore on the question of accused's intent to desert (CM ETO 15343, Deason). Thus the court here properly considered the fact that accused "walked out" of the place of detention after his first apprehension, had a vehicle which would have facilitated his return to military control at any time, and was actually in and out of various ordnance headquarters during his absence, which facts are contained in the confession. Other proper factors for consideration on this point include his subsequent use of a fictitious name and assumed rank, his unexplained absence for a period of 132 days (MCM, 1928, par 130a, p.143), and the general military situation during this period (MCM, 1928, par 125, p.135). The fact that he remained in uniform in no way negatives the conclusion of an intent to desert, since "it is well known that a man of military age is safer from inquiry by the police if in uniform than if he wore civilian clothes" (CM ETO 1629, O'Donnell). The finding of the trial court, being supported by competent substantial evidence, will not be disturbed (CM ETO 960, Fazio et al).

6. The charge sheet shows that accused is 21 years of age and "entered" service 6 May 1942 at Philadelphia, Pennsylvania. 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 as approved and the sentence as commuted.

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

Wm. J. Lynrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Ronald H. Carroll Judge Advocate

(193)

1st Ind.

War Department, Branch Office of the Judge Advocate General with the European Theater. 15 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Private First Class FRANCIS MILLER (13078920), Company B, 92nd Chemical 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 as approved and the sentence, as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15512. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15512

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

(Sentence as commuted ordered executed. GCMO 445, USFET, 2 Oct 1945).

(195)

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

BOARD OF REVIEW NO. 3

5 NOV 1945

CM ETO 15514

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Bad Mergentheim, Germany, 14 April 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. U.S. Penitentiary, Lewisburg, Pennsylvania.
Private ANDREW L. STEIN (42130187), Company G, 12th Infantry	)	

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

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

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

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

Specification: In that Private Andrew L. Stein, Company "G", 12th Infantry, did, at or in the vicinity of Winterscheid, Germany, on or about 2 February, 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: to engage with the German forces, which forces the said command was then opposing, and did remain absent in desertion until he was apprehended at Bracht, Luxembourg, on or about 13 February 1945.

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

Specification 1: In that * * * did, without proper leave, absent himself from his organization at or in the vicinity of Hurtgen Forest, Germany, from about 30 November 1944 to about 19 January 1945.

(196)

Specification 2: In that * * * did, without proper leave, absent himself from his organization at or in the vicinity of Bettendorf, Luxembourg from about 22 January 1945 to about 31 January 1945.

He pleaded not guilty to the charges and specifications. All members of the court present at the time the vote was taken concurring, he was found guilty of Charge I and Specification, Charge II and Specification 1 thereof, and Specification 2, Charge II, except the word "Bettendorf", substituting therefor the word "Consdorf". No evidence of previous convictions was submitted. All members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 4th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, commuted it, owing to special circumstances in the case, to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence for prosecution:

a. Introduced without objection was an extract copy of company morning reports showing entries for 2 December 1944, 28 January, and 2, 13, 19 and 20 February 1945 (R7; Pros.Ex.A). The morning report entry for 28 January 1945 shows accused from "dy to AWOL 1300 22 Jan 45" and that for 2 February 1945 shows him "AWOL to dy 1800 31 Jan 45" (Pros.Ex.A).

b. The first sergeant saw accused 1 February 1945 at Bergreuland, Luxembourg, near the German border, when accused was delivered to him by the battalion. He equipped him with a "rifle, gas mask and grenades - everything he needed before going on the line" and told him he would be taken to the company the next morning. The next morning accused started up in the mess jeep. Distant some two and a half miles from Bergreuland the company was holding a position and awaiting orders to move on Winterscheid then occupied by enemy forces. The company received an occasional round of artillery. At about 0800 it jumped off and cleared Winterscheid by about 1000. At about 1230, the first sergeant went to Winterscheid and discovered accused to be missing. He did not have his permission to be absent. The only persons authorized to be absent were those who had been given a Paris pass. Accused had no such pass (R5-7). The morning report entry for 13 February 1945 shows accused from "Dy to AWOL 0800 2 Feb 45" (Pros. Ex.A).

Accused was apprehended at Bracht, Luxembourg, on or about 13 February 1945 (R8). The morning report for 20 February 1945 shows accused from absent in confinement to arrest in quarters 15 February 1945 (Pros.Ex.A).

About the middle of February 1945, a guard "overheard him, one day, say [to another prisoner] he hoped the war would be over before he got caught" (R8).

4. After his rights as a witness were explained to him, accused elected to remain silent and no evidence was introduced on his behalf (R9).

5. With respect to Charge I and its Specification, that accused absented himself without leave at the time and place alleged and found was established by the first sergeant's testimony and the morning report for 13 February 1945. The circumstances under which he absented himself without leave support the inference that he did so to avoid hazardous duty (cf: CM ETO 6623, Milner; CM ETO 7189, Hendershot; CM ETO 8083, Cubely; CM ETO 8185, Stachura).

The evidence also is legally sufficient to support the court's finding that accused absented himself from his organization from 22 January to 31 January, as alleged in Specification 2 of Charge II.

As conviction of the desertion alleged in Charge I and its Specification authorizes the sentence imposed and the place of confinement designated, the evidence relating to the relatively minor absence without leave alleged in Specification 1 of Charge II has not been summarized in this holding and no opinion as to the legal sufficiency of such evidence to support the finding of guilty of Specification 1 of Charge II is here expressed.

6. The charge sheet shows that accused is 33 years of age and was inducted, without prior service, on 4 April 1944 at Camp Upton, New York.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as hereinbefore stated, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and Specification and Charge II and Specification 2, and the sentence as commuted.

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

(ON LEAVE) Judge Advocate

Malcolm C. Thurman Judge Advocate

B K Newey Jr Judge Advocate

(198)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 10 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private ANDREW L. STEIN (42130187), Company C, 12th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and Specification and Charge II and Specification 2, 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, this indorsement and the record of trial which is delivered herewith. The file number of the record in this office is CM ETO 15514. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15514).

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

(Sentence as commuted ordered executed. GCMO 599, USFET, 26 Nov 1945).

15514

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

BOARD OF REVIEW NO. 2

15 NOV 1945

CM ETO 15539

U N I T E D S T A T E S	) SEINE SECTION, COMMUNICATIONS ZONE, UNITED STATES FORCES, EUROPEAN THEATER
v.	)
Private PAUL J. THOMAS (38045983), 399th Quartermaster Truck Company	) Trial by GCM, convened at Paris, France, 14, 15, 16, 17 May, 4, 5 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Paul J. Thomas, 399th Quartermaster Trucking Company, European Theater of Operations, United States Army, did at St. Denis, Seine, France, on or about 16 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Gilbert N. Couch, Junior, a human being, by shooting him with an automatic weapon.

Specification 2: In that * * * did at St. Denis, Seine, France, on or about 16 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Albert Govan, a human being, by shooting him with an automatic weapon.

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 specifications. No evidence of previous convictions was introduced. All members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

On 16 March 1945 Sergeant Gilbert Couch, Junior, and Private First Class Lloyd W. Baldwin of the 386th Military Police Battalion, were on duty patrolling a twenty mile stretch of highway between Paris and Pontoise, France (R41) and were both wearing Military Police brassards and pistols (R74,80,81). At about 2130 hours on that day (R47,99,110) a 6x6 truck passed their jeep (R47,48,99) on the road from Pontoise to St. Denis (R47,48), at a point about four miles from St. Denis toward which, both vehicles were proceeding (R47,99). The truck travelled at excessive speed, about fifty miles per hour (R48,99), in view of which and the roughness of the road the jeep driven by Baldwin was unable to overtake it (R99). About a mile further the truck pulled to the side of the road and stopped (R48,99) to re-fuel (R48,101). Baldwin pulled his jeep in front of the truck which contained two colored soldiers (R48,101,171). The driver of the truck dismounted and Baldwin checked his trip ticket which appeared to be in order (R48,102) and held a flashlight for the driver while he refueled the truck from gas cans carried in the back of the truck (R48,102). Baldwin advised the driver of the speed limit but did not arrest him for speeding (R103). The other colored soldier did not dismount from the truck (R48,172). After the truck had been re-fueled, Baldwin returned to his vehicle and proceeded toward St. Denis, noting for a short distance that the truck was following and "then all of a sudden I didn't see his lights any more" (R48).

Baldwin and Sergeant Couch stopped at the Cafe Du Commerce in St. Denis (R41,66,67) located at the corner of two streets with a door opening to either street (R63,64). They left their vehicle parked on the wrong side of the street in front of the cafe (R66,67). The cafe contained in the front a bar room approximately 15 feet square with another room to the rear containing tables (R64,65). Diagrams of the cafe drawn by Baldwin in connection with his testimony were introduced into evidence by the defense as Def. Ex. "B1", "B2" and "B3" (R82). Sergeant Couch remained in the front room at the bar where he secured hot water to make coffee with powdered ingredients he had while Baldwin went to the rear room and checked the passes of two soldiers who were there with two French girls (R42,68,70, 263,265). Baldwin then returned to the bar where Sergeant Couch was drinking coffee (R42,68). The woman who owned the bar was present, and also a French-

man and perhaps one other person (R72,73,113).

A few minutes later the front door opened and a colored soldier stood just outside the door with an automatic weapon levelled at Baldwin and Couch (R171). He asked them if they were "MPs" and if that was their jeep outside (R42,69). When they replied affirmatively he ordered them to come outside with their hands in the air (R42,74). There was sufficient light from the cafe to see the man with the weapon (R171). Baldwin then went out of the front door with his hands at his side (R42,74); and Sergeant Couch who was behind him must have made his exit by the other door at the side as he did not come out of the door Baldwin did (R77,116,125,126,244). As Baldwin stepped out on to the sidewalk he saw a 2½ ton truck parked to his right on the wrong side of the street (R44,70,126), but could not identify it as being the same truck he had encountered earlier in the evening (R120). He also noticed another colored soldier standing next to the building and about five feet from the door (R42,76) who was later identified as Private Albert Govan (R36,52,131,138; Pros.Ex.L). The soldier with the automatic weapon directed Govan to take Baldwin's pistol and had to repeat the order several times before Govan complied (R43,76,83). He then told Govan to get Baldwin's holster also and as Govan was unfastening the holster a lone pistol shot came from the corner of the building to Baldwin's right rear (R42,43, 85) and Govan slumped to the ground at Baldwin's feet (R43,86,87). Baldwin testified that this shot was fired by Sergeant Couch (R43,85) because the soldier with the automatic weapon then fired a burst (R43,86,90) and Baldwin turned immediately (R121) and saw Sergeant Couch to his right rear (R43) laying on the ground with his head in the street and bleeding very badly about the head (R43,87,121). The colored soldier then approached Baldwin, fired another burst into the body of Govan who lay groaning at Baldwin's feet (R44,87,90) and demanded Baldwin's pistol belt which was handed to him (R87). He, then turned his back to Baldwin who slipped behind the truck and ran a short distance down the street (R43,91). The truck then drove off and Baldwin returned (R44,117). Baldwin's testimony with respect to the incidents immediately involving the homicides above summarized was as follows:

> "I heard a lone shot * * * That shot came from Sgt. Couch; one pistol shot (R42). The man at my right which a second before removed my weapon and holster fell at my feet (R43). * * * Immediately I heard a burst from this automatic weapon. I side-stepped very slightly and looked at my right rear and noticed that the Sergeant had been hit. I mean Sergeant Couch. * * * He was laying on the ground with his head in the street and he was bleeding very badly about the head (R43). * * * The other colored soldier was laying at my feet wounded from the pistol shot of Sgt. Couch. At that time I heard a few muffled moans from this colored soldier (R43) * * *

> The man fired two bursts with the automatic weapon. The first burst was when Sgt. Couch fell. The second burst happened when I heard the colored soldier groan at my feet. The man with the automatic weapon then went up to him and fired another burst into his body as he lay at my feet. That was the only two bursts which were fired from the weapon" (R44). (Underscoring supplied).

Baldwin saw that Couch was badly wounded and asked the two soldiers who had then emerged from the rear room of the safe to maintain watch (R44,118) while he went into the cafe and called his headquarters. This call was made at 2241 (R51,54). The time was established by entry on the headquarter's blotter which was received in evidence, without objection by the defense, as Pros.Exs. "2" and "2A" (R60,61). Baldwin thereafter took Sergeant Couch in the jeep to the 48th General Hospital arriving there about 2245 (R45,118). Meanwhile French police had taken Govan to a civilian hospital (R51) where the Battalion Patrol Officer, 386th Military Police Battalion (R50) was informed by a French doctor that he was dead (R54). His body was then removed that same night to the 48th General Hospital (R52). Clinical records of the 48th General Hospital were received in evidence, without objection by the defense, showed that both Couch and Govan were dead upon arrival at the hospital; that death resulted in both cases from bullet wounds and that the body of Govan showed evidence of fourteen bullet wounds (R153;Pros.Ex."3" and "4").

Three hours or so after the shooting and when he had a chance to "think over the circumstances" (R107), Baldwin remembered that the colored soldier with the automatic weapon was the same soldier who drove the truck earlier in the evening and for whom he had held the flashlight while he re-fueled his truck (R47,50). He also recalled that he had "picked up" the same soldier in Paris on 23 February 1945 (R50,92,94,170) and had taken him to Caserne Mortier and CID headquarters, along with other soldiers, because he was carrying a pistol and had a faulty pass (R94). At that time he had said to Baldwin, "someday he would be in a position where he would be carrying a gun and that I wouldn't be" (R98). When Baldwin made his first statement to the CID on 19 March 1945 he did not mention the incident of 23 February 1945 because "it did not have any bearing on me at that time" (R96,97). Baldwin made a second statement concerning the episode of 23 February 1945 after he had identified the accused from a company lineup of the 399th Quartermaster Truck Company on 19 March 1945 (R109). At said identification parade the men of the company were marched past Baldwin in about twelve groups of ten men each (R128), each man stating his name, rank and serial number (R128). When all of the men had been before him, Baldwin was asked if he had recognized the person he was looking for and he replied that he had (R128). The

process was then repeated and after about seven groups had been brought in for the second time Baldwin identified accused as the man who had fired the shots (R129). He recognized accused by the way he talked, his height and general build and not as a result of the episode of 23 February 1945 (R46,104,168). Baldwin's testimony as to his identification of accused at the identification parade on 19 March was corroborated by Captain William W. Hugill, the commander of accused's truck company, under whose direction the parade was conducted (R128,129).

On 16 March 1945 the company of accused was stationed at Silleron, France (R127), 115 miles from St. Denis (R135). Convoy time from Silleron to Paris was 6½ hours (R133), although under favorable circumstances the trip could be made by a 6x6 truck in about 3 hours (R144). On 16 March 1945 the accused was in arrest in quarters (R205) and was not assigned to any duty (R130). The decedent, Govan, of the same company, was on duty until 1800 on 16 March 1945 as guard at the truck line (R150). During his tour Govan was observed by another guard to move a truck off the line and park it down the road (R151). Vehicles were checked in and out of the area by a guard (R136), although it was possible for vehicles to leave or enter the area without being dispatched (R135). At 0200 on 17 March 1945 a truck entered the area without checking in and the guard did not see the driver of the vehicle (R133).

Private Hubby L. Jamerson of the 399th Quartermaster Truck Company testified that between 0200 and 0230 on 17 March 1945 the accused came to his room (R160), awakened him and told him "Govan is dead. He got killed by an MP and I got away" (R160). Jamerson told accused to go to bed and forget about the whole thing (R161), because he "thought it was a lie" and "didn't want to have anything to do with it" (R164). Jamerson subsequently resumed the stand as a witness for the defense at an adjourned session of the trial (the opening session was on 14 May 1945; the adjourned session on 5 June 1945). He then (R223) repudiated his testimony, stating that when he signed a statement for the CID on 21 March 1945 it contained blank spaces and that there was nothing in it about his being awakened by Thomas at 2:00 or 2:30 in the morning (R225); that he later saw the statement containing such matter and testified in accordance therewith because the CID told him that under the 24th Article of War he had to testify according to what was in the statement (R223-234). The Court ordered Jamerson delivered to the Provost Marshal for possible prosecution for perjury (R235). The CID agent who was present when Jamerson's statement was taken testified that it was in the same condition at time of trial as it was at the time the witness signed it (R274-276) and over the objection of the defense the statement was admitted in evidence as Pros.Ex. "6" (R277). Sergeant Woods testified that he slept in a small room off of the room occupied by accused (R239); that he did not see accused on the evening of 16 March 1945 but that around midnight someone came to his door and said "If anyone wants me I'll be downstairs" and although he did not see the person he "thought" that it was Thomas (R237,238).

Witnesses called by the court included Technician Fifth Grade Grosvenor and Private Harding Johnson, who testified that they were roommates of the accused; that they returned to their room between 8:00 and 9:30 o'clock in the evening of 16 March 1945 and that Thomas was not there and that they did not see him until they arose the next morning (R256-261). Staff Sergeant White, also called by the court as a witness, testified that he was Sergeant of the Guard on 16 March 1945; that deceased, Govan was a member of the guard on that day and that although Govan's tour was completed at 1800 he actually was not released until between 6:30 and 7:00 o'clock (R269).

The two French girls, who were in the back room of the cafe on the night of 16 March 1945, were called as witnesses by the Court and testified as to incidents of that evening leading up to the time of the shooting (R262-269). One testified that she would not recognize the soldier who did the shooting even if she did see him (R263) and the other testified that accused was not the man she saw that night (R266,267).

4. Defense introduced testimony from members of accused's organization for the purpose of establishing that accused was present in his quarters at Silleron, France, on the night of the shooting. It was stipulated that Private Leroy Rogers, if present, would testify that he played cards with accused and others at their quarters on 16 March 1945. That Willie Childs left the game to go on guard at 1900 and that accused left "sometime" later - that accused "played several hands before leaving" (R176). Technician Fourth Grade Anderson testified that on 16 March 1945 he saw accused and Willie Childs playing cards in their billet when he left "about 9:30" (R177), but on cross-examination, became very confused and indefinite respecting the time (R178-183). Private First Class Fennell testified that he saw accused and Willie Childs playing cards together on 16 March 1945 about 1900 (R184); that he and Childs went on guard duty about 1900 and that he again saw accused when he returned to the quarters around 9:30 to get a flashlight (R184). On cross-examination, this witness admitted that he did not see accused when he returned to the quarters at 9:30 o'clock (R187).

The proprietress of the Cafe du Commerce testified as to the incident in her cafe on the night of 16 March 1945 (R191-194) and stated that accused was not the man she saw in the door with the machine gun (R194); that he was "about the same build as this man, but his face was more round and the eyes more wicked and he spoke in a wicked way" (R194). On cross-examination, witness testified that she would not be able to identify the negro who came to the door that night (R204).

Accused, after being fully informed of his rights as a witness, was sworn and testified that on the night of 16 March 1945 he did not leave the company area (R205,206); that he was in arrest in quarters and had no duties (R205); that he got into a card game around 7:00 o'clock (R205); that

(205)

at 9:30 o'clock he was still in the company area but "couldn't give the exact place" (R207). Later in his testimony he stated that the card game lasted until 11:00 or 11:30 o'clock, but could not remember with whom he played (R213,214). He admitted that he was arrested in Paris by Private First Class Bladwin on 23 February 1945 but denied that he threatened Baldwin at that time or had any conversation with him (R208). That he last saw Govan between 4:00 and 5:00 o'clock in the afternoon of 16 March 1945 at which time Govan was on duty as a guard at the truckline (R209). He denied that he awakened Jamerson at 0200 on 17 March 1945 and told him that Govan was dead (R210) and didn't know why Jamerson should lie about him,

> "I know of no exact reason why Jamerson should tell a lie, but somehow or other, I was suspicious of Jamerson myself. But I had no direct evidence whatsoever. I couldn't put my fingers on anything because I had no evidence whatsoever as to prove it or -- because they picked me up and I couldn't get to hear anything about this case. I have no reason whatsoever, I couldn't -- that's what I want the court to understand -- the time they picked me up. I heard enough about this case to try to find out after they had tried to accuse me of this as to who could have been with Govan, but I had not enough time before I was picked up by the CID to get any information whatsoever as to who probably could have been with Govan before. Jamerson stated I was with Govan -- that he was a better friend to Govan than I was to him. If I'm not mistaken, I was with Jamerson better friends than I was with Govan. At least we messed around and run around with each other more than with any other one in the company" (R210,211).

He further testified that the CID beat him up, that "they beat me with guns on the back of my head" (R218).

5. The accused has been found guilty of the murder of Gilbert N. Couch, Junior and Albert Govan. The evidence clearly established that the deceased Couch was murdered by a colored man in uniform at the time and place alleged in the specification by the deliberate shooting of him with a deadly weapon.

As to the deceased Govan, there is positive evidence that he was first shot by the deceased Couch and lie upon the ground in a seriously wounded condition. Baldwin without qualification testified that he heard

Govan moan immediately prior to the time accused fired into him a burst from the automatic weapon. If Govan were dead at the time accused shot him, it is axiomatic that accused would not be responsible for his death. The inference, however, is clear that Govan was alive when shot by accused.

> "The law declares that one who inflicts an injury on another and thereby accelerates his death shall be held criminally responsible therefor. It is said in this connection that if any life at all is left in the human body, even the least spark, the extinguishment of it is as much homicide as the killing of the most vital being" (26 Ann. Jur. sec. 49, p.192).

The finding of the court that Govan was alive when shot by accused, implicit in its findings of guilty, is supported by substantial evidence (CM ETO 9305, Johnson).

6. The principal issue presented by the record is the identity of the person who committed the homicide. Baldwin positively identified the accused as the one who committed the offense. His testimony alone was sufficient to support the finding that the accused fired the fatal shots. He was corroborated by the testimony of Jamerson that accused told him that Govan was dead and that he got away. Govan, who took part in the fatal occurrence and lost his own life as a result, was shown to be a friend of the accused and to be on duty in the same organization. The vehicle used by Govan and his companion was shown by strong circumstantial evidence to belong to the same organization. It was therefore possible for the accused, if he were Govan's companion, to have committed the act. On the other hand there was evidence that accused was many miles away from the scene of the murder at or about the time of its commission. The accused denied that he was there or that he commited the deed. The evidence thus presented by both sides, and the evidence produced by the court in its efforts to exhaust all possible clues as to the identity of the offender, created a clear issue of fact. The court - the fact-finding body - resolved that issue against the accused. Inasmuch as the determination of issues of fact is within the sole province of the court and its decision is based upon substantial evidence, it may not be disturbed by this Board upon appellate review (CM ETO 2686, Brenson and Smith; CM ETO 3200, Price; CM ETO 3837, Bernard W. Smith; CM ETO 14573, Morton).

7. The testimony of Baldwin and Captain Hugell as to extra-judicial identification of accused at an identification parade conducted on 19 March 1945 was properly admitted in evidence (CM ETO 3837, Bernard W. Smith; CM ETO 7209, Williams and authorities therein cited).

8. The charge sheet shows the accused to be 22 years, two months of age. He was inducted into the service on 22 October 1941 at Paris, Texas.

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

10. The penalty for murder 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).

(ON LEAVE) Judge Advocate

Judge Advocate

John J. Collins, Jr. Judge Advocate

(208)

RESTRICTED

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 9 NOV 1945 TO: Commanding General, Seine Section, Theater Service Forces, European Theater, APO 887, U. S. Army.

1. In the case of Private PAUL J. THOMAS (38045983), 399th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15539. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15539).

E. C. McNEIL,
Brigadier General, United States Army,

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater
APO 887

BOARD OF REVIEW NO. 4

10 NOV 1945

CM ETO 15540

U N I T E D S T A T E S v. RENE C. POLLARD (O-2676S3), a civilian accompanying the army outside the continental limits of the United States	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Paris, France, 25, 26 April 1945. Sentence: Fine of $50,000 and confinement at hard labor for six years, an additional three years if fine is not paid. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 4
DANIELSON, MEYER and ANDERSON, Judge Advocates

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

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

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

Specification: In that Rene C. Pollard, United States Information Service, European Theater of Operations, United States Army, APO 887, did, at Paris, France, at various times from about 10 November 1944 to about 6 March 1945, feloniously embezzle by fraudulently converting to his own use, various and sundry quantities of foodstuffs, of the value of about $37.62, property of the United States, entrusted to him in his official capacity as an officer and employee of the United States.

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

Specification 1: In that * * * did, at or near Paris, France, on or about 4 December 1944, knowingly and unlawfully

apply to his own use and benefit a 6 x 6 truck, property of the United States furnished and intended for the military service thereof, of a value of over $50.00.

Specification 2: In that * * * did, at or near Paris, France, on or about 21 January 1945, knowingly and unlawfully apply to his own use and benefit a 6 x 6 truck, property of the United States furnished and intended for the military use thereof, of a value of over $50.00.

Specification 3: In that * * * did, at or near Paris, France, on or about 9 February 1945, knowingly and unlawfully apply to his own use and benefit a 6 x 6 truck, property of the United States furnished and intended for the military service thereof, of a value of over $50.00.

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

Specification: In that * * * did, at or near Paris, France, at various times between about 23 October 1944 and 6 March 1945, being at all such times an officer and employee of the United States, accept a promise for the payment of money, and pursuant thereto did receive such money, in the amount of about one million six hundred and thirty thousand (1,630,000) French francs, of the legal exchange value of about thirty-two thousand six hundred dollars ($32,600), with the intent and result of having his action in his official capacity as an officer and employee of the United States influenced thereby in permitting and authorizing the improper use of certain motor vehicles, e.g. a station wagon and a 6 x 6 truck, property of the United States.

After his plea to the jurisdiction of the court (hereinafter discussed) was overruled (R33), he refused to plead to the general issue, a plea of not guilty of all charges and specifications was entered for him by the court, and he was found guilty thereof. No evidence of previous convictions was introduced. He was sentenced to pay to the United States a fine of $50,000, to be confined at hard labor at such place as the reviewing authority may direct for fifteen years, and to be further confined at hard labor until the fine be paid, but for not more than three years in addition to the 15 years confinement adjudged. The reviewing authority approved the sentence but reduced the period of confinement to six years, not modifying, however, the additional confinement for three years in the event of failure to pay the fine, 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.

8. Jurisdiction of the court

a. Accused's plea to the jurisdiction of the court raises the question whether he is a person subject to court-martial jurisdiction within the meaning of the Article of War 2.

The Office of War Information (hereinafter referred to as OWI) was created by Executive Order 9182, 13 June 1942, to aid in the prosecution of the war with the Axis powers through its psychological warfare and informational activities. Executive Order 9312, 9 March 1943, defined the foreign informational activity of OWI. Prior to 15 October 1944 the operations of OWI in France were conducted through Supreme Headquarters, Allied Expeditionary Forces (hereinafter referred to as SHAEF), and OWI did not operate in its own name. OWI was, prior to 15 October 1944, known as the Psychological Warfare Division (hereinafter referred to as PWD) of SHAEF. On 15 October 1944 the informational work of PWD, conducted by its Allied Information Service department, was transferred to the United States Information Service (hereinafter referred to as USIS), a division of OWI, subject, in its work, to a degree of supervision by the American Ambassador to France, while the psychological warfare activity of OWI remained with PWD of SHAEF under the control of the Supreme Commander.

OWI in France was, then, composed of two more or less separate departments: (1) PWD, a division of SHAEF, under the jurisdiction of the Supreme Commander, and (2) USIS, its work being subject to a degree of review by the American Ambassador (R77-79).

There appears to be no doubt that OWI officers and employees assigned to PWD of SHAEF, and engaged in the work thereof, are subject to court-martial jurisdiction (SPJGW 1944/977, 15 March 1944, IV Bull. JAG 226), but accused was attached to USIS (R10), was not engaged exclusively in work for PWD, and, there being no controlling precedent, the jurisdiction of the court must be determined by an examination of his duties and the meaning of Article of War 2.

The Executive Officer of the European Division of OWI explained the function of USIS as follows (R88):

> "USIS is a section that devotes itself entirely towards it * * * towards representing the United States Army, Communications Zone, to the French people with the French informational mediate. From time to time the various section chiefs will consult with the respective section chiefs of COM Z relative to certain programs. For example, we will coordinate or conduct a radio program throughout France for the purpose of bringing back jerricans, or we will engage in some campaign which is destined to clear the Red Ball Highway of French pedestrians, campaigns such as that. It depends on what the problem is in COM Z, and it is usually dealt with as a separate campaign, and of course, we have a working staff that actually handles their day-to-day relationship".

The Army, then, looks to USIS as an informational specialist to project its problems to the French people (R56). The American Ambassador, while exercising a degree of control in certain fields of policy, has no administrative responsibility for USIS (R87).

USIS draws its basic rations from the Army, obtains gasoline and oil for its vehicles from the army, is subject to censorship by the army, its personnel travel only with the permission of the army, and, in general, it is attached to the army for maintenance, billeting, messing and transport (R78-80).

With special reference to accused, the record of trial shows that he was employed by OWI in February 1944, arrived in the European Theater of Operations in May 1944, remained in London three and one-half months, came to Brittany, France, in August 1944, and to Paris in October 1944. He was then assigned as mess and billeting officer of the Hotel Astra, that being the mess and billet of OWI officers and employees in Paris. His salary, including overtime and living allowances, wasapproximately $5300 a year (Pros.Ex.F).

The Hotel Astra was requisitioned by the United States Army in September 1944, was later assigned by it to SHAEF for use by OWI, and has never been returned to civilian control (R7). As mess and billeting officer of the Hotel Astra accused performed the duties traditional to that office: he drew rations from the army, transported them in a vehicle registered with the army, brought foodstuffs to Paris from outlying areas in an army truck, billeted authorized persons, and kept books and records to reflect these operations (R12,13). It also appears that the mess and billeting facilities of the Hotel Astra were not confined exclusively to USIS personnel, but were enjoyed as well by the officers and employees of PWD. In this connection the testimony of OWI's director for its European activities is pertinent (R77,78):

> "Q. Now, would Mr. Pollard's duties as the manager, so to speak, of the Astra Hotel billet, mess and bar * * * would that be classified as Psychological Warfare?
>
> A. It is very difficult, sir, because all of our personnel is involved to a certain extent in Psychological Warfare activities. The Astra hotel is the billet for the Office of War Information, United States Information Service, which was the civilian information activity in France. However, a great many of our individuals who are primarily assigned to either Psychological Warfare through SHAEF or the informational activities in France have interchangeable duties and interchangeable responsibilities, and it would be impossible to say that any one office had only

connection with informational activities or with Psychological Warfare on the other side.

Q. Now, did Mr. Pollard have any other duties outside of operating the billet and the mess?

A. He did not.

Q. But in the billet and in the mess employees or people connected with your agency might be one or the other; is that right?

A. That is correct".

The evidence further discloses that accused has and is authorized to wear a uniform, a privilege which he exercised in the furtherance of his criminal activities (Pros.Ex.H), that he has the assimilated rank of major and was so addressed by the French civilian he employed as a waiter in his apartment, enjoys Army Exchange Service privileges, and carries a War Department AGO Form 65 identification card reciting, among other things, that he is "a civilian accompanying the Army of the United States" (R19).

b. The decisions of the Federal courts, the holdings of the Boards of Review, and the opinions of The Judge Advocate General construing Article of War 2 are numerous (IV Bull. JAG 225). Although the problem now under consideration does not appear to have been determined heretofore, the tests of jurisdiction applied in other similar cases are applicable here. An examination of the precedents (IV Bull. JAG 225) discloses that the jurisdiction of courts-martial over civilians conferred by Article of War 2 must be determined from the facts of each case, and that it ordinarily derives from a complex of many factors. The degree of control exercised by the army over the civilian, the intimacy of their association, the nature, function and purpose of his work, the reciprocal duties and benefits,--all these considerations, and perhaps others, contribute to a solution of the question. The test is an objective one, and consensual features are not important (McCune v Kilpatrick, (D.C. Va. 1943), 53F. Supp. 80).

Article of War 2, the pertinent statute, provides, in part, as follows:

"The following persons are subject * * * [to court martial jurisdiction] * * *

* * * * * *

(d) all * * * persons accompanying * * * the armies of the United States without the territorial jurisdiction of the United States * * *"

Under Article of War 2, then, court-martial jurisdiction does not require that a person serve with or be employed by the army; if he accompanies the army without the territorial jurisdiction of the United States, jurisdiction attaches (In re Di Bartolo, (D. C. N.Y. 1945), 60 F. Suppl 929).

There can be no doubt that accused was "without the territorial jurisdiction of the United States" at all times alleged in the specifications, and the question for solution is solely whether he was a person "accompanying the armies of the United States".

The record of trial discloses that OWI, through PWD, was a part of SHAEF and actively engaged in destroying the enemy psychologically, while through USIS it projected the Army to France, sought the perpetuance of amicable relations between the army and the French people whose country was traversed by our military supply lines, and worked closely with the army in the prosecution of the war by campaigns such as to obtain the return of jerricans and to keep the highways clear of civilian traffic, and, in general, by its day-to-day efforts in behalf of the army. USIS relied on the army for billets, food, transport and a degree of administration, was subject to censorship, travelled only with the permission of the army, and its personnel bore assimilated rank, were issued uniforms and War Department identification cards, and enjoyed Army Exchange privileges.

It is clear that the function of OWI was to assist in the prosecution of the war, that the army exercised exclusive control over PWD and partial control over USIS, that there was a great intimacy of association between OWI and the Army, and that there was an abundance of reciprocal benefits and duties. Nor were the duties and responsibilities of PWD and USIS personnel clearly separate because the evidence shows their personnel were to a great degree interchangeable, and that "it would be impossible to say that any one office had only connection with informational activities or with Psychological Warfare" (R78). Although accused was assigned to USIS, both PWD and USIS personnel ate and lived at the Hotel Astra (R78), and so his duties involved responsibilities to personnel of both branches of OWI. It cannot be said, therefore, that his activities were confined exclusively to USIS.

It is of further interest that he was issued and carried a War Department AGO Form 65 identification card, reciting that he was a "civilian accompanying the army of the United States" (R19), in view of Cir. 83, Headquarters, ETOUSA, 27 July 1944, which sanctions the use of such cards of identification by civilians only in the event they are subject to military law, and which accords the holders thereof privileges traditionally limited to military personnel. While the possession of such an identification card by a civilian is not determinative of the question of jurisdiction, the issuance thereof pursuant to direction of the Commanding General of the United States Army in an overseas theater, and the acceptance and enjoyment thereof by accused, are entitled to consideration in determining his status. We cannot assume that the acts of the military authorities and the accused, in so solemn a matter, were wholly at variance with his status. They are in the

nature of an administrative construction, and are in that sense entitled to some weight in determining the question of jurisdiction. This is in keeping with the rule that in cases of doubt the administrative construction of a statute by persons charged with its enforcement, is accorded weight in arriving at its meaning (Cf: Louisville & N. R. Co v. United States, (1931), 282 U. S. 740, 75 L. Ed. 672).

It has heretofore been determined that employees of the Board of Economic Warfare, engaged in feeding and clothing the civilian population in an overseas theater, USO Camp Shows entertainers with troops overseas, Treasury Department agents engaged in foreign fund control work overseas, and Red Cross, YMCA and KC personnel serving in an overseas theater, are persons subject to court-martial jurisdiction (IV Bull. JAG 225). Likewise it has been held that employees of PWD of OWI attached to the army in Algiers are subject to court-martial jurisdiction (IV Bull JAG 226). In view of the nature of accused's work, which involved responsibilities to both PWD and USIS personnel, the purpose of PWD and USIS, which was to assist in the prosecution of the war, the control exercised by the army, the reciprocal benefits and duties, and the many other indicia of status disclosed by the record of trial, these precedents suggest, and we are persuaded, that at all times alleged in the specifications, he was a person accompanying the armies without the territorial jurisdiction of the United States, and subject to trial by court-martial. This conclusion is consistent with the judicially known principle that total war requires the mobilization of the psychological and informational resources of the nation, and the utilization thereof by the theater commander in the prosecution of the war.

A solution of the question presented here does not require us to determine the status of all USIS personnel serving overseas. It is enough for the purposes of this case to conclude that accused, in light of his special duties and the facts and circumstances shown by the evidence, was a person subject to court-martial jurisdiction by reason of the language of Article of War 2. The court was not in error, therefore, in overruling his plea to its jurisdiction.

4. Specification, Charge I

a. Specification, Charge I, alleges that accused, at various times from 10 November 1944 to 6 March 1945, embezzled certain foodstuffs of the United States of a value of approximately $37.62.

The evidence shows that accused maintained an eight-room apartment on Avenue Henri Martin in Paris (R34), which he rented for 4000 francs a month (Pros.Ex.F). M. and Mme. Albertone, French civilians, were employed by him as domestics to operate the apartment from November 1944 to March 1945 (R38), and occasionally ate some of the food which he brought to the apartment. Accused's "wife" lived with him in the apartment and also ate there (R38). He admitted that in "order to feed myself and the three above-mentioned people I have taken foodstuffs from the Hotel Astra", that this "food was

U. S. Army rations purchased by the CWI", and that he "started taking food home about the 10th day of November 1944 and continued doing so almost daily" (Pros.Ex.C). His apartment was searched about 7 or 8 March 1945 and various foodstuffs taken from the Hotel Astra, such as meat, sugar, lard, rice, milk, fish, fruit, and beans, were found therein (R35; Pros.Ex.G).

Photographs of the foodstuffs found therein were offered and received in evidence (Pros.Exs.A & B), which disclose the removal of foodstuffs in large containers and in substantial amounts. It was stipulated that the value of the foodstuffs shown therein was $37.82 (R46).

It appears that some CWI personnel maintained private billets, and that rations were drawn from the Hotel Astra for use therein (R76), but authorization to draw rations for use in private billets was limited to "rations which will take care of breakfast, and so forth" (R78,84), and no one was authorized "to take the kind and quantities of food as indicated by those pictures away from the Astra mess" (R78).

b. As mess officer accused was in charge of the foodstuffs at the Hotel Astra, and his control thereof was adequate to support a charge of embezzlement (CM ETO 1302, Splain). He admittedly removed substantial amounts of foodstuffs therefrom for the use of himself, his two servants and his "wife", during the period of time alleged, and his confession thereof is abundantly supported by evidence of the corpus delicti so as to render his extra-judicial statement admissible (MCM 1928, par. 114a, p.115). The removal of items of the kind and quantity shown, and for the purpose of feeding French civilians, was clearly improper, and there is substantial competent evidence to support findings that the removal and use thereof were unauthorized, and that the value and ownership thereof were as alleged.

The record of trial discloses a fraudulent conversion of property under the control of accused, and is, therefore, legally sufficient to support the findings of guilty of Specification, Charge I, and Charge I.

8. Specifications 1, 2, and 3, Charge II

a. Specifications 1, 2 and 3, Charge II, allege severally that on 4 December 1944, 21 January 1945 and 9 February 1945, accused misapplied a truck worth more than $50.00, belonging to the United States and furnished and intended for the military service thereof.

It is shown by the record of trial that about 1 December 1944 accused needed 300 bottles of cognac for the Hotel Astra, and that he requisitioned an army truck to transport it to Paris from an outlying area. Roger Nasaret, a French civilian, offered him 380 francs a bottle if he would deliver cognac to him in Paris, and agreed to advance the money necessary to finance the transaction. Accused thereupon entered into an agreement with his assistant, Jean Baruche, a French civilian, whereby Baruche undertook to buy cognac and utilize the excess space in the truck to transport it to Paris, and accused

agreed to pay Baruche one-fourth of the profit represented by the difference between the cost and the selling price of 300 francs. Mazaret gave accused 500,000 francs to finance the purchase, and on or about 4 December 1944 the truck left on its mission. When the truck returned, 300 bottles of cognac were delivered to the Hotel Astra and the extra cognac was delivered to an unknown destination. Accused made approximately $4,000.00 (200,000 francs) on the transaction (Pros.Ex.I; R46-49,55-62).

On or about 21 January 1945 accused again needed liquor for the Hotel Astra and spoke to Baruche about making another trip. He requisitioned an army truck to make the trip, and gave Baruche about 500,000 francs to defray the cost of cognac in addition to that required for the hotel. As a result of this utilization of the army truck to transport cognac for personal gain, accused made approximately $5,000.00 (250,000 francs) (Pros.Ex.I; R46,49,55-62).

On or about 9 February 1945 accused spoke to Baruche about making another trip to obtain cognac for the hotel and for personal sale at a profit. He again requisitioned an army truck and gave Baruche a substantial amount of money to cover the cost of the purchase. As a result of this transaction accused made approximately $3600.00 (130,000 francs) (Pros.Ex.I; R46-49, 55-62).

b. It is clear that at the times alleged accused wrongfully applied to his own use and benefit a truck worth more than $50.00 (R78) belonging to the United States and furnished and intended for the military service thereof. The utilization of an army truck for the purpose of transporting cognac to be sold at a personal profit is clearly an unauthorized use even though such use be incidental to an authorized one, and, the record of trial showing that profits of more than $12,000 accrued to him by reason thereof, there can be no doubt that the unauthorized use was a personal one and for his own benefit.

Accused, by his extra-judicial confession (Pros.Ex.I) has admitted the commission of the offenses, and, his confession being adequately supported and corroborated by proof showing that the offenses probably were committed (R46-49,55-62; MCM 1928, par.144a, p.115), the record of trial is legally sufficient to support the findings of guilty of Specifications 1, 2, and 3, Charge II, and Charge II.

6. Specification, Charge III

a. Specification, Charge III, avers that at various times between 23 October 1944 and 6 March 1945, accused, being an officer of the United States, agreed to receive and received about 1,630,000 French francs, of the value of about $32,600, with the intent and result of having his official actions influenced thereby in permitting the unauthorized use of certain motor vehicles belonging to the United States.

The evidence discloses that accused, as mess officer, had access

to the use of two motor vehicles belonging to the United States for the purpose of transporting foodstuffs to supplement the rations drawn from the army, viz., a station wagon and an army truck (R58,59,83;Pros.Ex.H). About 25 October 1944 he was approached by Roger Nazaret, a French civilian, who asked him if he needed butter and eggs at maximum ceiling prices. "He made the proposition that if I furnished the transportation, he could obtain same and I asked what his interest was. He told me that he would bring back some for himself and that he would make it worthwhile to me" (Pros.Ex.H). Accused accepted this offer, and in pursuance thereof, from time to time thereafter, furnished government transportation in return for money payments.

About 28 October 1944 accused dispatched the station wagon on a round trip of about 400 miles and permitted Nazaret to accompany the driver. Twenty kilograms of butter and five dozen eggs were brought back for the Hotel Astra mess, and Nazaret gave him "40,000 francs /approximately $800.00/ for myself, which he said was for the trip" (Pros.Ex.H).

About 1 November 1944 Nazaret made another trip with the driver and additional supplies were delivered for the mess. Nazaret gave him 50,000 or 60,000 francs (approximately $1000.00 or $1200.00) for this trip (Pros.Ex.H).

On several occasions during November, December and January, Nazaret introduced other French civilians, viz., Jean Grossman, a man known as Jean, and an unknown man, to accused and stated that these persons would make the trips in his place. On two occasions accused permitted two of these men to make the trip without the regular USIS driver. After each trip he was "paid off" by one of them, in amounts ranging from 40,000 to 65,000 francs (approximately $800.00 to $1300.00). About 17 trips were made in this manner, and in payment therefor he received from 1,000,000 to 1,500,000 francs (approximately $20,000.00 to $30,000.00) (Pros.Exs.H and I).

About 24 February 1945 Nazaret approached him at the Hotel Astra and requested the station wagon for 26 February 1945. Nazaret's friends, Jean Grossman and Marcel Dexheimer, French civilians, took the station wagon "to parts unknown to me", but were to return the next day, 27 February 1945. On the evening of 1 March 1945, he received a telephone call at the Hotel Astra from French officials at Versailles who stated that the station wagon had been stopped by French gendarmes near Versailles and that its load of 720 liters of tax-unpaid calvados had been confiscated. Accused told them that the calvados had been ordered by him and that he would pay the tax to obtain its release. The next day, 2 March 1945, he went to Versailles with Grossman, paid the tax amounting to approximately 67,000 francs (which was later refunded to him by the man known as Jean), and obtained the release of the calvados and some eggs and cream. He stated that he went to Versailles "dressed as a civilian technician to bear more weight with the French" (Pros. Ex.H).

The evidence further shows that accused sent $21,800 to his mother

in the United States by way of money orders and through military channels (Pros.Ex.G), that he had approximately $3940.00 (197,000 francs) in a briefcase in his apartment (R71; Pros.Ex.K), and approximately $30,000.00 (1,500,000 francs) invested in French war bonds (R68; Pros.Ex.I), and that all these funds, except $1200, or a total of approximately $34,240.00, derived from his illicit transactions (Pros.Ex.I). A profit of approximately $12,600.00 (630,000 francs) is shown to have accrued to him by reason of the misapplications of the army truck alleged in Specifications 1, 2 and 3, Charge II (discussed in pars. 5a and 5b, supra), so a net payment to accused of approximately $41,640.00 by reason of the transactions complained of in the Specification, Charge III, is shown.

b. The record of trial discloses that accused, during the time alleged, agreed to receive and received various sums of money in return for which he permitted his official actions to be influenced in favor of certain French civilians. It is shown that he profited to the extent of approximately $41,640 by reason of these illicit operations, and this proof was responsive to and amply supported the allegation that payment in the amount of about $32,800 was made to him.

The extra-judicial statements made by accused prior to trial (Pros. Exs.F,G,H and I) were offered and received in evidence, but substantial evidence, both direct and circumstantial, in proof of the corpus delicti, was introduced to show that the offense charged had probably been committed (MCM,1928,par.114a, p.115), and the propriety of their admission is clear. In this connection it was shown that accused had access to the two motor vehicles mentioned in the Specification (R58,59,83); that trip tickets were issued to him from time to time (Pros.Exs. C,D and E; R58 et seq.); that trips actually were made by French civilians in these motor vehicles; that items were transported and delivered to places other than the Hotel Astra (R49-57); and that accused had accumulated a large sum of money during his brief residence in France, which was greatly in excess of his earnings (Pros.Exs. J and K). This evidence, together with the other facts and circumstances shown by the record of trial, and the inferences legitimately to be drawn therefrom, showed that the offense alleged probably had been committed, and amply supported and corroborated the pre-trial statements of accused. It was not required that the evidence of the corpus delicti be sufficient of itself to prove the commission of the offense beyond a reasonable doubt, or to cover every element of the offense (MCM 1928, par.114a,p.115).

We are not required to determine whether the conduct of accused falls within the provisions of section 117, Federal Criminal Code (18 USCA 207), which proscribes the acceptance of a thing of value by any officer of the United States with intent to have his official action influenced thereby, for even if it does not his conduct was tainted with corruptness and moral turpitude and is denounced by Article of War 96 (CM 248104, Porter, 31 BR 137) to which he was subject (Article of War 2; 1912-40, sec. 359 (12), p. 167; Cf. In re Berue (D.C. Ohio 1944), 54 F. Supp. 252).

For the reasons stated the record of trial is legally sufficient to

support the findings of guilty of Specification, Charge III, and Charge III.

7. The sentence

a. As approved by the reviewing authority, the sentence of accused provides for a fine of $50,000 and confinement at hard labor for six years, and for additional confinement at hard labor for three years if the fine is not paid.

The Table of Maximum Punishments (MCM 1928, par. 104c, p. 94 et seq), being applicable only to enlisted personnel (Ibid.par.104a, p. 93), is not controlling in this case, and the court was empowered to impose such punishment, short of death, as might be appropriate. The sentence, being a legal one, is not subject to reexamination here.

It is evident, however, that the court, although not limited as to punishment, imposed a sentence far less severe than that suggested by the Table of Maximum Punishments and Federal legislation.

b. Specification, Charge I, alleges the embezzlement of government property of the value of $37.62, and the Table of Maximum Punishments (Ibid. par. 104c, p. 99) authorizes a sentence to confinement for one year for this offense.

c. Specifications 1, 2 and 3 Charge I, allege three separate misapplications of property of the United States of a value in excess of $50.00, and the Table of Maximum Punishments (Ibid.par. 104c, p. 100) authorizes confinement at hard labor for five years for each such offense, or a total of 15 years.

d. The offense alleged in Specification, Charge III, receiving money payments with intent to have his official actions influenced thereby, is not covered by the Table of Maximum Punishments, but is conduct denounced, or at least similar to that denounced, by section 117, Federal Criminal Code (18 USCA 207), which provides for confinement at hard labor for three years and a fine of not more than three times the amount received. When the Table of Maximum Punishments is silent, the court legitimately may look to pertinent Federal statutes for guidance as to an appropriate punishment (CM ETO 6234, Young et al). The evidence showing that accused was paid $41,640.00 by reason of the transactions complained of in Specification, Charge III, a fine of not more than $124,920 and confinement for three years are indicated by what Congress has said.

e. The Table of Maximum Punishments and the Federal Statutes, to which the court could look for guidance, but which were not limitations on its power, sanction, then, for the offenses alleged and proved, confinement at hard labor for 18 years and a fine of $124,920 (no consideration being given to a fine responsive to the illicit profit of $12,500.00 accruing to accused by reason of the offenses alleged in Specifications 1, 2 and 3, Charge III). The far less severe sentence of confinement for six years

(and an additional three years if the fine is not paid) and a fine of $50,000.00 was, however, imposed.

The evidence showing a total illicit gain by accused of $54,240.00, the fine of $50,000 does not fully confiscate his ill-gotten profits or compensate the United States for the moneys derived from the unauthorized use of its property.

The justness of the sentence, as to both confinement and fine, is readily apparent.

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 upon conviction of knowingly applying to one's own use property of the United States furnished or to be used for the military service thereof by Article of War 42 and section 88, Federal Criminal Code (18 USCA 87) (CM ETO 1764, Jones and Mundy). Lewisburg, Pennsylvania
The designation of the United States Penitentiary, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

(LESTER A. DANIELSON) Judge Advocate

(DETACHED SERVICE) Judge Advocate

JOHN R. ANDERSON Judge Advocate

(222)

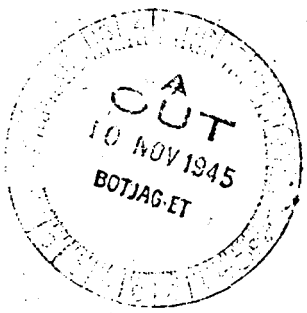
B Col Burgess
Capt Voigt

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 10 NOV 1945 TO: Commanding General, Seine Section, Theater Service Forces, European Theater, APO 887, U. S. Army.

1. In the case of NEVE C. POLLARD (O-267693), a civilian serving with United States Information Service outside the continental limits of the United States, 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 15540. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15540).



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

15540

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

BOARD OF REVIEW NO. 3 13 SEP 1945

CM ETO 15548

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private RENWICK G. CLARK (32742727), 448th Company, 85th Battalion, 19th Replacement Depot	Trial by GCM, convened at Paris, France, 22 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification 1: In that Private RENWICK G. CLARK, 448th Company, 85th Battalion, 19th Replacement Depot, European Theater of Operations United States Army, did, at his organization on or about 29 November 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 23 December 1944.

Specification 2: In that * * * did, at the Paris Detention Barracks, Seine Section Com Z, European Theater of Operations, United States Army, on or about 23 December 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 8 January 1945.

CHARGE II: Violation of the 69th Article of War. (Disapproved by reviewing authority).

Specification: (Disapproved by reviewing authority).

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. No evidence of previous convictions was introduced. All members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, disapproved the findings of guilty of Charge II and its Specification, approved the sentence and forwarded the record of trial for action pursuant to the provisions of Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but, owing to special circumstances and the recommendation of the reviewing authority, commuted it 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 the provisions of Article of War 50½.

3. The evidence for the prosecution shows that accused went absent without leave from his unit, a replacement company, where he was under arrest in quarters, 29 November 1944 (Pros.Ex.A). He was apprehended, wearing civilian clothes, in a restaurant in Paris 23 December 1944, escorted to the Paris Detention Barracks and instructed to remain in the waiting room there until summoned for processing (R4-7). He left during the interim -- within half an hour of his arrival -- and was delivered to military police by French civil police at a civilian police station in Paris 8 January 1945 (R6-7). At that time, though again wearing civilian clothes, he voiced no denial of his status as a soldier (R8).

4. For the defense, Madame Irene de Bine testified

that she had met accused's mother in America in 1928 and that accused spent two or three weeks in witness' apartment in Paris, including Christmas and New Year's Day. While there, he was disturbed by a "bad letter from home" and was always ill from drinking too much. He told her he did not want to desert but wanted to go back to the front lines. She suggested to him that as long as he was going to be punished anyway, he could go "tomorrow instead of today". He tried to return to his unit. She saw him in civilian clothes only once, there at her home, when she took his blouse to sew a lining in it (R8-10).

5. After his rights were explained to him, accused elected to testify in substance as follows: He never had any intention of deserting the service (R11). Upon receipt of news from home that his wife had induced a miscarriage and no longer loved him, he became upset, began to drink and left his unit about 26 November, living in a civilian apartment for two or three weeks (R11-13). He made several attempts to return to his organization, the 4287th Quartermaster Railroad Company, explaining that he "went back to Port Orleans two or three times to try to get a ride and they were picking up anybody because all colored boys were hijacking trucks, so I came on back" (R14). He was drunk the first time he put on civilian clothes and he had no recollection of how he got away after his first apprehension. On the day the French police apprehended him, he told Madame de Bine he was going back to take his punishment, put on civilian clothes, and went out. When the French police stopped and questioned him, he told them he was an American soldier (R11-12).

6. Accused was charged with two desertions of 25 and 15 days' duration respectively, the second commencing on date which terminated the first. The evidence shows that accused was absent without leave from his organization continuously for 40 days, commencing with the initiation of the first offense alleged, at a time when he was under arrest in quarters, and terminating with the second, interrupted, for a brief fraction of the day on which the first was alleged to have ended and the second begun, by his apprehension in civilian clothes in Paris, where he eluded custody and was again apprehended, again wearing civilian clothes, 15 days later. The inference of intent not to return is thus based on substantial evidence (CM ETO 7379, Keiser). Therefore, despite testimony for and by the accused indicating an absence of such intent, the record sustains the findings of guilty of desertion as charged.

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7. The charge sheet shows that accused is 22 years four months of age and that he was inducted at Camp Butler, New York, 14 December 1942. 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, as commuted.

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B C Lewis Jr Judge Advocate

15548

(227)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 13 SEP 1945
TO: Commanding General, United States Forces, European Theater (~~Main~~ Rear), APO ~~757~~ 887, U. S. Army.

1. In the case of Private RENWICK G. CLARK (32742727), 448th Reinforcement Company, 84th Reinforcement Battalion, 19th Reinforcement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15548. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15548).

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

(Sentence as commuted ordered executed. GCMO 449, USFET, 3 Oct 1945).

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

BOARD OF REVIEW NO. 3

14 SEP 1945

CM ETO 15549

U N I T E D S T A T E S	) SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)
Privates EARL B. HARTMAN (33586096) and JAMES H. WILLIAMS (33092674), both of Company C, 12th Infantry, 4th Infantry Division	) Trial by GCM, convened at Paris, France, 28 March 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U. S. Penitentiary, Lewisburg, Pennsylvania.

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

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

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

HARTMAN

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Earl B. HARTMAN, Company C, 12th Infantry Regiment, European Theater of Operations, United States Army, did, at his organization, on or about 28 August 1944, desert the service of the United States and did remain absent in desertion until he came under military control at Paris, France, on or about 23 January 1945.

WILLIAMS

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James H. WILLIAMS, Company C, 12th Infantry Regiment, European Theater of Operations, United States Army, did, at his organization on or about 28 August 1944, desert the service of the United States and did remain absent in desertion until he came under military control at Paris, France, on or about 23 January 1945.

Each accused pleaded not guilty and, all of the members of the court present at the time the votes were taken concurring, was found guilty of the Charge and Specification against him. Evidence was introduced of one previous conviction of Hartman by special court-martial for failure to obey the lawful order of a non-commissioned officer in violation of Article of War 96, and of two previous convictions of Williams, one by summary court for absence without leave for 3 days and one by special court-martial for absence without leave for 38 days, both in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentences and forwarded the records of trial for action under Article of War 48, but recommended that each sentence be commuted. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentences but commuted each to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentences pursuant to Article of War 50½.

3. The prosecution introduced in evidence two duly authenticated extract copies of the morning report of Company C, 12th Infantry, one relating to Hartman, dated 1 September 1944, and one relating to Williams, dated 18 September 1944, respectively showing each accused from duty to absent without leave on 28 August 1944 (R5,Pros.Exs.A,B). On 23 January 1945, both accused were apprehended in Paris, France. They were in uniform, had no passes and denied being absent without leave (R6-7).

On 31 January each accused signed a voluntary written statement before an agent of the Criminal Investigation Division, and each statement was introduced in evidence by the prosecution (R7-15, Pros.Exs.C,D). In substance, each statement shows that in August 1944, both accused became separated from their company during a barrage and thereafter remained with the 117th Infantry regiment for several days. Then they stayed with military police units for several weeks, finally getting transportation back to the rear echelon of their own regiment where they turned over papers given them by the military police showing the units they had been with during their absence. Here they saw their company clerk, a soldier named Tossinger. They were at regimental headquarters about a week when their company moved out without their knowledge, leaving them behind. They then went to Paris where, after a few days, they got a ride on a weapons carrier back toward their division. They took the weapons carrier in Metz and went to Rheims, where they picked up a woman and three men, one

of whom invited them to visit him at his home in Paris. Beginning about 1 October 1944 they visited with this Frenchman "off and on" until they were apprehended at his home by the military police in January (Pros.Exs. C,D).

4. After being first advised of their rights, each accused elected to testify (R15-16). Accused Williams testified that he is 25 years of age, from Virginia, and reached the fourth grade in school. He was assigned as a rifleman to the 12th Infantry when he landed in France about 16 June 1944. About 28 August he and Williams became separated from their company in a barrage and "were pulled back and got in the 117th Infantry", with which they fought for about two weeks and then came back for a rest period. They kept trying to locate their own regiment and finally reached the rear echelon of their company, where they talked with Sergeant Don Tossinger, the company clerk, who told witness he "had me down as missing in action". They also talked with a captain, whose name witness did not know, and turned over papers to him showing where they had been. They were taken to a sergeant, who told them to "hang around and get transferred to our outfit and they put us in a barn to sleep", which was about 400 yards from Company C. A sergeant and three other men also stayed in the barn. Later they were transferred to their outfit at which they stayed four or five days, until it moved out one night, leaving them in the barn. They "messed around" and then came into Paris about a month after their initial separation from their company, going absent without leave for the first time. They intended going back to their unit, but stayed in Paris with a Frenchman who owned a grocery store most of the time until they were apprehended (R17-22).

Accused Hartman testified that he is 22 years old, was born in New Jersey and went as far as the third grade in school. He came to France with the 12th Infantry on 16 June 1944, and met Williams in Cherbourg. He had nothing to add to Williams' testimony. They gave the papers to the Captain in a "mansion" outside Paris. They heard their organization had come to Paris and thought they could find it (R22-23).

It was stipulated that if Private Donald J. Tossinger were present in court he would testify that one day late in September 1944 he saw and talked with both accused at the rear echelon of Company C, 12th Infantry, and that Williams asked how he was getting along. He replied, "Hello Jimmy, I had you down missing in action". Tossinger had been assistant company clerk of Company C. After a short conversation he left accused (R23-24).

5. Initial absence without leave of each accused on 28 August 1944 was established by the morning report entries. The prosecution was not bound by the exculpatory statements contained in the confessions since they were contradicted by the morning report entries (20 Am. Jur., sec. 1227, p.1081). Nor was the court bound to believe accuseds' testimony or extra-judicial statements. Moreover, accuseds' presence with other organizations, if wrongful and unauthorized, would not preclude their being absent without leave from their own (see CM ETO 5437, Rosenberg). The stipulated testimony of the assistant company clerk to the effect that he saw both accused in the rear echelon of their company late in September does not establish their effective return to military control. In any event, both accused admitted being absent without leave a period of approximately 114 days from about 1 October until their apprehension on 23 January 1945. An intent to desert the service formed while

absent without leave after 1 October would render accused guilty of desertion (MCM, 1928, par. 130a, p.142). From their undisputed, unauthorized absence of 114 days in an active theater of operations, terminated by apprehension, the court was authorized to infer an intent on the part of each to remain permanently away from the service (CM ETO 5406, Aldinger; CM ETO 1629, O'Donnell; CM ETO 6093, Ingersoll).

6. The charge sheets show that accused Hartman is 21 years five months of age and was inducted 19 February 1943 at Philadelphia, Pennsylvania. Accused Williams is 24 years ten months of age and was inducted 6 May 1943 at Camp Lee, Virginia. No prior service is shown as to either accused.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B H Lewis Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 14 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Privates EARL B. HARTMAN (33586096) and JAMES H. WILLIAMS (33092674), both of Company C, 12th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15549. For convenience of reference, please place that number at the end of the order: (CM ETO 15549).

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

(As to accused Williams, sentence as commuted ordered executed. GCMO 455, ETO, 4 Oct 1945).
(As to accused Hartman, sentence as commuted oedered executed. GCMO 456, ETO, 4 Oct 1945).

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

BOARD OF REVIEW NO. 2

3 NOV 1945

CM ETO 15550

UNITED STATES	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Bad
	)	Mergentheim, Germany, 14 April
Private ROBERT N. APP	)	1945. Sentence: Dishonorable
(13077922), Company G,	)	discharge, total forfeitures,
12th Infantry	)	and confinement at hard labor for
	)	life. United States Penitentiary,
	)	Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private Robert N. App, Company "G", 12th Infantry, did, at or in the vicinity of Winterscheid, Germany, on or about 2 February 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: to engage with the German forces, which forces, the said command was then opposing, and did remain absent in desertion until he was apprehended at Bracht, Luxembourg, on or about 13 February 1945.

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

Specification 1: In that * * * than Private, Company "C", 12th Infantry, did without proper leave, absent himself from his organization at or in the vicinity of Hurtgen Forest, Germany from about 30 November 1944 to about 19 January 1945.

Specification 2: In that * * * did, without proper leave, absent himself from his organization at or in the vicinity of Bettendorf, Luxembourg, from about 22 January 1945 to about 31 January 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, he was found guilty of all charges and specifications. Evidence was introduces of one previous conviction by special court-martial for absence without leave for four days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to ~~death with musketry~~. The reviewing authority, the Commanding General, 4th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in this case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution as to Charge I and its Specification is substantially as follows:

Accused was transferred to Company G, 12th Infantry Regiment on 31 January 1945 (Pros.Ex.A) and on 1 February 1945, he was turned over to the First Sergeant of that company at the company kitchen then located at Bergrueland, Luxembourg. The sergeant had him equipped with a rifle, gas mask, "and everything he would need to join the company, as any one man would have on the line with him". He told him where to sleep that night and advised him he would awaken him the next morning and have him taken up to the company, which was then located outside the town of Winterschied, Germany, in a holding position awaiting further orders. At that time there were "just a few rounds of artillery fire now and then". The next morning accused was taken up to the company. At approximately 0800 hours on 2 February 1945, the company attacked

and took the town of Winterscheid. Although this town was searched at approximately 1230 hours, accused could not be found and he had not been evacuated through medical channels. He had not been authorized to be absent nor was he given a Paris pass, which was the only type pass issued by his organization at that time. It was stipulated by the prosecution, the defense counsel and the accused that he was apprehended at Bracht, Luxembourg on or about 13 February 1945 (R6,7,8).

4. Accused, after his rights as a witness were explained to him (R9), elected to remain silent and no evidence was introduced in his behalf.

5. Charge II and its specifications involve absence without leave, relatively minor offenses compared to desertion alleged in Charge I, and conviction of the latter authorizes the sentence imposed and place of confinement designated. The evidence pertinent to Charge II is not summarized or its legal sufficiency determined.

6. Accused's absence without leave on 2 February 1945 -- the date and at the placed leged in the Specification of Charge I -- was established by the uncontradicted testimony of his First Sergeant. Substantial evidence was introduced showing that on the night before he absented himself, the necessary equipment for combat servie was issued to him and he was told he would be taken to his company the following morning. It further appears that he was taken to the company the next morning where some artillery fire was being received. After the company had attackedand taken their objective he could not be found and was not found until some ten days later far in the rear. Under these circumstances the court was justified in inferring that he left his organization with the intent to avoid hazardous duty. Accordingly, there is substantial evidence of all the elements of the offense charged in this specification (MCM,1928,par.130a, p.142; CM ETO 13764, McGraw).

7. The charge sheet shows that accused is 28 years of age and enlisted 10 April 1942 at Philadelphia, Pennsylvania. 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 the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification , and legally sufficient to support the sentence.

9. The penalty for desertion in time of war is death or such other punishment as the 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,8June 1944,sec.II,pars.1b (4),3b).

(ON LEAVE) Judge Advocate

Ronald D Mills Judge Advocate

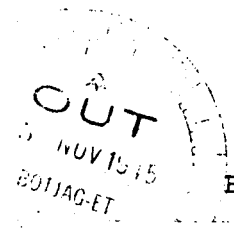
John J. Collins Judge Advocate

1st Ind.

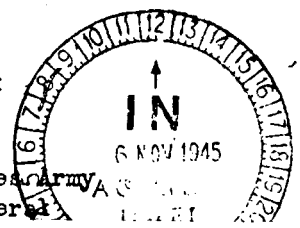
War Department, Branch Office of The Judge Advocate General with the European Theater 3 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private ROBERT N. APP (13077922), Company G, 12th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification 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 15550. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 15550).



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



(Sentence as commuted ordered executed. GCMO 602, USFET, 28 Nov 1945).

JJA sent to TJAG 17 Nov 45. RESTRICTED 15550 TS-427

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

BOARD OF REVIEW NO. 2

12 SEP 1945

CM ETO 15553

U N I T E D S T A T E S	102ND INFANTRY DIVISION
v.	Trial by GCM, convened Stendal, Stendal, Prussia, Germany, 4 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private ANTHONY PELOSI (31250559) Medical Detachment, 406th Infantry	

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that ANTHONY PELOSI, Private, Medical Detachment, 406th Infantry, did, at Luhden, Germany, on or about 10 April 1945, misbehave before the enemy, by refusing to obey the lawful order of Captain JOHN M. STREET, to replace a wounded first aid man who had been evacuated, and at a time when his organization was actively engaged with the enemy.

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He pleaded not guilty and, all members present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced or two previous convictions, one by summary court for absence without leave for two days and one by special court-martial for absence without leave for one day, both in violation of Article of War 61. All members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 102nd Infantry Division, approved the sentence but owing to the previous satisfactory performance of the soldier under combat conditions recommended that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case and the recommendation of the reviewing authority commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution: On 10 April 1945, the accused was a litter bearer assigned to the Medical Detachment, Third Battalion, 406th Infantry. He was present that day at the aid station of the battalion (R6-7) at Luhden, Germany (R10). The battalion was engaged with and attempting to dislodge the enemy from some adjacent hills (R9). As a result of casualties, three of its aid men had been evacuated (R7,9). These men had to be replaced by the medical personnel working in the battalion aid station. By process of rotation, it was the accused's turn to perform that duty (R7). Captain John M. Street, commanding officer of the medical detachment, told the accused to get himself ready to perform the duty of aid man for the infantry company. Accused had been trained to perform this duty. Accused, who had previously told his sergeant that he would not perform that duty because he "could not take it" (R7-8), told Captain Street that he could not "take it out there" and that he would prefer facing a court-martial trial than to obey that order. He refused to go (R8,11).

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

5. The uncontradicted evidence for the prosecution shows that the accused shamefully misbehaved himself before the enemy when through cowardice he refused to obey his commanding officer to replace a wounded first aid man who had been evacuated - a duty for which he had been trained, at the time and place alleged in the Specification and in the presence of the enemy. The findings of guilty are well

supported by the evidence. Such conduct constitutes a violation of the 75th Article of War (MCM, 1928, par.141, page 156; CM ETO 3196, Puleio,II Dig.Op. ETO 337).

6. The charge sheet shows the accused to be 22 years nine months of age. Without prior service,he was inducted 17 November 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, as commuted.

8. 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 United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement upon commutation of a death,sentence is authorized (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. 12 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private ANTHONY PELOSI (31250559), Medical Detachment, 406th 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 15553. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15553).

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

(Sentence as commuted ordered executed. GCMO 448, USFET, 3 Oct 1945).

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

BOARD OF REVIEW NO. 2

3 NOV 1945

CM ETO 15556

U N I T E D S T A T E S	)	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	)	
Private HARRISON F. GAMMON (15086738), Company "E", 320th Infantry, 35th Division.	)	Trial by GCM, convened at Paris, France, 9 March 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Private Harrison F. GAMMON, 19th Replacement Depot, European Theater of Operations, United States Army, did, at APO 176, on or about 10 October 1944 desert the service of the United States, and did remain absent in desertion until he came under military control at Paris, France, on or about 14 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 not guilty of Specification 1 of the Charge and guilty of the Charge and Specification 2 thereof. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, Commanding General, Seine Section, Communications Zone, European Theater of Operations approved the sentence, forwarded the record of trial for action under Article of War 48 with a recommendation that the sentence be commuted. The confirming authority Commanding General, United States Forces, European Theater, confirmed the sentence, but, owing to special circumstances in the case and the recommendation of the convening authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution in support of the Charge and the Specification of which the accused was found guilty is in substance as follows:

During the first part of October 1944, accused was admitted as a casual at the 108th General Hospital, Clichy, Paris, France. The disposition date in his case was 10 October 1944 (R7). Paragraph 5 of Special Orders Number 180 dated 9 October 1944 of the headquarters of that hospital was introduced in evidence without objection (R7, Pros.Ex.B). It provided that accused was relieved from that organization and "WP o/a 10 October 1944 to the 19th Repl. Depot, APO 176, U.S. Army, reporting on arrival to CO for asgmt. The RTO will furnish the nec T". There was then introduced in evidence without objection an extract copy of the morning report of 29 January 1945 of the 85th Replacement Battalion, 19th Replacement Depot at APO 176 which showed as to accused "Atchd unasgd not jd (AWOL) fr 108th Gen Hosp 10 Oct 44" (R9, Pros. Ex"C"). On 14 December 1944 an agent of a military police battalion at APO 887, Paris, France, while checking passes of various personnel, at a Cafe, apprehended the accused dressed in uniform. He had in his possession a number of invalid passes (R9-10).

4. The accused having been fully advised of his rights as a witness elected to remain silent as to Specification 2 (R11). Private C.B. Breckman, a witness for the defense, testified that he saw the accused either the last of October or early November in a cafe and the accused told him "that he was getting ready to turn in to his outfit" (R-15). He never

saw him after that but he had seen him there on a prior occasion (R15,16). The witness did not state where the cafe was located.

5. The accused stands convicted of desertion from the service on or about 10 October 1944 until he was returned to military control on or about 14 December 1944. To sustain this conviction there must be evidence (a) that accused absented himself from his place of duty without leave as alleged and (b) that he intended, at the time of absenting himself or at some time during his absence, to remain permanently away (MCM 1928 par. 130a, p. 143). If the absence is prolonged and there is no satisfactory explanation of it, the court is justified in inferring from that alone an intent to remain permanently absent (Ibid). The prosecutions evidence is undisputed that accused was admitted to the 108th General Hospital during the early part of October and, upon disposition of his case, was relieved from that organization, placed on orders on 9 October 1944 to proceed on 10 October 1944 to the 19th Replacement Depot, APO 176, and to report to the Commanding Officer on arrival. The order also provided his means of travel. As evidenced by the morning report of the 85th Replacement Battalion, 19th Replacement Depot, he never reported as directed and was not given authority by that organization to so absent himself. In the meantime, he was seen around cafes and was apprehended in a cafe in Paris on 14 December 1944 for not having a valid pass. He did have, at the time of his apprehension, several invalid passes in his possession. Late in October or early November, he told a fellow soldier in a cafe that he was "getting ready to turn in to his outfit". This witness had seen him in the same cafe before. Such a statement, under these circumstances, is clearly an admission of his then existing status of absence without leave. The record clearly establishes the place accused was supposed to be and the fact that he was not at that place. All these circumstances clearly justify the court in inferring that his absence was for the time alleged and without leave. (CM 126112, Dig. Op.JAG, 1912-40 sec.419 (2), p. 282; CM 189682 Myers, 1 BR 179). His unexplained absence of over two months during a period of intense enemy activity in the theater where the 19th Replacement Depot was located and functioning, together with the evidence of the manner of his return to military control, justify the court's conclusion that he intended, at the time of his initial absence without leave or sometime during that period, not to return to the service. (CM ETO 1629 O'Donnell).

6. The charge sheet shows that accused is 24 years and eight months of age and was inducted 14 December 1941 at Fort Thomas, Kentucky. No prior service is shown.

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

8. The penalty for desertion in the 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 Pemitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. 2, pars. 1b (4), 3b).

(ON LEAVE) Judge Advocate

Ronald D Miller Judge Advocate

John J. Collins Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of the Judge Advocate General with the European Theater. 3 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Private HARRISON F. GAMMON (15086738), Company E, 320th 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 15556. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 15556).

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

(Sentence as commuted ordered executed. GCMO 598, USFET, 26 Nov 1945).

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

BOARD OF REVIEW NO. 1

10 NOV 1945

CM ETO 15558

U N I T E D S T A T E S	12TH ARMORED DIVISION
v.	Trial by GCM, convened at Heidenheim, Germany, 16 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Place of confinement not designated.
Private OLLIE MITCHELL (34521057), Headquarters 17th Armored Infantry Battalion	

HOLDING by BOARD OF REVIEW NO. 1
STEVENS, CARROLL and O'HARA, Judge Advocates

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

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

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

Specification 1: In that Private Ollie Mitchell, Headquarters 17th Armored Infantry Battalion, APO 262, U.S. Army, did, at Unterdiessen, Germany, on or about 13 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Johann Ellenrieder, a human being, by shooting him with a P-38 pistol.

Specification 2: In that * * * did, at Unterdiessen, Germany on or about 13 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Matens Ellenrieder, a human being, by shooting him with a P-38 pistol.

Specification 3: In that * * * did, at Unterdiessen, Germany on or about 13 May 1945, with malice aforethought, willfully, deliberately, feloniously

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unlawfully and with premeditation kill one Karl Gingerich, a human being, by shooting him with a P-38 pistol.

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

Specification: In that * * * did, without proper leave absent himself from his station and duties at Headquarters 17th Armored Infantry Battalion, APO 262, U.S. Army, from about 8 May 1945 to about 14 May 1945.

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

3 a. Charge I and specification:

The evidence summarizes as follows:

Accused, a negro (R7), was a Private First Class attached to the 17th Armored Infantry Battalion, 12th Armored Division (R15). The offenses with which he was charged in these specifications were alleged to have occurred on 13 May 1945 in Unterdiessen, Germany (about 37 miles south-west of Munich). At the trial on 16 July 1945 the court took judicial notice of

> "the fact that, even though the war was over on 13 May, that as a matter of fact American soldiers were at that time and still are searching out SS German soldiers. Houses are being entered for that purpose" (R30).

A prosecution witness testified that on 13 May 1945 "there was still a lot of sporadic firing going on in the vicinity" (R19).

Maria Antoni, a German woman 23 years old, testifying as a witness for the prosecution, said that between 2130 and 2145 hours on 13 May accused came to her house in Unterdiessen and knocked on the door. She, her parents, and two brothers, 10 and 12 years old, were in bed. One of her brothers awakened her father. By the time he reached the door, accused had broken down the door. He had his pistol in his hand and, speaking in English, sounded to the witness as if he were angry that the door had not been opened. He wanted to see who or what was in the beds" and looked under the beds, using matches, staying in the house about 15 minutes. When asked three times what he wanted, he finally replied "Hidden soldier". Her house was on the same street as, and about 200 to

250 meters away from, the house of Matthaus Schorer (R18) (where the shooting later occurred).

Songa Hubshmann, a German woman of 20 years (R28), who could apparently speak English (R32), testifying as a defense witness, said that at about 2200 hours someone knocked on the door of her house. They did not open the door right away because they did not know "exactly what the meaning was". Later "the farmer" went out to open the door but the door had already been forced. Accused came into the house and, at pistol point, forced them to sit down on a couch. He called for light because the rear part of the house had been blacked out, asked for a key to lock the door to the room, and searched the rest of the house accompanied by the farmer. When accused returned from the search, he said that a German soldier had shot an American and told them that when American soldiers knocked on the doors it was their duty to open immediately since the German soldier had gone in the meantime. He further said that he was looking for SS troops. Witness' house was about 100 meters from the house of Matthaus Schorer (R28-29).

Matthaus Schorer, a witness for the prosecution, testified that on the night in question after 2200 hours (R11), accused came to the door of his house and knocked. Witness looked out from an upstairs window and said that two Americans had already been there "with the hope that he would leave after I told him that". Accused called up "American" and witness said "Wait until I put on my pants" because he was just in his shirt at the time. Accused then "tore at the door". Witness called "Help, Help" in a loud voice, saw accused back off from the door as if to kick it in, and again called "Help, Help". The door broke open, the catch on the door jamb giving way (R7). Accused came through the doorway with his pistol in hand. Though witness did not speak English, he believed accused said something to this effect: "Why did you call for help?". Witness was forced into the front room. His youngest boy of about nine years grasped him around the neck and accused took the boy and threw him into the bed in the front room. He threw an alarm clock which the boy had been playing with off the bed. Witness was then forced, at pistol point, into other rooms, where his 15-year-old boy and his daughter were. Accused then looked in all the rooms and "must have heard" a sound, because he went to the front window where witness had stood when he first observed accused. Witness was forced to stay in the front room but when accused started down the stairs, stood at the head of the stairs. When accused was about half way down, witness "heard a sound as if he were releasing the safety on his pistol". About 20 seconds later, when accused was standing in the doorway, five, six, or seven shots were fired. The shooting was rapid. After the shooting, accused went out through the door, got on a bicycle, and rode off. Witness then rushed downstairs and found two bodies just outside the door and another body about four meters from the door. The bodies were those of the three deceased (R7-9). They were not in uniform but one of deceased had been a German soldier and had not yet been discharged (R10). It was "quite light" at the time. Accused had looked in every room but took nothing from any room (R11). The three deceased lived about 200 to 250 meters from his house. In this village the people were instructed to be off the streets at 2100 hours (R13).

A pretrial statement signed by accused, after a warning as to his rights, was substantially as follows: About 2100 hours he met a Pole who said "SS, SS man" and pointed down the street to a house. He rode to the house on his bicycle, knocked on the door, and, after no one answered, knocked again. An old man came

to the door. Accused entered, led a young man to a seat, pointed his gun at two girls, and told them to sit down. He then took the old man upstairs and looked in all the rooms. One of the girls spoke English. He told her that he was "looking for SS. I heard there was SS in there", that "the war is not over there's still SS in town." and "the next time some one knocks on the door you be sure and come open." He then went to the next house and knocked at the door. No one answering, he knocked again. An old man came to the window upstairs, opened it, and "hollered out" (R16; Pros. Ex. B).

> "I kicked against the door and he wouldn't come open the door so I kicked again and again and the door opened. I kicked it in. I had my gun out in my hand. I goes upstairs, I was expecting to meet somebody going up and I goes into the room where this old man was and I pulled him out of the window and looked out of the window. I didn't see anything on the outside. I searched the room. A little kid was in the bed and he jumps up in the bed as if he was frightened. I told him to lay down in bed that I wouldn't bother him. I said all I want is the SS. I took the old man and looked around in the rooms. Then I heard a noise downstairs. I goes downstairs and on the way down I pulled my safety off and just as I got to the door something strikes me on the shoulder and in the side. Well for a second I didn't know if it was SS or not so I start shooting. After I shot them back off me - then I get on my bicycle and rode off. It all took about five minutes. There was about three people maybe more" (Pros. Ex. B at p.10).

Accused, after his rights as a witness were explained to him, elected to be sworn as a witness (R30) and testified that all parts of his pretrial statement were true and correct. In his testimony, however, he elaborated on some portions of the statement. He testified that it was dark and he did not know exactly which house the Pole pointed to but "figured" it was one of two houses. After searching the house in which the girl who spoke English lived, he went to the house of Matthaus Schorer. After searching in all the rooms, he heard a noise (R31-32).

> "And I came back to look and didn't see anything, so I comes downstairs and as I am going downstairs I knock the safety off my gun. I didn't know who was down there and I heard the noise and I didn't know if it was soldiers or not. I knew it wouldn't be safe to go down with my safety on and not be able to fight the minute anything happened. I goes down the stairs and just as I got to the door something struck me in the arm and I make a shot" (R32).

People with clubs struck him. All he could see was three persons - he could not see them "very plain to know if there was any more or just the three". He was struck in the shoulder, in the side, and two other places. He did not know if it was SS troops or what because "it was dark and I couldn't tell so I started shooting before they took my gun away from me and shoot me". After the shooting and as soon as they "backed off of me", he jumped on his bicycle. He had entered the house of Schorer to find SS troops, but did not know which house they were in. After he fired the first shot, he was struck again on the head and elsewhere (R33).

When the "first lick" hit him he jumped back "and it all looked like they were rushing me". He "figured" they would get him "jammed up" in the hall "and there wasn't anything I could do and so I fired all five shots rapidly" (R36). He could see the persons

> "but I couldn't see what they had, but I took the clubs to be clubs. It was pretty dark and I couldn't even see the clubs"(R39).

Two swellings resulted from the blows he received, though they had gone down by the time he was given a medical examination four days later. The next day after the shooting he was sore in these places, and the next night, when he went to sleep, he could hardly get on his side (R39).

It was stipulated that a medical officer would testify that he examined accused on 17 May 1945 and found a small healing abrasion of indeterminate age over the right pectoralis major muscle, but found no bruise or laceration (R29).

It was also stipulated that Mr. Ludwig Huggenberger would testify that at about 2200 hours on 13 May he was getting ready to go to bed when he heard someone holler "Help" several times.

> "I went downstairs to the kitchen where I met Johann Ellenrieder who, after I cautioned not to leave alone, departed. I then followed in the direction taken by Johann. On the way down the street I heard a gun fire five times and I took cover. In two or three minutes I proceeded to the spot where I had heard the shots come from and discovered three bodies lying in front of the home of Mr. Schorer. I noticed a club by each of the bodies and they were about 72 centimeters long and about 3½ centimeters in thickness. I discovered the bodies to be Johann Ellenrieder, his son Matens Ellenrieder, and a neighbor Karl Gingerich. Their former place of residence being about 200 meters from the scene where I found them" (R23).

An agent of the Criminal Investigation Division testified that on 15 May, two days after the shooting, he found three clubs about 20 yards from Schorer's house "lying together as though someone had picked them up and laid them there" (R21,22).

It was stipulated that the three persons named as the deceased in the specifications under Charge I died on or about 13 May 1945 from gunshot wounds (R14).

b. Charge II and Specification:

Accused said in his pretrial statement that on 8 May 1945 he was accompanying a movement of his organization by convoy, driving a civilian automobile. He became separated from the convoy, and spent the next few nights sleeping at a French camp and in civilian homes. He claimed he did not know how to locate his organization. On the evening of 13 May he started looking for a place to sleep in the little village of Unterdiessen, Germany, and was told by a Polish man that there were SS soldiers in a house to which the man pointed. After

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leaving Schorer's house following the shooting, accused spent the night at a house in the next village and was arrested in a woodshed where he had hidden on seeing an approaching military vehicle (R16; Pros. Ex. B).

The custodian of the morning reports of accused's battalion read into the record an extract copy of his company's morning report showing accused's unauthorized absence from 5 to 30 May 1945 (R24). After a showing of want of personal knowledge on the part of the officer who authenticated the original, the court sustained the defense's objection to the admission of the extracts, but denied his motion to exclude the portion of the testimony wherein they were read in evidence (R24-25). The first sergeant testified that accused was absent from 8 to 14 May 1945 (the period of absence alleged), but that he did not know whether he had authority for such absence (R27).

Accused testified at the trial that on the day of his apprehension he avoided the military police as they would put him in the stockade "because I was AWOL, for one reason" (R36).

4 a. Charge I and specifications:

The killing by accused of the persons alleged is clearly established by the prosecutions evidence and admitted by the defense. The evidence does not encompass the theory of voluntary manslaughter, because there is no indication in the record that he killed in the heat of passion. As to involuntary manslaughter, the court was justified in inferring from all the evidence, including accused's own pretrial statement and testimony at the trial, that the homicides were not caused either (1) unintentionally or (2) by culpable negligence in performing a lawful act or an act required by law (MCM, 1928, par. 149a, pp.165-166).

The sole remaining question presented by the record is whether the killings were executed with malice aforethought and were thus murders or in self-defense and thus excusable homicides. Malice is presumed where a deadly weapon is ued in a manner likely to and does in fact cause death (1 Wharton's Criminal Law (12th Ed., 1932) sec. 426, pp.654-655), and an intent to kill may be inferred from an act of accused which manifests a reckless disregard of human life (40 CJS, sec. 44, p.905, sec. 79b, pp.943-944). The burden of establishing the defense of self-defense rested upon accused (26 Am Jur. sec. 289, pp.353-354). It is elementary that to sustain that burden, he was required to establish among other elements that he was without fault in bringing on the difficulty, that is, that he was not the aggressor and did not provoke the supposed necessity of taking life for his own protection (26 Am. Jur. sec.126, p. 242). It may be accepted as established that sporadic firing was occuring in the vicinity of Unterdiessen, Germany, on 13 May 1945; that although on that date the war was in a sense over, American soldiers were searching out German SS soldiers (and still doing so on the date of the trial, 16 July); and that houses were being entered for that purpose. Whether or not accused was searching for enemy soldiers on an authorized military mission was at most a question of fact for the court, which in view of all the evidence, was justified in concluding that he had no right or duty to enter the Schorer house. The court was within its province in disbelieving accused's explanation although consistent with the

evidence, of his actions and his possibly self-serving statements prior to the shooting. Moreover, the members of the court, all belonging to a combat division, could properly consider as not inherently probable the story that accused, who was absent without leave at the time, entered these houses single-handedly for the sole and bona fide purpose of hunting down German SS troops, without the precaution of posting armed soldiers around the house or even telling anyone of his entering upon this dangerous mission. In this connection, the court could consider the fact that he abandoned his mission immediately after the shooting, although he did not know whether the men he had killed were SS men or not. Moreover, there is not a shred of evidence that he acted under superior orders or in the performance of a lawful military mission. His asserted assumption of military authority which led to the killing could not endow him with the immunity of a soldier who commits homicide in the performance of his duty "in the heat and exercise of war" (30 C.J., sec.204,pp.42-43).

As accused descended the stairs in the house, he heard a noise like someone walking, released the safety on his pistol, and approximately twenty seconds later killed three men in what appears to have been virtually one rapidly fired volley. To avail himself of the defense or self-defense he must not have been the aggressor and intentionally provoked the difficulty, unless he afterwards withdrew and deceased became the aggressors (MCM, 1928, par.148a, p.163). Certainly in this tiny German village settling down for the night accused by his drastic unauthorized actions became the aggressor and provoked the difficulty. Had he seen men armed with clubs approaching and retreated, however, minutely, he might have shifted the position of aggressor to them. But he saw no one, merely heard a noise outside, and there was never a suggestion of retirement in his conduct. In going down stairs he took his time and"didn't waste much time either" (R37). Were there any doubt remaining as to his character as aggressor after a consideration of these facts, that doubt must be dispelled when it is recalled that during his descent he released the safety of his pistol. That was not the act of a man withdrawing from a fight in good faith, nor were his thoughts those of a man seeking to avoid bloodshed: "I knew it wouldn't be safe to go down with my safety on and not be able to fight the minute anything happened" (R32). Instead of avoiding an affray, he invited it by going forward to meet whoever was approaching, without knowing them to be friend or enemy, and opened fire the instant he was struck, with such unruffled precision that he killed three men with from five to seven shots. He could not but have knowledge that his acts would, at the very least, probably cause grievous bodily harm to some one and for all that he knew that someone might just as well have been American soldiers. He gave evidence of an intent to commit such acts some twenty seconds earlier in releasing the safety, disregarding the period of descent with drawn pistol prior thereto. In view of this evidence, the question whether accused's action was in legitimate self-defense was at most one of fact to be determined by the court and its finding that it was not will not be disturbed, based as it is upon substantial evidence (CM ETO 4640, Gibbs). In this connection, it must be remembered that the court was not required to believe accused's story that these men actually attacked him without warning. The testimony that clubs were seen by the victims' bodies and the medical evidence were inconclusive on this point.

It may be noticed that use of an immoderate amount of force in the suppressing of a mutiny is an unlawful act which makes the user guilty of manslaughter at least (MCM, 1928, par. 149a, p.166). The situation here,

however, is not analogous. As above indicated, the court was justified in concluding that accused brought on the difficulty and the supposed necessity of taking life as the only solution thereof, and the findings of guilty of murder are supported by the evidence (CM ETO 14380, Hall and cases therein cited).

b. Charge II and Specification:

The record would not have justified the admission of the extract copy of the morning report offered by the prosecution, and the court properly excluded it. However, the court inconsistently and erroneously permitted the testimony wherein the extract was read into the record to stand. In addition to other objections, this extract stated the beginning and end of the period of unauthorized absence to be, respectively, before and after the beginning and end of the period alleged. However, the first sergeant testified that accused was absent during the period alleged, and accused stated himself that he was "AWOL". In view of this independent evidence clearly establishing the offense as alleged, the improper reception and retention of the testimony wherein the extract was read was not prejudicial to the substantial rights of the accused (CM ETO 15512, Miller, and cases therein cited).

5. The charge sheet shows that accused is 23 years of age and was inducted 20 November 1942, to serve for the duration of the war plus six months. He had no prior service.

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

7. 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 authorized (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4) 3b).

Edward L. Stevens, Jr. Judge Advocate

(DETACHED SERVICE) Judge Advocate

James Holtan Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
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BOARD OF REVIEW NO. 3

22 SEP 1945

CM ETO 15579

U N I T E D S T A T E S	)	XXIII CORPS
	)	
v.	)	Trial by GCM, convened at Idar-Oberstein, Germany 9 July 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private JOHN L. PINKETT (13019461), 4454th Quartermaster Service Company	)	

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 92d Article of War.

Specification: In that Private John L. Pinkett, 4454th Quartermaster Service Company, did, at Idar-Oberstein, Germany, on or about 31 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Fraulein Judith Leyser.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by special court martial for absence without leave of 13 days and 5 3/4 hours. 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 pla ce

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

3. Evidence for Prosecution.

In the city hospital at Idar-Oberstein, Germany, on the night of 30-31 May 1945 (R7, 10) the prosecutrix, Judith Leyser, 20 years of age,

> "was on night service * * * and at half-past one the door opened and a colored soldier came in and pointed a gun at me * * * He told me I would have to come along, and I asked him what he wanted, in English. He attacked me and I wrestled with him * * * I knocked the pistol out of his hand, ran away and wanted to go to the room of Sister Martha [Schneider] * * * but I did not succeed, and I called for help, 'Sister Martha, Sister Martha'. She opened the door but when she noticed she could not help me she closed the door again and went to the window and called for help. When the American soldier said that I would have to come down he said the MP's were waiting downstairs. He dragged me downstairs and out of the house, and when I was downstairs he told me I was not to come to the MP's but for his personal pleasure * * * I wrestled with him. I knocked his helmet off his head and broke away three times. He followed me every time and succeeded in catching me. He beat me over the head and cheek [with the gun]. I had a wound on my cheek which is still hurting me today * * * He dragged me to a garden nearby and for about ten minutes to a quarter of an hour I was out of my senses * * * [Upon regaining her senses], I saw him go down the street * * * I felt sick and I vomited * * * I got up and went back to the hospital" (R10-11).

During the struggle she lost a brooch (Pros. Ex.1) and a string that was tied around her blouse (R12).

Martha Schneider testified that she was aroused by the prosecutrix calling for help. Upon opening the door she saw an American soldier pointing a gun at and holding the prosecutrix. Frightened, she closed the door. After a while she heard prosecutrix say, "I can't, I can't". Then for a while she heard nothing whereupon she went to the window and called for help. After a time other nurses arrived who stopped passing military police who said they would send help. Soon the prosecutrix returned. "She was all pale and had a swollen cheek and some blood on her". The apron of her nurses' helper uniform "was torn and she was looking dirty" (R6-9).

According to the prosecutrix, when she returned to the hospital "MP's were present and told me to be examined by an American doctor" as was done "about half past three the same night". The military police "examined everything in the house, and afterwards also in the garden" (R11).

About 0200 hours on the night in question, the Charge of Quarters in a nearby MP Battalion went to the municipal hospital in Oberstein, Germany, for the purpose of investigating a report (R16-17). "I found a girl" (R16) "that was hurt" (R20). While he did not observe her mental condition (R19) for he was in her presence in the light for "not over 2 minutes" (R20, "her face was swollen, I believe" (R17). He searched the premises. He found a wallet and a tassel or piece of rope from a robe or gown, a broken piece of a /Phillip Morris/ cigarette, a pin from a girl's dress * * * and a rubber" (R16). The pin (Pros.Ex.1) was in the hall and the rubber and wallet were in the garden (R17). The wallet contained a ration card bearing accused's name (R18, Pros.Ex.2). The rubber "had been unrolled" and (R19) "had been used but it was not loaded", i.e. "the man hadn't gone off"-- it contained no sperm (R17). However, "it had been wet on the inside because it was stuck from one side to the other" (R19).

Accused made the following voluntary pre-trial statement to a C.I.D. Agent:

> "I have been in the Army 5-½ years. I have been overseas about four months, and entered Germany about the 1st of May 1945. At about 10 o'clock on the night of 31 May 1945 I went to the houses behind our barracks and got five bottles of wine. Left there about 11:30 P.M. with a friend, Idel Looney. I gave him one bottle of wine, drank three bottles myself and walked down into the town of Oberstein. And after I left the town, about 12:30 A.M., I was supposed to have met this girl by 1 o'clock. When she did not come I went

up to the hospital to get her. I went into the building and made her come down to the pathway. We talked awhile and then she wanted to go back, but I wouldn't let her. I persuaded her to go into the garden. I had one bottle of wine in my hip pocket which I took out and set it on the ground. Then we both sat down on the ground. She said that she was going to tell the MPs. that I had made her have an intercourse with me, which I did. I put the bottle of wine in my pocket and went back to the houses back of our barracks. And when I returned to my barracks they were having roll call and there the MPs put me under arrest. I do admit I had sexual intercourse with this girl, which is the same girl that identified me. I admit doing wrong and am willing to take the consequences, and I would appreciate any leniency I can get. I would also like to volunteer my services with the United States Army in the war against Japan" (Pros.Ex.3).

In court the prosecutrix identified accused as the person who attacked her (R13). She also testified to having previously identified him among six colored soldiers (R15). Although on the night of the alleged offense there were no lights in the hallway "there was some light coming out of the kitchen and there was a glass door through which some light came in. The rest was dark" (R15). While admitting that colored people are somewhat more difficult to identify than white, she also said that "because there are so many colored people at my home it is easy for me to identify them" (R14). She w as born in Brazil and lived there until three months before the outbreak of the war (R15).

4. For the defense, a soldier testified he had seen the prosecutrix walking near the stockade area on more than one occasion (R30-33). Called as a witness for the defense, the prosecutrix denied ever walking in the area of the stockade. On cross examination, she also denied having a date with accused at 0100 hours (R29-30) as accused claimed in his pre-trial statement (Pros.Ex.3).

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

5. Prosecutrix' identification of accused as her assailant was substantiated by his pre-trial admission to being present at the hospital and by the discovery in the garden of a ration card bearing his name. Her testimony of how she was assailed was corroborated, in part, by Martha Schneider who, in addition, upon the prosecutrix' return to the hospital, noted her bruised condition as

did a soldier shortly thereafter and a "CID" agent the same or next day. Accused's pre-trial admission of intercourse, particularly when construed in conjunction with the prosecutrix' testimony and in the light of a used prophylactic device found in the garden shortly after the alleged offense, sufficiently established penetration(CM ETO 611, Porter). Substantial evidence supports the findings.

6. The charge sheet shows that accused is 24 years of age and was inducted, without prior service, June 1941.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
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BOARD OF REVIEW NO. 3

14 SEP 1945

CM ETO 15593

U N I T E D S T A T E S	) SEINE SECTION, COMMUNICATIONS ZONE,
	) EUROPEAN THEATER OF OPERATIONS.
v.	)
	) Trial by GCM, convened at Paris,
Private JAMES E. JOSEPH (38265289), 199th Reinf Co., 50th Reinf Bn., 19th Reinforcement Depot.	) France, 7 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U. S. Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James E. JOSEPH, 19th Reinforcement Depot, European Theater of Operations, United States Army, did, at his organization, on or about 24 January 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France, on or about 5 March 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding Officer, Seine Section, Communications Zone, European Theater,

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of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48, but recommended that the sentence be commuted. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution introduced in evidence without objection a duly authenticated extract copy of the morning report of the 199th Reinforcement Company, 50th Reinforcement Battalion, 19th Reinforcement Depot, for 25 January 1945, showing accused from duty to absent without leave as of 24 January 1945 (R4, Pros.Ex. A). Accused was apprehended by the military police on 5 March 1945 in Paris, France, at which time he carried a concealed, loaded pistol and wore the chevrons of a staff sergeant (R5).

On 13 March accused signed a voluntary written statement before agents of a Criminal Investigation Division, in which he said that on 18 or 19 January 1945 he left his organization and went to a nearby town, where he met two white women who took him into Paris in their car. He stayed at their apartment for about two weeks, after which the three, accompanied by another soldier, went by train to Liege, Belgium, for two days and also stayed overnight in Ostend, Belgium, before returning to Paris. On one occasion he served as messenger between the two women and a civilian man in the exchange of American money for French money. On another occasion he went with the women and a soldier into the country where he saw seven "GI" trucks, one of which he loaded with American rations five different times that night. One of the women gave him $100.00 in American money and the other woman gave him a .45 caliber American army pistol. A soldier, whom he was to meet one night, gave him 21 or 22 rounds of ammunition during the day, whereupon he called the military police and told his story and asked them to pick him up. They could not pick him up because he did not know where he was. He was apprehended when he went to a general hospital to buy cigarettes and candy (R6-7,Pros.Ex. B).

4. After being advised of his rights, accused elected to testify (R7-8). His testimony substantially corroborates his written statement. He did not know there was money in the package he delivered until it was opened by the man to whom he gave it. He did not know whether the "GI" trucks he saw were carrying food, ammunition or clothing. The two women asked him about food, clothing and ammunition dumps in Belgium, but he told them nothing. He never fired the pistol he had when apprehended. He did not turn himself in because there was always someone with him when he went out. He called the military police from a cafe across the street from the hotel where he lived, but he did not ask for the address of the cafe. He wore his identification tags when he was apprehended (R9-13).

5. Absence without leave of accused from 24 January to 5 March is clearly established by the evidence for the prosecution and admitted by accused. From such unauthorized absence for a period of 40 days in an active theater of operations, terminated by apprehension, during which accused engaged in unlawful practices for personal gain, the court was clearly warranted in inferring an intention on the part of accused to remain permanently away from the service (CM ETO 1629, O'Donnell; CM ETO 5406, Aldinger; CM ETO 6093, Ingersoll; CM ETO 1577, Le Van).

6. The charges were served on accused on 6 April andhe was brought to trial the following day. The record of trial shows that following arraignment he waived all rights to "objection to being tried by this court within five days of the service of the charges on him" (R4). There is no indication in the record of probable injury to accused, and trial within the regular five day period was not improper or prejudicial to him (CM ETO 3475, Blackwell; CM ETO 5255, Duncan; CM ETO 5445, Dann).

7. The charge sheet shows that accused is 29 years eight months of age and was inducted 7 December 1942 at Camp Beauregard, Louisiana.

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

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

_____ 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. 14 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private JAMES E. JOSEPH (38265289), 19th Reinforcement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15593. For convenience of reference, please place that number at the end of the order: (CM ETO 15593).

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

(Sentence as commuted ordered executed. GCMO 523, USFET, 30 Oct 1945).

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Branch Office of The Judge Advocate General
with the
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BOARD OF REVIEW NO.2

22 SEP 1945

CM ETO 15604

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private FRANCIS AGNEW (12001012), Detachment 72, 3rd Replacement Depot, Ground Force Replacement System	Trial by GCM, convened at Paris, France, 14 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private FRANCIS AGNEW, 3rd Replacement Depot, European Theater of Operations, United States Army, did, at this organization, on or about 31st August 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Villejust, Seine-&-Oise, France, on or about 19th December 1944.

CHARGE II: Violation of the 94th Article of War.
(Disapproved by Reviewing Authority)
Specification: (Disapproved by Reviewing Authority)

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of two previous convictions, one by special court-martial for failing to obey a lawful command of his superior officer in violation of Article of War 96 and one by summary court for absence without leave for one day in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, disapproved the findings of guilty of the Specification and Charge II, approved the sentence with the recommendation that it be commuted and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in this case and the recommendation of the convening authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the 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 is substantially as follows:

Accused is in the military service of the United States (R5, 11). A duly authenticated extract copy of the morning report of Detachment 72, 3rd Replacement Depot for 1 September 1944 was received in evidence showing accused from duty to absent without leave at 0600 hours, 31 August 1944 (R5; Pros. Ex.A). On 18 December 1944 Lieutenant Guy M. Sheridan and several enlisted men were out searching for a truck that was reported stolen (R11,12). In the vicinity of "Villa Just" they encountered accused behind the steering wheel of a parked jeep. He told the Lieutenant he became lost on the way from Chartres to Paris (R12). Lieutenant Sheridan, after detailing one of his enlisted men to guard accused, left to investigate a truck parked on a side road several hundred yards distant (R12). While attempting to apprehend a soldier who fled from the vicinity of the truck, a report was made to Lieutenant Sheridan that accused had driven away from the enlisted man detailed to guard him. As he walked along the highway at 0100 hours on 19 December 1944 Lieutenant Sheridan again found accused and took him into custody (R13). Accused was delivered to the Provost Marshal at the 19th Replacement Depot (R5,13).

4. Lieutenant Sheridan was recalled as a defense witness and testified that accused told him he was returning to his unit and had become lost while going from Paris to Chartres (R14).

Accused after his rights as a witness were fully explained to him (R15), elected to remain silent.

5. Accused's unauthorized and completely unexplained absence for 110 days, terminated by apprehension is clearly established by uncontradicted

evidence. Occurring as it did in an active theater of military operations, the court was warranted in inferring that he intended to remain permanently absent from military control (MCM, 1928, par.130a,pp.143,144) CM ETO 10211, Stoner). The court's findings of guilty is sustained by clear and compelling evidence.

Over defense counsel's objection a witness was permitted to testify as to the contents of an envelope found on accused when he was taken into custody (R5,6) and evidence was presented that the vehicle in which accused was sitting when first apprehended, contained certain items of government property (R7). While it is permissible to show that an accused committed other offenses during his unauthorized absence (CM ETO 2901, Childrey) as bearing on his intent not to return to military control, the proof of such offenses should be complete and not merely a showing of an isolated suspicious circumstances. Hence this evidence was incompetent, and its admission constituted error. Inasmuch as the other evidence is clear and compelling as to the guilt of accused, it is not believed he was seriously prejudiced thereby (CM ETO 1201, Pheil)

6. The charge sheet shows that accused is 23 years eleven months of age and enlisted 9 September 1940 at Plattsburg Barracks, New York. No prior service is shown.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW58). 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).

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

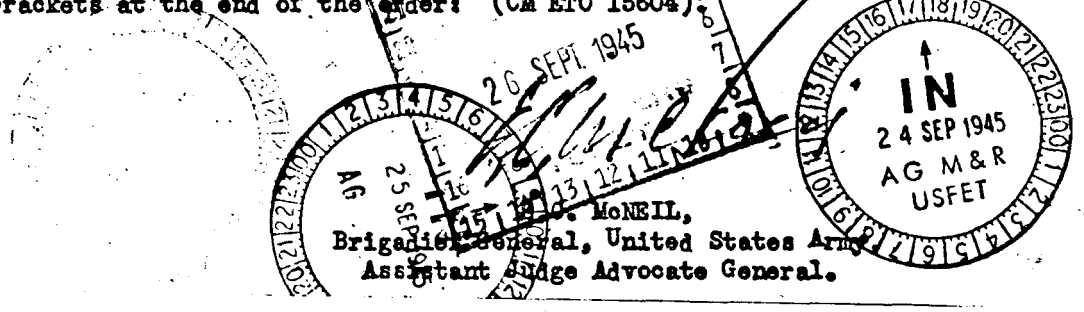
Judge Advocate

(272) 1st Ind.

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

1. In the case of Private FRANCIS AGNEW (12001012), 3rd Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 15604. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15604).



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

(Sentence as commuted ordered executed. GCMO 472, USFET, 8 Oct 1945).

15604
670

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

15 SEP 1945

BOARD OF REVIEW NO. 3

CM ETO 15617

U N I T E D S T A T E S	) SEVENTH UNITED STATES ARMY
	)
v.	) Trial by GCM, convened at Gutersloh,
	) Germany, 23 June 1945. Sentence as
Privates EDWARD ANTHONY (34818155)	) to each accused: Dishonorable dis-
and GEORGE CAHEE, JR. (38057468),	) charge, total forfeitures and con-
both of 3026th Quartermaster Bakery	) finement at hard labor for life.
Company Mobile (Special).	) 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 soldiers named above has been examined by the Board of Review.

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

ANTHONY

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

Specification: In that Private Edward Anthony, 3026th Quartermaster Bakery Company Mobile (Special), did, at Engerstrasse Number 116, Herford, Germany, on or about 25 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Elli Houppert.

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

Specification: In that * * * did, at Engerstrasse Number 116, Herford, Germany, on or about 25 April 1945, unlawfully enter the dwelling of Frau Elli Houppert, with intent to commit a criminal offense, to wit, rape therein.

CHARGE III: Violation of the 96th Article of War.
(Disapproved by the reviewing authority).

Specification 1: (Nolle prosequi).

Specification 2: (Disapproved by the reviewing authority).

CAHEE

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

Specification: In that Private George Cahee, Junior, 3026th Quartermaster Bakery Company Mobile (Special), did, at Engerstrasse Number 116, Herford, Germany, on or about 25 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Elli Houppert.

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

Specification: In that * * * did, at Engerstrasse Number 116, Herford, Germany, on or about 25 April 1945, unlawfully enter the dwelling of Frau Elli Houppert, with intent to commit a criminal offense, to wit, rape therein.

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

Specification 1: In that * * * did, at Engerstrasse Number 116, Herford, Germany, on or about 25 April 1945, wrongfully strike Frau Elli Houppert in the face with his hand.

Specification 2: (Nolle prosequi).

Specification 3: (Disapproved by the reviewing authority).

Each accused pleaded not guilty and, two-thirds of the members of the court present at the time the votes were taken concurring, each was found guilty of the charges and specifications against him. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the rest of his natural life. The reviewing authority disapproved the findings of guilty as to Charge III and Specification 2 thereof as to Anthony and Specification 3 of Charge III as to Cahee, approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that at about 2330 hours on 25 April 1945 both accused knocked at the kitchen door of 42-year-old Frau Elli Houppert, a housewife and mother of four children, at her home in Herford, Germany (R9-10,15). She opened the door and accused Anthony asked for schnapps by motioning (R10). Both accused had rifles in their hands (R16). They went into the bedroom and back into the kitchen where Frau Houppert sat down on a chair. Accused Cahee pulled her up and pointed upstairs. Both accused then forced her to go upstairs with them. "I had to go, both had rifles and I was afraid." She called for help from her "mother and the American police", whereupon Cahee "hit me in the face" (R10-11). Accused "dragged" her to the attic and sat her down on a stool. Anthony kneeled in front ofher and attempted to pull down her bloomers but failed because she was "sitting tight to the stool". Then Cahee grabbed her arm and "yanked" it. Anthony made her lie on the floor by grabbing her and pushing her over backwards. He grabbed her bloomers and pulled them down. "He did not succeed immediately; it took him some time because I was lying tight to the floor" (R12-13). She was "crying and weeping" (R14) and was "very much afraid" (R16). Cahee, who was standing in the hallway listening, seemed angry at Anthony because it took him so long. Anthony finally put his penis into her vagina "as far as he could" and had intercourse with her. She "would have never allowed him to do it; he took it on himself to do it". She "could not see very well because of tears in my eyes" and "time seemed like eternity" to her (R13-14).

After Anthony finished, Cahee forced her to lie down again on the floor. "When he embraced me, I had the impression he was trying to break my back so I laid down." He did "exactly the same", pushing his penis into her vagina "as far aspossible". After he finished, accused talked and then went downstairs (R14). The acts of intercourse pained her. Accused were drinking, but were not drunk to the extent that they stumbled" (R15).

Both accused returned to their billets between 0100 and 0200 hours. Cahee had a cut on his hand (R17-19). The following day, Frau Houppert saw a newly broken window pane in the back door of the house leading from the yard into a hallway. She also saw blood in front of the stairs (R16). Frau Anna Seitmann, also a resident of the house, heard noise outside and knocking on the kitchen door during the night of 25 April. She also saw the blood and broken glass the next morning (R8-9).

On 14 and 15 May 1945, each accused signed a voluntary written statement in which he admitted going to the house on the night of 25 April (R19-22, Pros.Exs.1,2). Anthony stated that after knocking and receiving no answer, Cahee broke a window with his hand and they climbed in through the window. Anthony fired a shot in the house and Cahee fired two shots. Cahee told him to "zig zig the lady", so he forced himself on her and had intercourse with her (Pros.Ex.1). Cahee stated that they entered the house for the purpose of "looking around". He told prosecutrix if she wanted to "zig zig" he would bring her some coffee the following night. She then lay on the floor and he had intercourse with her, using a contraceptive. He did not strike her (Pros.Ex.2).

4. After their rights as witnesses were explained to them, both accused elected to remain silent and no evidence was offered in their behalf (R23).

5. The testimony of prosecutrix shows that each accused had carnal knowledge of her by force, without her consent, and by putting her in fear of losing her life or suffering great bodily harm, at the time and place alleged, under circumstances constituting the crime of rape (CM ETO 3740, Sanders et al; CM ETO 3933, Ferguson et al; CM ETO 14032, Andrews et al; CM ETO 15274, Spencer, et al). While the statement of Cahee indicates his act was consummated with consent of prosecutrix, the question of fact thus raised was for the court to determine (CM ETO 10715, Goynes).

The evidence shows that accused Cahee broke a window at the back of prosecutrix' home and that both accused entered the house with authority. Such unlawful entry, coupled with the actual commission of rape by each accused shortly thereafter, is sufficient to establish the offense of housebreaking as charged against each accused (MCM 1928, par.149e, p.169; CM ETO 3679, Roehrborn; CM ETO 4071, Marks et al).

The striking of prosecutrix in the face by accused Cahee was clearly a violation of Article of War 96 (CM ETO 8456, Thorpe). Since such assault was actually a preliminary step in the sequence of events which ultimately culminated in the more serious crime of rape, it would have been more proper to omit this charge. However, since the other offenses properly charged were of such gravity to support the sentence, the substantial rights of accused Cahee were not prejudiced by the addition of this charge (CM ETO 11729, Held).

6. The charge sheets show that accused Anthony is 25 years three months of age and was inducted 1 November 1943 at Fort McClellan, Alabama. Accused Cahee is 24 years four months of age and was inducted 27 June 1941 at Fort Sill, Oklahoma. No prior service is shown as to either accused.

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

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

B R Sleeper Judge Advocate

William C. Sherman Judge Advocate

B K Ely Jr. Judge Advocate

15617

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

BOARD OF REVIEW NO. 3

21 SEP 1945

CM ETO 15619

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Augsburg, Germany, 18 June 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Privates BRADIE CAPPS (34495173), and FINGAL E. ERICKSON (37023149), both attached unassigned to Detachment Three, Ground Force Reinforcement Command	

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

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

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

CAPPS

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

Specification 1: In that Private Bradie Capps, attached unassigned to Detachment Three, Ground Force Reinforcement Command, did, at Kaufbeuren, Germany, on or about 3 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Maria Jaeger.

Specification 2: In that * * * did, at Kaufbeuren, Germany, on or about 3 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Fraulein Mathilde Ley.

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

Specification 1: In that * * * did, at Kaufbeuren, Germany, on or about 3 May 1945, with intent to commit a felony, viz, rape, commit an assault upon Frau Maria Jaeger, by willfully and feloniously striking the said Frau Maria Jaeger in the face with his fist.

Specification 2: In that * * * did, at Kaufbeuren, Germany, on or about 3 May 1945, with intent to commit a felony, viz, rape, commit an assault upon Fraulein Mathilde Ley, by willfully and feloniously striking the said Fraulein Mathilde Ley in the face with his fist.

Specification 3: In the * * * did, at Kaufbeuren Germany, on or about 3 May 1945, in the nighttime, feloniously and burglariously break and enter the dwelling house of Frau Maria Jaeger, with intent to commit a felony, viz, rape.

ERICKSON

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

Specification: In that Private Fingal E. Erickson, attached unassigned to Detachment Three, Ground Force Reinforcement Command, did, at Kaufbeuren, Germany, on or about 3 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Fraulein Mathilde Ley.

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

Specification 1: (Finding of Not Guilty)

Specification 2: In that * * * did, at Kaufbeuren, Germany, on or about 3 May 1945, in the nighttime, feloniously and burglariously break and enter the dwelling house of Frau Marie Jaeger, with intent to commit a felony, viz, rape.

Each pleaded not guilty and, with the exception that Erickson was found not guilty of Specification 1, Charge II, each was found guilty of all charges and specifications. No evidence of previous convictions was introduced. All members of the court present at the time the vote was taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentences, designated the 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 at the time and place alleged the two accused forcibly gained entrance into the apartment of Frau Maria Jaeger, terrorized the occupants by firing a weapon and other acts of violance and thereafter struck and had carnal knowledge of Frau Maria Jaeger and her sister, Fraulein Mathilde Ley, as alleged. The acts of accused Capps were characterized by a rather marked degree of brutality. The identity of the accused as the actors in the crimes shown is clear and

the testimony of each prosecutrix was corroborated by the testimony of other witnesses. The evidence clearly and abundantly supports the court's findings that the acts of each accused constituted the offenses charged and the record of trial is amply sufficient to support both the findings and the sentence (CM ETO 9611, Prairiechief; CM ETO 9083, Berger et al; CM ETO 4194, Scott; CM ETO 996, Burkhart).

4. After being advised of their rights, both accused elected to remain silent and no evidence was introduced in their behalf.

5. The charge sheets show that accused Erickson is 25 years three months of age and was inducted on 19 March 1941 at Fort Snelling, Minnesota, and that accused Capps is 27 years four months of age and was inducted on 23 November 1942 at Fort Oglethorpe, Georgia. Neither had prior service.

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

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

B R Keeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B K Casey Jr Judge Advocate

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

BOARD OF REVIEW NO. 3

28 SEP 1945

CM ETO 15620

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Augsburg, Germany, 6 June 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Privates DAVID EAGANS (34006094), and WILL COPELAND (35120973), both of 442nd Quartermaster Truck Company	)	

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

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

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

EAGANS

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private David Eagans, 442nd Quartermaster Truck Company, did, at Schelklingen, (vic. Blaubeuren), Germany, on or about 25 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Anna Kaufmann.

COPELAND

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Will Copeland, 442nd Quartermaster Truck Company, did, at Schelklingen (vic. Blaubeuren), Germany, on or about 25 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Anna Kaufmann.

Each pleaded not guilty and, all of the members of the court present at the times the votes were taken concurring, each was found guilty of the Charge and Specification pertaining to him. No evidence of previous convictions was offered as to Copeland. As to Eagans, evidence was introduced of two previous convictions by summary court, one for absence without leave for about one day and wrongfully removing a vehicle without permission in violation of Articles of War 61 and 96 and one for violation of curfew regulations in violation of Article of War 96. Three-fourths of the members of the court present at the times the votes were taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence as to each, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

The prosecutrix, Frau Anna Kaufmann, testified that on the morning of 25 April 1945, three days after American troops first occupied the town of Schelklingen, Germany, a Belgian came to the apartment house in which she was then living and asked her and another woman who lived in the house to do some sewing for him. Shortly thereafter, while she was working on the dewing, two colored soldiers, whom she later identified as the accused came to the apartment and knocked on the door "with a rifle". They were admitted into the apartment by the Belgian and began negotiations with him apparently looking toward the barter of a watch. They left soon thereafter but returned some twenty minutes later with cigarettes, which they gave to the Belgian. This done, Eagans and the Belgian left the house, while Copeland remained in the apartment. Eagans and the Belgian went around to the rear of the house where the Belgian called out to Frau Kaufmann (R7,8,16,17). She went down stairs to the rear of the house in response to his call, whereupon the Belgian "said he would like to tell me something" (R18). When she asked him what he wanted, he replied by laughing and, together with Eagans, "grabbed" her by the arms. At this time she told the Belgian "I do not go along; this is out of the question" (R18). Nonetheless, Eagans pulled her by the arm and, with the Belgian pushing from behind, she was forced to return to her apartment on the first floor (R9). She was weeping at the time and called to one of her neighbors for aid "but the door was closed" (R20).

When the three reached her apartment, she asked the Belgian not to leave her alone with Eagans. However, he ignored her request and, after pushing her on a bed and telling her to undress, left the room. When he left, she attempted to arise but Eagans pushed her back on the bed and again threatened her with his rifle (R9,10,11). He then placed the rifle on an adjoining bed and undressed. During this time, he was standing in such a position that Frau Kaufmann could not leave the room without passing in front of him. After undressing, he approached Frau Kaufmann and, holding

her feet "firmly", removed her pants. He then laid himself on top of her and had sexual intercourse with her (R11,12). She did not call out for help because "it would have been to no avail" and, after Eagans laid himself on top of her, did not offer further resistance because she feared she would be shot (R12,24). When he finished, he picked up his clothing and his rifle and went into an adjoining room (R13) and Frau Kaufmann arose, got her pants and sat on the edge of the bed preparatory to putting them on (R21,22).

However, Copeland immediately entered the room, lifted her legs from the floor and laid her back on the bed (R13,20-22). Then, despite the fact that she "beat around him" and tried to push him away, he also had intercourse with her (R13,22). She submitted because she was still afraid that she might be killed if she resisted (R13,24). She admitted, however, that Copeland did not have his rifle with him when he entered the room and did not threaten her or strike her (R13,22,23). When asked why, in view of these facts, she was afraid, she stated, "At this moment I could not deliberate at all" (R13). After a very short time her child entered the room and at this Copeland, who had been holding her "firmly", released his grasp and she was able to arise. Shortly thereafter, both accused left the house (R14,25). Frau Kaufmann testified that she made prompt complaint of the occurrence to the military authorities (R14,26).

Frau Kaufmann's testimony was corroborated as to surrounding circumstances by the testimony of the Belgian who admitted the two accused to her apartment on the morning in question and by the testimony of one of the other occupants of the apartment house. The fact that she made prompt complaint to the military authorities was corroborated by the testimony of American military personnel.

4. Each accused, after being advised of his rights as a witness, elected to testify on his own behalf. Copeland testified that he and Eagans left their bivouac area about 0800 hours on 25 April 1945 and walked to a nearby village where they encountered a Belgian on the street. Eagans inquired about cognac and the Belgian said that he though he could get some for them. Thereafter, all three went into a house in the village where there was "a blonde lady" (the prosecutrix) (R33,34,43). While there, he conversed with the woman and Eagans talked with the Belgian. They later left, went back to their area, got cigarettes, and returned to the house where Eagans gave the Belgian the cigarettes in return for a watch (R24,35). Thereafter, all three men left and went to a refugee camp where they got "something like snops". They walked along the road and drank some of the "snops" but, because it was too sweet, threw it away without finishing it and returned to their camp about 1130 hours (R36-38, 42). While in the house with the Belgian, they did not ask the prosecutrix if she would have intercourse with them, did not go upstairs with her, and did not molest her in any way (R35,38).

Eagans' testimony was roughly to the same effect as Copeland's except he stated that, through the Belgian, he asked the prosecutrix if she would have intercourse with them. He understood that she refused because they were negroes (R45). He stayed on the ground floor at all times while in the house and did not have intercourse with the prosecutrix (R43).

5. The prosecutrix testified that both accused had intercourse with her at the time and place alleged while the accused, although admitting their presence in the apartment, denied that intercourse took place. The testimony of the prosecutrix was corroborated as to surrounding circumstances by the testimony of other witnesses and by the fact that she made prompt complaint to the military authorities. If she is to be believed, Eagans and the Belgian, pulled her upstairs and pushed her on the bed. Eagans then threatened her with a rifle and had intercourse with her without her consent. Copeland was present in the apartment while these events were taking place. Soon thereafter, although without his gun at the time, he also had intercourse with her without her consent and despite the fact that she "beat around him" and attempted to push him away. She explained her lack of more vigorous resistance by the fact that she was put in fear of death or great bodily harm. Her lack of consent was sufficiently manifested to each accused. On the evidence presented, the court could find that each accused had carnal knowledge of the prosecutrix by force and without her consent, and that each was thus guilty of rape, as alleged (cf. CM ETO 15679, Baker & Everett; CM ETO 12329, Slawkawski; CM ETO 10700, Smalls; CM ETO 9083, Berger and Bamford; CM ETO 8837, Wilson).

6. The charge sheets show that Eagans is 24 years two months of age and was inducted 21 January 1941 and that Copeland is 32 years of age and was inducted 20 March 1941. Neither had prior service.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon 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
APO 887

BOARD OF REVIEW NO.4

10 AUG 1945

CM ETO 15641

UNITED STATES

v.

Private FRANK J. PEDRO (6660753), Attached-unassigned, Detachment 85, 19th Reinforcement Depot

DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS

Trial by GCM, convened at Marseille, France, 26 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 4
DANIELSON, MEYER and ANDERSON, Judge Advocates

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

2. The only evidence introduced in support of Specification 1 of the Charge is the morning report of accused's organization (Pros.Ex.1) and the confession of the accused (Pros.Ex.2). The morning report has no probative value because it was signed by an unauthorized person, and is not, therefore, of evidentiary value either to establish the commission of the offense or to establish the corpus delicti in support of accused's confession. The record of trial is, therefore, legally insufficient to support the finding of guilty of Specification 1 of the Charge.

Lester A. Danielson Judge Advocate

Judge Advocate

John R. Anderson Judge Advocate

15641

AGPO 2-45/19M/C504ABCD

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

BOARD OF REVIEW NO. 2

22 SEP 1945

CM ETO 15653

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Salzburg, Austria, 16 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private HUGH A. PEREZ (34795923), Company L, 7th Infantry	

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

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

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

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

Specification 1: In that Private (then Private First Class) Hugh A. Perez, Company "L", 7th Infantry, did, at Hachimette, France, on or about 22 January 1945, desert the service of the United States, by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended at Lapange, France, on or about 1 February 1945.

Specification 2: In that * * * did, at Singling, France, on or about 14 March 1945, desert the service of the United States, by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he surrendered himself at Luneville, France, on or about 29 March 1945.

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

Specification: In that * * * did, without proper leave, absent himself from his organization at Marbache, France, from about 26 February 1945 to about 4 March 1945.

Accused pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications substituting as to Specification 1 of Charge I, the words "returned to military control at a place unknown" for the words "was apprehended at Lapange, France" and as to Specification 2, Charge I the words "returned to military control at a time and place unknown" for the words, "surrendered himself at Luneville, France, on or about 29 March 1945". 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 rest of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

a. On 22 January 1945, the 3rd platoon of Company L, 7th Infantry, of which accused was a member, was at Kaysersberg, France and moved to Guemar, France, as an assembly area to make an attack (R8). The accused was present when the platoon was briefed on the tactical situation prior to the move (R9-10). Enroute to the assembly area, the unit suffered casualties from artillery fire. When the company arrived at Guemar, the accused was missing and was not present with his unit between that date and 1 February 1945. The platoon commander did not give him permission to be absent (R9). Prosecution introduced in evidence without objection an extract copy of the morning report of Company L, 7th Infantry, showing the location of the company on 22 January 1945 as "Hachimette, France" and the entry of 23 January 1945 showing accused "fr duty to AWOL (time unknown) 22 Jan 45" (R7,Pros.Ex.A).

b. On 14 March 1945, the platoon, of which the accused was a member, was moving into position for an attack against the Germans. The attack was made the following morning (R11,12). During the attack the unit suffered casualties from artillery, rifle and machine gun fire. Accused was not among those who made the attack. He was not seen in his platoon during the next ten days (R11). The accused's squad leader testified that the company commander did not give him permission to be absent (R12). An extract copy of the morning report for Company L, 7th Infantry, was admitted showing the following: "14 Mar 1945, Singling, France", "17 Mar 45 * * * Perez, Hugh A, Pvt * * * duty to AWOL (hour unknown) 14 Mar 45" (R7, Pros.Ex.B).

c. With reference to Charge II and its Specification, there was admitted in evidence without objection an extract copy of the accused's organization showing the company was located at Marbache, France on 26 February 1945. The entry of 27 February 1945 showed accused as "duty to AWOL (hour unknown 26 Feb 45" and an entry of 5 March 1945 showed him as "AWOL to duty 0900 4 Mar 45" (R7, Pros.Ex.A).

4. The defense introduced testimony of an acting squad leader, under whom accused had served a short time, to the effect that accused is satisfactory as a soldier (R13).

The accused, after being advised of his rights by the law member, made a lengthy unsworn statement in which he told of his induction on 9 November 1943, his temporary assignment as a radio operator in October and November of 1944, and his assignment to Company L about 16 November 1944. He also related his experience in the Meurthe River crossing in November 1944 when many of his friends were killed. While in the mountains in December he was caught in an artillery barrage and in running to his position was unable to continue because his chest was hurting him. He went to the "medics", was kept overnight and returned to duty. Later he was examined by a medical captain who told him he had pleurisy and bronchitis and to tell his battalion "medics" so he could be sent to a hospital. He went on sick call and was returned to duty without being examined. On 16 January, his company lost 50% of its men by mortar and rifle grenade fire; he was hit on the forehead and chest with shrapnel but only scratched. He had to help take care of the wounded. After the Colmar push, their own mortars dropped H.E. on him and eight other men, wounding six. He stayed with five of the wounded and gave them first aid; one of the men died. He stayed with the company and made all the attacks until 20 January. He concluded his statement with "But irrespective of the outcome or judgment of the court, I have only one idea in mind; in that of redemption for the punishment given me" (R14,15,16).

5. The accused's abandonment of his unit on 22 January and 14 March 1945, when it was moving in for an attack on each occasion, was in each case an act from which the court was justified in the absence of any explanation, in concluding that he deliberately absented himself to avoid the hazards and perils of combat with the enemy. He was present when his organization was briefed as to the mission of 22 January. It appears from the evidence that he was with his unit when it was on the move on 14 March but did not take part in the attack the next morning. His unsworn statement, while not specific, tends to confirm the court's conclusion that he intended to avoid combat and does not in any way contradict the prosecution's evidence. The court was justified in inferring from all the circumstances in this case that the accused, on each date alleged, possessed knowledge of the tactical situation and knew that his unit was about to be engaged in conflict with the enemy (CM ETO 7413, Gogol).

Since the period of absence as to each specification under

Charge I was shown to be of sufficient duration to be consistent with an intent to avoid the hazardous duty alleged, specific findings as to the duration of the absence and means of termination were unnecessary. The offenses were committed when accused, with the specific intent alleged, absented himself without leave (CM ETO 5958, Perry and Allen; CM NATO 1087, III Bull JAG 9).

The offense alleged in Charge II was fully established by competent evidence (MCM 1928, par.132, p.146 and par.117, p.121).

6. The charge sheet shows the accused to be 30 years of age. Without prior service, he was inducted on 9 November 1943 at Camp Blanding, Florida.

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).

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

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

20 SEP 1945

BOARD OF REVIEW NO. 2

CM ETO 15654

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Salzburg, Austria, 17 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JOHN R. LYONS (34725576) Company K, 7th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John R. Lyons, Company "K", 7th Infantry, did, near Dampierre, France, on or about 11 September 1944, desert the service of the United States by absenting himself from his organization without proper leave with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended at Epinal, France, on or about 27 March 1945.

He pleaded not guilty and, all of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. No evidence was introduced of previous convictions. 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 period 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 accused was a member of Company K, 7th Infantry (R8). There was received in evidence, over objection (R7), duly authenticated extract copies of the morning reports for that unit, pertaining to accused, showing an entry on 11 September 1944 at Dampierre, France, "dy to MIA 11 Sept 44", an entry on 16 September 1944 "MIA to AWOL 1400 11 Sept 44", and third entry dated 4 April 1945 "above EM from AWOL to be placed in arrest in Regtl Work Platoon 1 April 1945" (Pros.Ex.A).

Sergeant Desrosiers, gunner of the machine gun section to which accused was assigned as an ammunition bearer, testified that at about 1200 on the afternoon of 11 September 1944, their company made an attack, starting out from a town. When they got about 500 yards away, the enemy started shelling them, and "a lot of men got wounded and killed" (R8). Desrosiers took a wounded man back and saw accused in the town the company had left. The enemy was then about 500 or 600 yards distant (R8,9). Desrosiers told accused that he was returning to the company and asked him if he (accused) was also going back (R9,10). He was not sure what accused replied, but the latter did not return to the company with him. After that occasion, he did not again see accused until the day of the trial (R10).

4. On being advised of his rights, accused elected to make an unsworn statement, through his counsel. The statement consisted of that part of the report of the Division Neuropsychiatrist which stated, under the heading "Information furnished by the soldier", that accused claimed "he was reclassified to temporary 'limited assignment' status on grounds of psychoneurosis by the 70th Station Hospital in February or March 1944 and then reassigned as general service by 7th Replacement Depot in May 1944" (R11). No other evidence was introduced by 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, par.130a, p.142).

Under Article of War 28, any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter. The undisputed evidence shows that accused was absent from his organization without leave during the period and with the intent alleged. At a time when his unit was

actually engaged in combat, he was shown to be in the area it had left just before attacking, and he must conclusively have been aware of the hazardous nature of the enemy shell fire. From these circumstances, and his failure to return to his unit when asked to do so by a sergeant of his section, the court properly inferred that his absence without leave was with the specific intent to avoid hazardous duty (CM ETO 7413, Gogol; CM ETO 7153, Seitz).

6. The charge sheet shows accused to be 21 years and seven months of age. Without prior service, he was inducted 10 March 1943 at Fort Oglethorpe, Georgia.

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

8. The penalty for 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).

Temporary Duty Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2

17 OCT 1945

CM ETO 15661

UNITED STATES	)	94TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	Susice, Czechoslovakia, 20 July
Private WILLIAM A. SATMARY (20138529), Company "L", 302d Infantry	)	1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for four years. Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France.

OPINION BY BOARD OF REVIEW NO. 2
HEPBURN, MILLER and COLLINS, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater 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 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 75th Article of War.

Specification: In that Private William A. Satmary, Company L, 302d Infantry, did, at Hermeskiel, Germany, on or about 18 March 1945, run away from his company, which was then engaged with the enemy, and did not return.

He pleaded not guilty to, and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by a summary court for an absence without leave of 7½ hours from his ward at the 40th General Hospital on 15 April 1945, 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 4 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 Delta Disciplinary Training Center, Les Milles, France, as the place of confinement. The proceedings were published by GCMO No. 47, Headquarters 94th Infantry Division, APO 94, 1 August 1945.

3. Evidence for the prosecution:

The testimony of two officers and four enlisted men of Company L, 302d Infantry, showed that on 18 March 1945 the accused, who was a member of the first platoon, was with the company when it moved out in an attack near Bickenfeld, Germany. Its forward movement was halted by enemy machine gun fire and the first platoon was ordered to knock out the enemy guns (R7,14). For that purpose, it was decided to use anti-tank grenades. The accused was the carrier of these grenades (R11). When the squad leader turned to take grenades from the accused, he saw him going down the road toward the rear (R13). He had no permission to leave (R11). By reason of the accused's conduct, one of the officers was compelled to go to the rear area to obtain grenades. As a result the attack was delayed for at least 25 minutes (R7,12), during which time the platoon was subjected to machine gun fire, but suffered no casualties (R12-13). The company commander stopped accused as he came to the rear and ordered him forward again. Accused explained his retreat by saying that it was "too hot for him". He started toward the platoon but instead of returning, went through a draw and continued to the rear (R7,9,14; Ex.1).

4. Evidence for the defense:

On 17 March 1945 accused came to his battalion aid station as a patient, was diagnosed as suffering from combat exhaustion and evacuated to the 104th Evacuation Hospital (R15,16; Def.Ex.A). On the same day an entry was made in the morning report of Company "L" as to the accused, "Dy to Clr Sta L D" and on the following day "Clr Sta to dropped fr rolls 104th Evac Hosp" (R18; Def.Ex.B). The neuropsychiatrist of the 104th Evacuation Hospital examined the accused upon his entry in that hospital on 17 March 1945 and diagnosed him as suffering from combat exhaustion (R18; Def.Ex.C). When examined later in July, he was again diagnosed as having had combat exhaustion and a chronic tapeworm infestation (R19). He was treated for nine days for these ailments at the 104th Evacuation Hospital, where the diagnosis was "psychoneuroses, acute, severe, anxiety state with somatic complaints"(R19).

The accused testified in his own behalf and stated that on 17 March 1945 he left the platoon to get medical treatment going direct to the battalion aid station from which place he was immediately evacuated to the clearing station by ambulance after he was examined by the battalion surgeon (R21-22). His intention when leaving the front lines, was to get medical treatment. He did not ask permission

because he "did not know what he was doing at that time" (R23). His recollection of the incident was confused. He recalls seeing only his company commander and one of the other officers there. He did not remember the company commander saying anything to him (R23).

5. One of the officers who testified that the occurrences related above took place on the 18th March 1945 was recalled as a witness and testified that he was not certain of the date and that it could have been one or two days earlier or later (R20).

6. The evidence for the prosecution established that the accused did at the time and place alleged in the specification, run away from his company when it was engaged with the enemy as averred in the specification. Such evidence standing uncontradicted and unexplained proved a clear case of misbehavior before the enemy in violation of Article of War 75 (CM ETO 1249, Marchetti; CM ETO 1408, Saraceno; CM ETO 3196 Puleio; CM ETO 4004, Best; CM ETO 4095, Delre; CM ETO 4783, Duff.

7. There was interposed as a defense, proof that accused at the time he ran away from his organization was suffering from combat exhaustion and a physical disorder. The validity of this defense is called into question and requires consideration.

a. There is evidence that accused at the time of the commission of the offense was sane within the legal definition of the term (Testimony of Captain Albert N. Mayers, Medical Corps (R20; CM ETO 4219, Price; CM ETO 13376, Aashen; CM ETO 16887, Chaddock). Therefore as to the question of his mental responsibility the record is sufficient to sustain the implied findings that accused was sane and being a question of fact the findings of the court on this question are conclusive on the Board of Review on appellate review (CM ETO 9877, Balfour). However, the foregoing finding does not reach the vital question involved. Captain Mayer emphasized the fact that accused's affliction did not concern the question of his mental responsibility. He ruled out of consideration the mental afflictions of "psycho-neurosis", "obsession" and "amnesia" by stating "but neither of these apply in this particular case" (R20). In "early July" 1945 he diagnosed accused's affliction as; "combat exhaustion, old, recovered and was suffering from a tapeworm infestation" (R19). The finding of Major Christianson on 18 July, 1945 was:

> "Private Satmary, was suffering from Combat Exhaustion at the time of my examination (122 days after offense). The discharging diagnosis in this case was: Psychoneuroses, acute anxiety state with psychomatic complaints mod severe" (R18; Def.Ex.C).

Unlike the majority of battle line desertion and misbehavior cases the record of trial shows that accused went to the clearing station immediately upon leaving his company where a diagnosis of "Combat Exhaustion" was made (R16; Pros.Ex.A). The morning report did not charge him with any dereliction but reported him in the clearing station and thence to

the 104th Evacuation Hospital (R18; Def.Ex.B). The records corroborate accused's testimony (R22). Therefore there exists in the record of trial bona fide proof that accused was suffering from "combat exhaustion" supported by a showing that his conduct after he left his company was regular. He remained under military control.

b. The solution of the problem presented in turn depends upon the determination of two subsidiary questions:

(1). "Genuine and extreme illness or other disability at the time of the alleged misbehaviour" is a defense to a charge laid under the 75th Article of War. (Winthrop's Military Law and Precedents - Reprint p.624). Does "combat exhaustion" come within the classification of "other disability"? The rule of "Esjudem Generis" is applicable (CM ETO 567, Radloff, 2 BR (ETO) 143 at p.156). "Combat exhaustion" is certainly a manifestation of a condition whereby a soldier "will not be an adequate fighting unit" (Mayers testimony, R19) and therefore the results are the same as if he suffered an attack of acute appendicitis or a strangulated hernia. The placing of bona fide "combat exhaustion" such as is exhibited in this case, in the same class as "genuine and extreme illness", and therefore a complete defense to the charge within Winthrop's pronouncement, seems to be reasonable and just and consistent with common sense and practical experience.

(2). The second subordinate question is whether in this case the existence of this defense was an issue of fact for the court or whether in the state of the record the Board of Review is authorized to declare as a matter of law that the defense was proved. We have heretofore held that ordinarily the existence of a "genuine and extreme illness" is a question of fact for the court and if there is substantial evidence that the accused was physically capable of performing his duties the finding of the court will not be disturbed on appellate review (CM ETO 1404, Stack; CM ETO 1409, Mieczkowski; CM ETO 4095, Delre; CM ETO 4783, Duff). The foregoing is the rule generally applied because of conflicting evidence in the record, however, in the instant case, it appears that there is substantial evidence in proof of this defense and the prosecution utterly failed to meet the challenge. The official records show beyond doubt that accused immediately upon leaving the battle line placed himself in medical hands for diagnosis and treatment. He went directly to the clearing station and was then taken (he testified he was moved by ambulance) to the 104th Evacuation Hospital. The morning report of his organization sustained this evidence. Thereafter while in proper medical channels accused was examined and the diagnosis of his illness was made by two Army medical men whose conclusions stand undenied. The only evidence in the prosecutor's case as to accused condition is in the testimony of Private Robert L. Sharon, when on cross examination he was asked "was the appearance of the accused strange in any way", he replied:

> "Just a man under a nervous strain, Sir. I do not know if he had ever been under fire before. He was awfully scared. His face was red and flushed" (R9).

Sharon's testimony thus supports defense's evidence; it does not deny it. A careful study of the record of trial fails to reveal any evidence which created an issue of fact for the court. There is nothing improbable or questionable in the evidence supporting this defense. If the testimony of the accused is wholly disregarded there remains competent, substantial proof of accused' disability at the time he left the battle line: (a) official records and (b) testimony of army medical officers. The evidence is entitled to the same consideration as that accorded to the prosecution's evidence. Without contradiction therefore the record of trial shows that accused was rendered incapable of performing his duties at the time and place alleged in the same manner and degree as if he were seized with a severe physical illness.

Under such circumstances and conditions the Board of Review is of the opinion that as a matter of law accused sustained the burden of proving facts which relieved him of liability for his conduct and that the record of trial is legally insufficient to support the finding of guilty and the sentence.

8. The charge sheet shows the accused to be 26 years, 8 months of age. He enlisted at Bridgeport, Connecticut, 22 August 1940. He had no prior service.

9. The court was legally constituted and had jurisdiction of the person and the offense. For reasons stated the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty and the sentence.

Judge Advocate

Judge Advocate

(ON LEAVE) Judge Advocate

(300)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 17 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat.724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat.732; 10 USC 1522), is the record of trial in the case of Private WILLIAM A. SATMARY (20138529), Company "L", 302d Infantry.

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

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

(Findings and sentence vacated. GCMO 578, USFET, 13 Nov 1945).

ETO 15661 SATMARY, WILLIAM A.

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

BOARD OF REVIEW NO. 1

16 AUG 1945

CM ETO 15666

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, US FORCES, EUROPEAN THEATER
v.	
Private GEORGE W. WILSON (33354914), 3512th Quartermaster Truck Company	Trial by GCM, convened at Paris, France, 21,23 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. Federal Reformatory, Chillicothe, Ohio

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

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

2. The extra-judicial pre-trial statement of accused (R20; Pros. Ex.A), whether it be considered as a technical confession or simply as a series of admissions against interest was admissible in evidence. The fact that an accused was not warned of his rights under the 24th Article of War does not render the confession involuntary (CM ETO 5584, Yancy, and authorities therein cited). The voluntariness of the statement was a question of fact for the court. There is substantial evidence that accused was acting neither under compulsion nor under promise of immunity or favor when he talked with Special Agent William A. Morrison of the Counter Intelligence Corps. Under such circumstances, the conclusion of the court will not be disturbed on appellate review (CM ETO 2343, Welbes; CM ETO 4701, Minnetto; CM ETO 9288, Mills).

3. There is no proof in the record of trial of those facts which would elevate the offense denounced by the ninth paragraph of the 94th Article of War (wrongful disposition of property of the United States furnished and intended for the military service) to the offense of interfering with the war effort in violation of the 96th Article of War as defined in CM ETO 8234, Young, et al; CM ETO 8236; Fleming, et al; and CM ETO 8599, Hart, et al. The court erroneously applied the doctrine of said cases which has application only in the extraordinary and peculiar circumstances described in the holdings of the Board of Review. The

fact that the instant accused admitted the disposition of 675 cans (3375 gallons) of gasoline does not in itself supply evidence of widespread diversions of gasoline such as to constitute the necessary factual background, as contemplated by the Young and companion cases. The case of CM ETO 9000, Frank Cox, cited by the staff judge advocate in his review was a published order case. Reference to the record of trial shows that pursuant to the advice and recommendation of the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater, the sentence of the accused was reduced by the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, so as to include dishonorable discharge (suspended), total forfeitures and six months confinement only. The basis of said remission was the fact that the prosecution failed to present the necessary proof required by the Young case. Neither will judicial notice supply the necessary evidence. Such attempts to "short-cut" the necessary factual proof have been repeatedly condemned by the Board of Review (CM ETO 7506, Hardin; CM ETO 6226, Ealy). The absence of such proof does not preclude the treatment of the Specification herein as alleging the lesser included offense of wrongful disposition of Government property furnished and intended for the military service under the ninth paragraph of the 94th Article of War and it will be so considered (CM ETO 6226, Ealy, supra; CM ETO 7506, Hardin, supra; CM ETO 7609, Reed and Pawinski; CM ETO 9987, Pipes; CM ETO 11075, Chesak; CM ETO 11076, Wade). The fact that it was laid under the 96th Article of War is immaterial (CM ETO 11076, Wade, and authorities therein cited).

4. The evidence is substantial and convincing that accused, at the time and place alleged, wrongfully and knowingly disposed of 3375 gallons of gasoline, property of the United States, furnished and intended for the military service, of a value in excess of $50.00, an offense in violation of the ninth paragraph of the 94th Article of War (CM ETO 13276, Clower, et al; CM ETO 9987, Pipes; CM ETO 9288, Mills). The authorized punishment for such offense is dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years (MCM, 1928, par.104c, p.100). The sentence is therefore excessive. The period of confinement should be reduced to five years.

5. The charge sheet shows that accused is 23 years, eight months of age and that he was inducted 26 October 1940 at Wilkes Barre, Pennsylvania to serve for the duration of the war plus six months. No prior service is shown.

6. The court was legally constituted and had jurisdiction of the person and the offense. Except as herein stated, 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 so much of the findings of guilty as involves a finding that accused, at Paris, France, from about 15 September 1944 to on or about 1 January 1945, wrongfully and knowingly disposed of 3375 gallons of gasoline, property of the United States furnished and intended for the military service thereof, by sale thereof

to Raymond Robillard and other persons unknown, of a value in excess of $50.00 in violation of the 94th Article of War, and so much of the sentence as provides for dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years.

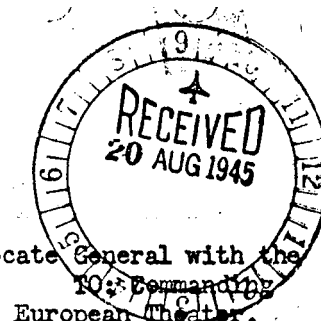
7. Confinement in a penitentiary is authorized upon conviction of wrongfully and knowingly disposing of property of the United States furnished and intended for the military service thereof of a value exceeding $50.00 by Article of War 42 and section 36, Federal Criminal Code (18 USCA 87) (see CM ETO 1764, Jones and Mundy). The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement of accused is proper (Cir.229, WD, 8 June 1944, sec.II, par.3a, as amended by Cir.225, WD, 25 Jan 1945).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(304)



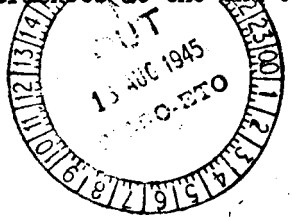
1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 16 AUG 1945 TO: Commanding General, Seine Section, Theater Service Forces, European Theater, APO 887, U. S. Army.

1. In the case of Private GEORGE W. WILSON (33354914), 3512th Quartermaster Truck Company, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support so much of the findings of guilty as involves a finding that accused at Paris, France, from about 15 September 1944 to on or about 1 January 1945, wrongfully and knowingly disposed of 3,375 gallons of gasoline, property of the United States, furnished and intended for the military service thereof, to Raymond Robillard and other persons unknown, of a value in excess of $50.00 in violation of the 94th Article of War and so much of the sentence as provides for dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The record of trial clearly exhibits the fact that the case against accused was prepared in a haphazard manner and without a sufficient analysis of the evidence available to the prosecution. The evidence even as submitted would have sustained a finding of desertion. The charge of desertion should not have been withdrawn. The accused richly merits a heavier punishment than may be now legally imposed, and the ends of justice are thus at least temporarily defeated. That failure is not the result of the military judicial process, but of the lack of care and circumspection in preparing the case for trial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15666. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15666).



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

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(305)

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

BOARD OF REVIEW NO. 3 14 SEP 1945

CM ETO 15679

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Augsburg,
	)	Germany, 9 June 1945. Sentence as
Privates CALVIN J. BAKER (34797765) and HENRY B. EVERETT (39342676), both of 3122nd Quartermaster Service Company.	)	to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

BAKER

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

Specification: In that Private Calvin J. Baker, (then Private First Class), 3122 Quartermaster Service Company did, at Allewind, Germany, on or about 7 May, 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Anna Egner.

CHARGE II: Violation of the 93rd Article of War.
(Motion for finding of not guilty sustained).

Specification: (Motion for finding of not guilty sustained).

EVERETT

CHARGE: Violation ofthe 92nd Article of War.

Specification: In that Private Henry B. Everett, (then

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Tec 4), 3122 Quartermaster Service Company did, at Allewind, Germany, on or about 7 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Anna Egner.

Each accused pleaded not guilty. A motion for finding of not guilty was sustained as to Charge II and its Specification against Baker. Two-thirds 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 against him.

No evidence of previous convictions was introduced against Baker. Evidence was introduced of one previous conviction against Everett by summary court for wrongfully appearing in a house of prostitution in violation of Article of War 96. Three-fourths of the members of the court present at the time the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that at about 1130 hours on the morning of 7 May 1945, both accused, colored soldiers, entered without permission an open door of the dwelling occupied by Frau Anna Egner, prosecutrix, and her grandparents, in Allewind, Germany. Both had rifles in their hands and were "slightly intoxicated". They grabbed prosecurtrix' grandfather by the shirt and wanted schnapps. Both the grandfather and prosecurtrix, who came out of the kitchen, told them they had no schnapps. Everett then hit prosecutrix on the hand, pointed his rifle at her and made her go into the cellar, where she again assured him they had no schnapps and gave him a bottle of berry juice, which he broke (R7-10,13). When she started to go upstairs, Everett stood in front of her and said "fick-fick", to which she replied, "Nix; I am a woman and I have two children." He then grabbed his rifle and said, "Nix fick-fick, boom boom", which she understood to mean that he would shoot her if she did not do what he wanted. Pointing his rifle at her and threatening her, Everett made her lie down. He pushed her, tore off her drawers and had intercourse with her, penetrating her private parts with his sexual organ. She did not resist because she was "so scared he would shoot me afterwards" (R10-11).

After Everett finished, he went upstairs. When prosecutrix tried to follow, he grabbed her by the blouse and made her go back. Then accused Baker came downstairs with his rifle in his hands and pointed where she should "stretch out" again. He then had intercourse with her, penetrating her private parts with his sexual organ. She did not struggle with him because of her fear of his rifle (R11-12). She would not have been as afraid of white soldiers, but she had heard that colored troops were "bad" when they were drunk and would mistreat a woman if she would not "give in" (R19).

Accused were at her house altogether for 20 to 25 minutes (R17). After Baker left the cellar, she went upstairs, and went to a doctor at about 1300 hours (R12-13). At an identification parade held that night at 1130 hours she identified Everett, but did not see or identify Baker, whom she identified for the first time at the trial (R15-16,19).

The mayor of Allewind testified that at about 1150 hours on 7 May, he went to the home of prosecutrix at the request of her grandmother, and found prosecutrix weeping. She said to him, "Mr. Mayor, what shall I do? Two colored soldiers raped me" (R20-23).

Dr. Helmut Barth testified that at about 1300 hours on 7 May, prosecutrix came to him weeping, and said she had been raped by two colored soldiers and wanted to know if she had contracted a venereal disease (R24).

A German civilian identified accused as two colored soldiers who were firing their rifles at the inn of Herr Haussler in Allewind, on the morning of 7 May (R26-28).

4. After their rights as witnesses were explained to them, both accused elected to remain silent (R51).

For the defense, two privates first class of accused's company testified that Baker was in the company identification parade held the night of 7 May (R31,39). One of the privates first class was positive he saw Everett about 1140 hours on 7 May in his quarters (R32-33). The other saw Everett at about 0900 hours on 7 May at the mess hall and again later that morning at about 1100 or 1130 hours in his room (R40).

The company mess officer was reasonably sure, but not positive, that Baker was in the lineup (R49). He also testified that Baker was an excellent soldier and that Everett had done an excellent job in the kitchen, receiving a promotion to sergeant (R47). He thought it would require about 30 minutes to walk from prosecutrix' home to Everett's billet by road, or about 15 minutes by cutting across fields (R46).

5. Recalled as a witness for the court, the mayor testified that he saw two soldiers fire four shots in the rear of the village of Allewind at about 1145 hours on 7 May (R51). Franz Haussler, a witness for the court, testified that he saw two colored soldiers, one of whom he identified as Everett, in his tavern or inn about 1100 hours on 7 May. He had "some doubts" as to whether Baker was the other soldier (R52-53).

6. The testimony of prosecutrix, which is corroborated in part by that of other witnesses who saw her shortly after the alleged acts of rape, shows that each accused had carnal knowledge of her at the time and place alleged. Her testimony indicates that she did not forcibly resist the advances of accused, but rather that she submitted to their illegitimate demands because she was in fear or apprehension of losing her life or of suffering serious bodily injury at their hands. In view of their threatening words and gestures and the other circumstances, such fear appears to have been entirely reasonable. The evidence clearly supports the findings of guilty (CM ETO 3740, Sanders et al; CM ETO 5870, Schexnyder; CM ETO 10841, Utsey; 1 Wharton's Criminal Law (12th Ed. 1932), sec. 701, p. 942).

While there was some question as to identification of Baker, the prosecutrix positively identified him at the trial and her identification was corroborated by another civilian witness who saw accused together in an inn in the village the same morning the rapes occurred. In view of the positive identification at the trial, evidence relating to the identification parade, much of which was elicited by the defense, even if improper, did not prejudice accuseds' substantial rights (CM ETO 6554, Hill; CM ETO 7209, Williams).

7. The charge sheets show that accused Baker is 34 years one month of age and wasinducted 3 December 1943 at Camp Blanding, Florida. Accused Everett is 32 years two months of age and was inducted 17 December 1943 at Portland, Oregon. No prior service is shown as to either accused.

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

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

B R S Leeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. H. Levy Judge Advocate

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

BOARD OF REVIEW NO. 3

14 AUG 1945

CM ETO 15689

UNITED STATES	45TH INFANTRY DIVISION
v.	Trial by GCM, convened at Augsburg, Germany, 14 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JOHN J. FORS (36455300), Company K, 157th Infantry.	

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DENNY, 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 John J. Fors, Private, Co. K, 157 Infantry, did, at Nothweiller, Germany, on or about 16 December 1944, desert the service of the United States with intent to avoid hazardous duty, to-wit: Combat duty against the Axis Forces, and did remain absent in desertion until he surrendered himself on or about 29 December 1944.

Specification 2: In that * * * did, at Riepertsweiller, Germany, on or about 17 January 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Doremy, France, on or about 20 March 1945.

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Specification 3: In that * * * did, at or near Reinheim, Germany, on or about March 27, 1945, desert the service of the United States and did remain absent in desertion until he surrendered himself at Munich, Germany, on or about 11 May 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and all specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved only so much of the finding of guilty of Specification 1 as involves a finding that the accused did, at the time and place alleged, absent himself from his organization without proper leave and did remain absent until about 29 December 1944 in violation of Article of War 61, approved the remaining findings of guilty and the sentence, designated the Eastern Branch, UnitedStates 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 may be summarized as follows:

a. Specification 1: A duly authenticated extract copy of the morning report of accused's organization for 22 December 1944 shows him "Duty to AWOL 2359 hrs. 19 Dec 1944," and an entry for 29 December 1944 shows him "AWOL to Present Confinement, Regt'l Stockade" (R3, Prox.Ex.A). On 16 May 1945, after first having been warned of his rights, accused stated to the investigating officer that on 16 December 1944 he was returned to his company "from some Raple Depot or hospital or something," and that he decided he was not going back on the line because he was "too scared and couldn't face it." He had a bad hand and asked his company commander for reclassification. He was put in a mortar squad and went back to his platoon, which was on the line near Nothweiler, Germany. He "took off" on 18 December and went to different towns in the area. On 29 December he turned himself in to the military police (R7-10).

b. Specification 2: A duly authenticated extract copy of the morning report of accused's organization for 17 January 1945 shows him "Pres.Conf.Regt'l Stockade, to Dy; Dy to AWOL 2359 hrs." (R3,Pros. Ex.A). On 16 May 1945 accused stated to the investigating officer that while he was in the regimental stockade he heard "that his outfit was in a bad spot" and that "Germans were all around them," although he did not know just where hisunit was. Then a captain came and told the men they were being sent back to their companies. Accused became scared and decided he would not go back and would "take off" the first chance he got. He was taken to his company kitchen at Offweiler, and "knew he

was going up that night or the next morning," so he "took off" from the latrine. He had "decided to go all the way back this time." He was picked up by the military police on 20 March 1945 in Doremy, France (R8). The company assistant mail clerk testified that the company was located around Reipertsweiller, Germany on 17 January 1945, and that he had no knowledge of accused being present with the company from 17 January to 20 March (R5).

c. Specification 3: At about noon on 27 March 1945 accused was brought to his company kitchen in the town of Reinheim, Germany, where he asked for his mail and also asked the supply sergeant for a pair of shoes. The supply sergeant was to take accused "up to the front lines with him when he went up with the supplies that night." However, accused did not go up and could not be found although an hour's search for him was made by six soldiers in the kitchen area and in the town of Reinheim, which "wasn't too big." He was last seen around noon that day when he got his mail (R4-6). His first sergeant and the assistant mail clerk each testified that accused was not present for duty with his company from 27 March 1945 until about 11 May 1945, when he was first seen in Munich (R5,6-7). The company morning report for 11 May 1945 shows accused "AWOL to Dy 1600 hrs." (R3,Pros.Ex.B). The investigating officer, in detailing the substance of accused's statement to him on 16 May 1945, testified:

> "About two or three days before the company crossed the Rhine, he got back to the company and they sent him down to the supply room to draw some equipment. I believe he was told at that time that he was going up to the lines that night but he got scared again and he took off that night. On May 11th, I guess it was, he heard that the war was over and he came back to the company. That was it. He turned himself into the MPs on May 8th and got back to the company on May 11th" (R8-9)

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 (R11).

5. The evidence is clearly sufficient to show absence without leave of accused in support of the findings of guilty of Specification 1 as approved by the reviewing authority.

Absences without leave by accused from 17 January to 20 March, and from 27 March to 11 May 1945, were adequately shown by the evidence relating to Specifications 2 and 3 respectively. From the mere length of either of such absences alone, for 62 days and 45 days respectively, in an active theater of operations, the court was authorized to infer an intent on the part of accused to remain permanently away from the

service (CM ETO 1629, O'Donnell; CM ETO 6093, Ingersoll; CM ETO 13018, Ostrowski). Moreover, the court could properly consider accused's actions and his statements to the investigating officer as evidence of an intention on his part, at the time he absented himself on both 17 January and 27 March, to avoid hazardous duty or to shirk important service, which intent could be shown in proof of the offenses charged under Specifications 2 and 3 (CM ETO 5117, DeFrank; CM 245568, III Bull. JAG 142). The evidence fully sustains the findings of guilty of such specifications.

6. The charge sheet shows that accused is 21 years of age and was inducted 27 February 1943 at Kalamazoo, Michigan. No prior service is shown.

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

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

B R Sleeper Judge Advocate

(ON LEAVE) Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

29 SEP 1945

CM ETO 15704

U N I T E D S T A T E S	)	84TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	Weinheim, Germany, 13 July
Private First Class GUY H.	)	1945. Sentence: Dishonorable
CARVER (36286880), Company B,	)	discharge, total forfeitures
334th Infantry	)	and confinement at hard labor
	)	for life. United States Peni-
	)	tentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification 1: In that Private First Class Guy H. Carver, Company "B", 334th Infantry, did, without proper leave, absent himself from his organization at Wiesloch, Kreis Heidelberg, Germany from about 0130 hours, 15 June 1945 to about 0410 hours, 15 June 1945.

Specification 2: In that * * *, did, without proper leave, absent himself from his organization at Baiertal, Kreis Heidelberg, Germany from about 2320 hours, 19 June 1945 to about 0650 hours, 20 June 1945.

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

Specification: In that * * *, having been duly placed in arrest at Wiesloch, Kreis Heidelberg, Germany on or about 15 June 1945, did, at Baiertal, Kreis Heidelberg, Germany on or about 19 June 1945, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that * * *, did, at Baiertal, Kreis Heidelberg, Germany, on or about 20 June 1945, forcibly and feloniously, against her will, have carnal knowledge of Hannelore Hotz.

He pleaded not guilty to, and two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States 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 accused was a member of the guard relief scheduled to go on duty at 0200 hours 15 June 1945 at Wiesloch, Germany. At 0130 hours when the sergeant of the guard went to his billet to wake him, accused was not there (R7). He did not thereafter report for guard duty nor return to his organization until approximately 0410 hours same date (R9). The following morning he was placed in arrest in quarters by his company commander(R11). He breached his arrest prior to 2030 hours 19 June 1945 and was seen in town after midnight on the morning of 20 June 1945 (R12,37,39).

At about midnight 19 June 1945, an American soldier, identified by prosecutrix and her grandmother as the accused, knocked on the door of the Hotz residence in Baiertal, Germany, and demanded admittance (R17,18,31,32). When Suzanne Hotz, grandmother of the prosecutrix, refused to "open up" he reiterated his demand and when she asked what he wanted, he said "Fraulein" and was told there was none there. He continued to knock and bang until "our father" [Mrs. Hotz' 80 year old husband] insisted, over her protest, that she see what he wanted. He came first into Mrs. Hotz' room and "looked around for a Fraulein"; then he went upstairs and she followed him, with a light, calling to her 16 year old grand-daughter, Hannelore Hotz, the prosecutrix, to come on down with him "so we can get rid of him (R31). Accused entered prosecutrix' room with

> "a lit match in his hand and he said 'Miss, get up' and I said 'No', and he said 'Yes, Miss, get up' and then I got up and went downstairs with him to the kitchen".

He stayed about a quarter of an hour with the prosecutrix and her grandparents in the kitchen, insisting meanwhile that the girl accompany him "to show him where he was sleeping" (R18). When she explained that curfew regulations would not permit her to leave the house until eight-

thirty, he replied that "with an American soldier it doesn't matter". He showed her a chain with a small heart and cross on it and assured her that he was a good Catholic too (R19). He also indicated by pointing to one of the two watches he was wearing, one on each wrist, that in two minutes he would be back again (R20). In the course of their conversation carried on partly by signs and partly in German, with which language the soldier displayed some slight acquaintance, he represented that he was unable to find his billet but refused the old woman's offer to show him the way, insisting that he wanted only the prosecutrix to accompany him (R32). She finally undertook, from outside in front of the house, to explain to him how to arrive at his billet, but

> "he said 'No, No' and said that I was to come with him and I said 'No, No', and he said 'Yes' and then I thought that I would have to go with him and I went with him. * * * Then we kept on walking and we went up the hill and then we went through the cemetery but I was terribly scared in case the guards should come and he said 'It won't make any difference as long as I am with you' and we kept on going. * * * We were standing in a field, in front of a corn field, and then he was speaking of a child and I didn't know what he was talking about, but then I knew what he meant and because I didn't want to do it he threw me down on the ground. * * * Then I pushed him away and he gave me a smack on the face and then * * * he laid himself on top of me and then when I was starting to scream he held my mouth and boxed my face. * * * Then I tried to get up again and he pushed me down again and he beat me upon the head making me think I couldn't see or hear any more" (R20-21).

At this point, he also tore her undergarments and had sexual intercourse with her, after which she managed to escape from him and run home (R21-22).

In the meantime her grandparents left their house in search of her and reported to American soldiers that a soldier had forced himself into their home and gone away with their granddaughter (R33). When she returned she was crying bitterly, had marks all over her face and body, and her lips were bitten (R34). She reported that accused had beaten her terribly but did not tell her grandparents that night that he had had sexual intercourse with her "because that would have been too exciting" (R22). The next morning she could hardly get out of bed, her body was black, blue and swollen, she had a black eye, scratches all over her throat and other marks of violence, (R22-23,29), noted also by the medical examiner who found lacerations on body and vagina as well (R44). She first reported the sexual intercourse to a German woman, an interpreter, whom her grandmother brought to her bedside the next morning. This woman accompanied her to the "local commander", who caused her to be examined by an American doctor that day (R22-23).

Accused's company commander testified that prosecutrix and the interpreter reported the alleged rape to him on the morning of the 20th and from prosecutrix description he thought of accused, who was one of two men who had been absent the previous night. He called accused in the room and prosecutrix wrung her hands and hung her head, speaking in German, which the officer could not understand (R28). That afternoon she identified him as her assailant at an identification parade of about 20 men of the same size and description as accused (R29). She and her grandmother both identified him at the trial (R18,32).

At 0030 or 0100 hours 20 June 1945, an enlisted man from accused's company saw accused and a girl who appeared to accompany him willingly, walking along a street in the town of Baiertal (R36-37,39). They were headed away from the billets, up the hill (R41). Witness was about 10 yards away and it was a clear night (R39). To avoid meeting them, he stepped into a gateway and accused gave no indication of seeing him (R41). Shortly thereafter the same witness and members of the guard encountered prosecutrix' grandparents, out looking for her (R37-39,42).

4. No evidence was presented by the defense; accused, having been advised of his rights, elected to remain silent.

5. The elements of rape - sexual intercourse with a woman by force and against her will - are all shown by the uncontradicted testimony of the prosecutrix, convincingly corroborated as to significant surrounding circumstances by the testimony of her grandmother and, to a lesser degree, by that of two American soldiers. Substantial evidence thus sustains the findings of guilty of the Specification and Charge III.

The brief absences for two and a half hours and seven and a half hours, respectively, and the breach of arrest initiating the second, are shown by uncontradicted evidence sustaining the findings of guilty of Charges I and II and their respective specifications.

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

7. The charge sheet shows that accused is 28 years ten months of age and that, with no prior service, he was inducted at Fort Sheridan, Illinois, 30 November 1942.

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

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B R Sleeper Judge Advocate

Malcolm C Sherman Judge Advocate

 B. H. Hasty Jr. Judge Advocate

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

BOARD OF REVIEW NO. 3

21 SEP 1945

CM ETO 15705

U N I T E D S T A T E S)	84TH INFANTRY DIVISION
)	
v.)	Trial by GCM, convened at Weinheim,
)	Germany, 6 July 1945. Sentence: Dis-
Private First Class WILLARD)	honorable discharge, total forfeitures
PYLES (35236665), 3119th)	and confinement at hard labor for life.
Quartermaster Service Com-)	United States Penitentiary, Lewisburg,
pany.)	Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Willard Pyles, 3119 Quartermaster Service Company, did, at Stockheim, Germany, on or about 3 April 1945, forcibly and feloniously, against her will, have carnal knowledge of FRAU ANNY BISSON.

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

to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. 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 complaining witness, Frau Anny Bisson, testified that on 3 April 1945, five days after American troops first entered the town of Stockheim, Germany, accused approached her as she was standing outside the door of the house in which she was then living and directed her to go into the house. He followed her into the kitchen and started to make advances to her, pointing his rifle at her when she resisted. When she began to weep, he left the house but returned some ten minutes later, took her by the arm and pulled her into a room adjoining the kitchen where he threatened her with his rifle and succeeded in having intercourse with her without her consent and despite her efforts to prevent him from accomplishing his purpose. The testimony of the complaining witness was corroborated as to surrounding circumstances by the testimony of another witness, by her physical appearance after the incident and by the fact that she made prompt complaint to the military authorities. Accused admitted that he had intercourse with Frau Bisson at the time and place alleged but denied that he pointed his rifle at her and asserted that the intercourse took place at her solicitation and with her consent. For further evidentiary details, see paragraph 3 of the review by the staff judge advocate of the reviewing authority. The pattern of conduct shown by the evidence is a comparatively familiar one. On the evidence presented, the court was warranted in finding that accused had carnal knowledge of the complaining witness by force and without her consent, thus constituting his act rape, as alleged (Cf: CM ETO 15679, Baker and Everett; CM ETO 12329, Slawkawski; CM ETO 10700, Smalls; CM ETO 9083, Berger and Bamford; CM ETO 8837, Wilson).

4. The charge sheet shows that accused is 24 years eight months of age and was inducted 5 May 1944 at Columbus, Ohio. He had no prior service.

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

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

B K Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B V Dewey Judge Advocate

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

BOARD OF REVIEW NO. 4

20 NOV 1945

CM ETO 15719

U N I T E D S T A T E S	)	79TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Bochum, Germany, 21 May 1945. Sentence: (suspended) Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years.
	)	
Private CHARLES R. KENNEDY (36739244), Company F, 315th Infantry	)	
	)	
	)	

OPINION by BOARD OF REVIEW NO. 4
DANIELSON, LEYER and ANDERSON, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater and there found legally insufficient to support the findings and the 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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Charles R. Kennedy, Company "F" 315th Infantry, then Private First Class Charles R. Kennedy, Company "F" 315th Infantry did, at the vicinity of Montigny, France on or about 13 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 returned to military control at Nancy, France on or about 24 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 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 20 years. The reviewing authority approved the sentence but suspended the execution thereof. The proceedings were published in General Court-Martial Orders No. 176, Headquarters 79th Infantry Division, 30 July 1945.

3. The evidence adduced by the prosecution is substantially as follows:

Captain Tennyson L. Nordstrom, company commander of accused's organization, testified that on 13 November 1944, the first sergeant reported to him that accused was absent from the assembly area southwest of Montigny (R7). He further testified that he learned that accused was given permission to go to the aid station and did not return, that "we made a check" at the aid station, and they had not evacuated him. Hence, he considered him absent from the company (R7). He did not see accused with the company between 13 November and 24 November 1944 (R7) and he had no permission to be absent during that period (R7). He next heard about accused when he reported to him on 24 January 1945 (R7). On 11 November 1944, Captain Nordstrom told the men in his command that the company was going into an assembly area in preparation for an attack on the Montigny-Ancerviller defense line and that they might have to take several strong points (R8). On cross-examination, he testified that at the time accused was reported missing, he did not know accused personally. He was asked:

> "Q. You couldn't state that he was absent from the company at the time he was reported to you as being absent?
>
> A. That's correct" (R8).

On examination by the court, he said that he possibly saw accused before 24 January 1945 as he did not know him personally (R9). On redirect examination, he testified that if a man had returned to the company, he would have occasion to receive a report to this effect, and that where had been no such report made in regard to accused between 13 November and 24 November 1944 (R9).

Second Lieutenant Frank J. Sadowski, testified that on 13 November 1944, he was in charge of the battalion aid station (R10). If a man is evacuated his name is put on the record book and if not evacuated, he is sent back to his company (R10,11). There was no entry in the record book that accused had been evacuated (R11,12, Pros.Ex.A).

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Private Nathan Solinsky of accused's company testified that both he and accused were present on 11 November 1944 when Captain Nordstrom told them that they were going on a hazardous mission and that they were going to move into an assembly area and into an attack (R13,14).

It was orally stipulated by and between accused, his counsel, and the prosecution that accused returned to military control on 24 November 1944 at Nancy France(R14).

4. Accused having been warned of his rights by the law member, elected to remain silent (R18).

Captain Nordstrom was recalled and testified that accused was in combat with the company after 24 January 1945; that he was doing his job satisfactorily and under present conditions he would like to have him back in the company (R15). He was asked by defense counsel:

> "Q. On the date that accused was reported missing from the company, could you say that he was absent of your own personal knowledge?
>
> "A. I couldn't say that about any of the men" (R15).

First Sergeant John W. Cheney testified that on 13 November 1944, he was mess sergeant of accused's organization (R17). He had known accused since 24 January 1945 (R16) and since then accused had been in contact with the enemy and had done his job as well as any other soldier (R17).

5. It will be noted at the outset that the evidence presented to prove the absence without leave upon which the Charge of desertion is based was entirely oral. The morning report of accused's organization was not introduced, and hence questions of "official writings" or "entries made in the regular course of business" as exceptions to the hearsay rule are not raised. Likewise inasmuch as the proof was entirely oral, decisions of the Board of Review dealing with morning reports and the extent to which entries therein may or may not be based upon hearsay, from the point of view of their admissibility in evidence as official writing or business entries, have no application in this case. This is because the exceptional status specifically conferred upon morning reports by the Manual for Courts-Martial, as far as hearsay evidence is concerned, is nowhere extended to oral testimony. The latter therefore either must be based upon the personal knowledge of the witness or must fall into one or another of the recognized exceptions to the hearsay rule. Otherwise it is incompetent, whether or not objected to, and does not constitute evidence in proof of the offense charged. "Hearsay is not evidence" (MCM,1928, par. 113,p.113,par.126c,p.137; CM 238557, Whitford, 24 BR 28).

Careful examination of the record of trial reveals that

proof of the alleged absence without leave herein (an essential element of the offense of desertion (MCM,1928,par.130a,p.142)) was based upon hearsay testimony. Captain Nordstrom, company commander of accused's organization, was permitted to testify that the first sergeant reported to him on 13 November 1944 that the accused was absent from the area. On cross-examination and later on direct examination for the defense, he testified that he had no personal knowledge that the accused was absent at the time that he was reported to be absent. He further testified that he did not see the accused present for duty with the company between 13 November and 24 November 1944, but in connection with his testimony that he next saw the accused on 24 January 1945, he admitted that it was possible that he saw him before then because he did not know the accused personally.

All of the testimony directly tending to prove absence without leave was thus pure hearsay, grossly incompetent and highly prejudicial to the substantial rights of the accused and the negative testimony of the company commander that he did not see accused during the period in question is vitiated by his admission that he was unacquainted with accused and hence did not know whether he had seen him or not. Nor is there any circumstantial evidence sufficient to prove the necessary absence so as to bring the case within the principles laid down in CM ETO 527, Astrella. The testimony of the officer in charge of the aid station to the effect that accused was not evacuated therefrom as a casualty and that of the company commander that accused was not reported to him between 13 November and 24 November 1944 as having returned to the company are valueless in this respect since there is no competent evidence either that accused was suppoed to report to the aid station or ever did so or that he was ever away from his company. Nor may absence without leave be inferred solely from the stipulation that accused returned to military control on 24 November 1944 (CM ETO 5633, Gibson; CM ETO 11693, Parks; CM ETO 14486, Marks).

6. The charge sheet shows that accused is 27 years of age and was inducted 9 March 1943 at Chicago, Illinois. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and the offense. Errors affecting the substantial rights of the accused were committed during the trial as discussed above. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and the sentence.

Judge Advocate

Judge Advocate

(ON LEAVE) Judge Advocate

1st Ind.

War Department, Branch Office of the Judge Advocate General with the European Theater 20 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private CHARLES R. KENNEDY (36739244), Company F, 315th Infantry.

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. It is noted that although accused appears to have returned to duty on 24 January 1945, charges were not preferred until 21 April 1945 and the case was tried on the 21 May 1945. The record reveals that during this interim, accused engaged in active combat with his company (R15-17) and that his performance of duty was satisfactory to a degree that his company commander testified at the time that he would like to have him back (R15-17). While the question of condonation is not technically involved, it would not appear that the best interests of military justice are properly served by the trial of a soldier for a purely military offense long after its commission and after an intervening period of almost four months of satisfactory service performed under hazardous combat conditions.

4. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made. Also included 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

20 NOV

IN 23 NOV 1945 M & R

(Findings and sentence vacated. GCMO 643, USFET, 7 Dec 1945).

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

BOARD OF REVIEW NO. 4 5 SEP 1945

CM ETO 15734

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Civilian FRANK W. KENDRICK (N-002170), Signal Section, Headquarters, Communications Zone, United States Forces, European Theater	Trial by GCM, convened at Paris, France, 13, 16 July 1945. Sentence: Total forfeitures and confinement at hard labor for 10 years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 4
DANIELSON, MEYER and ANDERSON, Judge Advocates

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

2. Accused was tried on the following Charges and Specifications:

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

Specification 1: In that Frank Will Kendrick, Civilian, serving with the Armed Forces of the United States in the European Theater of Operations, did at Mommenheim, France, on or about 4 March 1945, feloniously take, steal and carry away two (2) bottles of Schenleys Whiskey, value about $3.50, the property of Chief Warrant Officer William Rious; one (1) bottle of White Label Scotch Whiskey, value about $1.75, the property of First Lieutenant Arthur W. Foehser; one (1) black bake-lite "Argus" 35 millimeter camera with chrome fittings, value about $50.00; and one (1) black rough-grain leather camera-case with carrying strap, value about $10.00, the property of Captain George H. Dickerson, Jr.

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Specification 2: In that * * *, did, at Saverne, France, on or about 9 March 1945, feloniously take, steal and carry away one (1) pair of "Wolenzak" binoculars 8 x 30 power, with the initials "D.B." and the name "Singerhoff" scratched on bridge between eyepieces, with a black shoulder-strap attached, having the name "Captain Singerhoff" inked on the rough side thereon, value about $30.00; one (1) black leather binocular case, having the words "Captain Singerhoff, Chaplain" scratched on the flap thereof, value about $10.00; one (1) "Zippo" cigarette lighter, value about $2.00; and about ten thousand (10,000) francs, French currency, value about two hundred American dollars ($200.00), the property of Captain David B. Singerhoff.

Specification 3: In that * * *, did at Bergheim, France, on or about 21 March 1945, feloniously take, steal and carry away one (1) "Mauser" pistol, serial number 82695, value about $60.00, and one (1) brown leather holster, value about $10.00, the property of Chief Warrant Officer Floyd F. Newsom.

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

Specification: In that * * *, did, at Luneville, France, on or about 27 March 1945, wrongfully and in violation of the provisions of Letter AG 121 OpGA, Headquarters, European Theater of Operations, 23 September 1944, Subject: "Prohibition Against Circulating, Importing, or Exporting United States and British Currencies in Liberated and Occupied Areas and Certain Transactions Involving French Currency Except Through Official Channels", have in his possession eighty-seven dollars $87.00 in United States currency.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for ten years. The reviewing authority approved the sentence, designated the 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. Since accused is a civilian, the question whether he is a person subject to military law within the definition of such persons laid down in Article of War 2 immediately arises. The record of trial leaves no room for doubt on this score. It was stipulated by the Trial Judge Advocate, defense counsel and accused that the latter at the pertinent times was "a person accompanying and serving with the armies of the United States in the field in the European Theater of Operations, and is now and was at the time the offenses here involved are alleged to have been committed, subject to military law, within the meaning of the 2nd Article of War" (Pros.Ex.I). The evidence affirmatively supports the conclusions set forth in this stipulation. Thus, it is shown that accused was a technical observer employed by the Philco Corporation of America from which his compensation was derived (R17,52). Pursuant to contract between the corporation and the War Department, he was assigned to the European Theater of Operations on orders to be attached to a unit. He was under the jurisdiction of the Chief Signal Office in this theater and during the periods here involved was sent to various anti-aircraft units as a technical observer in connection with radar equipment (R17,18). The Philco Corporation was reimbursed by the War Department for sums paid to him by way of compensation and expenses (R52,53). He was issued an AGO card listing him as a technical observer with the assimilated rank of Major and bearing number N-002170 (R19). (See Circular 83 ETO, 27 July 1944, Par.4). At the time of the three larcenies charged herein, accused was actually quartered in the officers' billets of the anti-aircraft units to which the victims of the thefts belonged, and it was from these billets that the property in question was taken. At the time, hostilities in this theater had not ended and the units were stationed in or near areas of active military operations (R6,8,9,11, 14,20,24,29,63). On this state of facts, the decisions of the Board of Review and of the Federal Courts construing Article of War 2, make it abundantly clear that accused was a person either "accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States" or "in time of war * * * accompanying or serving with the armies of the United States in the field", and hence subject to military law under the provisions of that Article (see In Re di Bartolo, (SDNY 1943) 50 Fed. Supp.929; CM 280860 (1945) IV Bull. JAG 228).

4. With respect to the merits of the case, the record of trial is legally sufficient to sustain the findings of guilty reached by the court. Accused's confession which was received in evidence (Pros.Ex.5), admits the larceny of all the articles alleged to have been stolen in Specifications 1, 2 and 3, Charge I, as well as the possession of the United States currency described in the Specification of Charge II. Some question was raised relative to the voluntary character of the confession (R30-42), but the factual issue thus presented was one for the determination of the court whose findings will not be disturbed by the Board of Review in view

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of the substantial competent evidence supporting them (CM ETO 5805, Lewis and Sexton). The corpus delicti of the offenses charged was amply proved by evidence showing the loss by their owners of the articles in question at the times and places specified (R7,10,12,16), the recovery of certain of such articles from the possession of accused shortly thereafter (R20,23,42), and the possession by accused of $87 in United States Currency (R42,43). The value of the stolen property was stipulated (Pros.Ex.6). All elements of the offenses specified have therefore been proved by substantial competent evidence and the findings of guilty are accordingly supported by the record of trial.

5. The sentence includes forfeiture of all pay and allowances due or to become due (R72). Inasmuch as accused's compensation was not derived from the United States Government, this portion of the sentence is illegal and void (CM ETO 14632, Lang).

6. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for ten years.

7. Confinement in a penitentiary is authorized upon conviction of larceny of property of a value exceeding $50.00 by Article of War 42 and section 287, Federal Criminal Code (18 USCA 466). 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).

Leslie A. Daneker Judge Advocate

Marcus A. Meyer Jr. Judge Advocate

John R. Anderson Judge Advocate

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

BOARD OF REVIEW NO. 2

20 AUG 1945

CM ETO 15740

UNITED STATES	9TH INFANTRY DIVISION
v.	Trial by GCM, convened at Kothen, Germany, 3 May 1945. Sentence: Dismissal, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
First Lieutenant BOYD G. LOCKWOOD (O-1046181), Company H, 47th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that First Lieutenant Boyd G. Lockwood, Company H, 47th Infantry, did at Kalenborn, Germany, on or about 15 March 1945, desert the service of the United States with intent to avoid hazardous duty and shirk important service and did remain absent in desertion until he surrendered himself at Paris, France on or about 18 March 1945.

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

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All 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 the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the Prosecution:

On 14 March 1945, the accused, a First Lieutenant, reported for duty as a reinforcement officer to the 47th Infantry, and was assigned to Company H (R6,7). Company H was at that time engaged in active combat with the enemy in the vicinity of Kalenborn, Germany. The company commander assigned him as leader of the machine gun platoon, which was then reorganizing because of heavy casualties. He explained the combat situation to the accused and instructed him to take the platoon forward to the line and during the attack that was scheduled for the following morning to hold the platoon in position until the rifle companies had reached their objectives and then to go forward and take up a defensive position. An experienced lieutenant was sent along with the accused to help him get acquainted with the situation and with the men. The accused took the platoon into its position in the line and on the following day was last seen in that position as the rifle companies were moving forward. He was reported as missing in the late afternoon and upon search being made could not be found. The platoon during that entire day and for many days thereafter was in constant contact with the enemy (R8,9,11,16,17,19). The organization's morning report for 24 March 1945, showed the accused to be "Dy to AWOL. 15 Mar 45" (Pros.Ex.1). It was shown by stipulation that the accused voluntarily returned to military control at Paris, France, on 18 March 1945 (R20; Pros.Ex.2).

4. Evidence for the Defense:

The accused, after his rights as a witness were fully explained to him, elected to testify in his own behalf (R23). He described himself as an inexperienced and poorly educated youngster, his present age being 22 years, who after five years in the army and a record of failures in numerous training schools had never before had an infantry command even as small as a squad, and knew nothing of the organization or function of an infantry platoon. He therefore considered himself

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unfit for any infantry duty, but fit only for antiaircraft work in the coast artillery (R22-26,28,30). Finding himself in a position where he realized that the sergeant next in command could better fill the position, he became discouraged and left the organization with a Lieutenant Long of Company F, for Headquarters, European Theater of Operations, intending to obtain for himself an assignment which he might be capable of holding (R27).

5. Discussion:

The following elements of proof are necessary to establish guilt of deserting with intent to avoid hazardous duty: (1) that the accused was absent without leave; (2) that the accused, or his organization, was under orders or anticipated orders involving hazardous duty; (3) that the accused was notified, or otherwise informed, or had reason to believe, that his organization was about to engage in hazardous duty; (4) that at the time he absented himself he entertained the specific intent to avoid such hazardous duty (CM ETO 1921, King; CM ETO 2396, Pennington; CM ETO 5958, Perry).

The evidence for the prosecution and the admissions of the accused made during his testimony as a witness in his own behalf clearly established that the accused did, without authority, at the time and place alleged in the Specification, through fear and in order to avoid the hazards of his duty, shamefully desert and abandon his organization when it was actually engaged in the hazardous duty of combat in close contact with the enemy. The evidence was, therefore, legally sufficient to support the findings of guilt. Such conduct constitutes a violation of Article of War 58 (MCM, 1928, par.130a; CM ETO 4986, Lubino; CM ETO 7230, Magnanti).

6. The charge sheet shows the accused to be 22 years 7 months of age. He enlisted at St. Paul, Minnesota, on 7 February 1940, was appointed Second Lieutenant on 5 November 1942, promoted to First Lieutenant, 16 April 1943, and assigned as an infantry officer on 3 January 1945.

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. In the opinion of the Board of Review the record of trial was legally sufficient to support the findings and the sentence as confirmed.

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8. Desertion in time of war is punishable by death or such other punishment as a court-martial may direct (AW 58). Designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir.229, WD, June 1944, sec.II, pars. 1b(4),3b).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 20 AUG 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of First Lieutenant BOYD G. LOCKWOOD (O-1046181), Company H, 47th 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 15740. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15740).

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

(Sentence ordered executed. GCMO 369, USFET, 31 Aug 1945).

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Branch Office of The Judge Advocate General
with the
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BOARD OF REVIEW NO. 2

20 AUG 1945

CM ETO 15741

U N I T E D S T A T E S	)	9TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Kothen, Germany, 3 May 1945. Sentence: Dismissal, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
	)	
Second Lieutenant JED H. LONG (O-1329604), Company F, 47th 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 officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that 2nd Lieutenant Jed H. Long, Company "F", 47th Infantry, did at Kalenborn, Germany, on or about 15 March 1945, desert the service of the United States with intent to avoid hazardous duty and shirk important service and did remain absent in desertion until he surrendered himself at Paris, France on or about 18 March 1945.

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

3. Evidence for the Prosecution:

Substantial competent evidence of record shows that on 14 March 1945, the accused, a second lieutenant, reported for duty at or near Kalenborn, Germany, to the 47th Infantry, and was assigned to Company F as a platoon leader. The tactical situation of that company was explained to him, and he, thereupon, assumed command (R6-8,11-12). The following morning, in accordance with instructions issued by the company commander, the accused and his platoon participated in a successful advance against the enemy under heavy artillery fire. Casualties were sustained. The platoon took its objective and dug in to hold its position. It was then subjected to moderate artillery fire (R10-12,18). The accused was present with his platoon as late as noon that day when ordered to reorganize the position that was taken. Without authority he shortly thereafter disappeared and on search made could not be found (R8,10-11). On 18 March 1945, he appeared in Paris, France, where he voluntarily surrendered (R14; Pros.Ex.1).

4. Evidence for the Defense:

The accused elected to testify in his own behalf (R17). He admitted he was assigned as platoon leader of Company F of the 47th Infantry and that he participated in the attack against the enemy on the morning of 15 March 1945. The objective was taken and the platoon dug in to hold its position. They were subjected to heavy artillery fire which resulted in casualties. One shell landed six feet from the foxhole that he occupied and another shell, which proved to be a dud, landed in the foxhole. This was the first

time he had ever been under shell fire. About this time he met a Lieutenant B. G. Lockwood who persuaded him to leave his organization and go back with him to the European Theater of Operations Headquarters for reclassification. Not realizing what he was doing, and not informing anyone, he left without permission at a time when his company was in such close proximity to the enemy that they were exchanging artillery fire (R16-20). Lieutenant Lockwood corroborated the accused and admitted that he pursuaded him to accompany him to Paris for reassignment. He described the accused at that time to be helpless and willing to do anything that was suggested. The accused wanted to stop at the regimental headquarters but Lieutenant Lockwood told him that the proper procedure was to go to the European Theater of Operations Headquarters in Paris (R21-23).

5. Discussion:

The following elements of proof are necessary to establish guilt of deserting with intent to avoid hazardous duty: (1) that the accused was absent without leave; (2) that the accused, or his organization, was under orders or anticipated orders involving hazardous duty; (3) that the accused was notified, or otherwise informed, or had reason to believe, that his organization was about to engage in hazardous duty; (4) that at the time he absented himself he entertained the specific intent to avoid such hazardous duty (CM ETO 1921, King; CM ETO 2396, Pennington; CM ETO 5958, Perry).

The evidence for the prosecution and the admissions of the accused made during his testimony as a witness in his own behalf clearly established that the accused did, without authority, at the time and place alleged in the specification, through fear and in order to avoid the hazards of his duty, shamefully desert and abandon his organization when it was actually engaged in the hazardous duty of combat in close contact with the enemy. The evidence was, therefore, legally sufficient to support the findings of guilt. Such conduct constitutes a violation of Article of War 58 (MCM 1928, par.130a; CM ETO 4986, Lubino; CM ETO 7230, Magnanti).

6. The charge sheet shows accused to be 25 years and 7 months of age. He enlisted on 26 March 1942, and was commissioned second lieutenant, 27 December 1944.

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. In the opinion of the Board of Review, the record of trial is legally

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sufficient to support the findings and the sentence as confirmed.

8. Desertion in time of war is punishable by death or such other punishment as a court-martial may direct (AW 58). Designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper(AW 42; Cir.229, WD, June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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(341)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 20 AUG 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Second Lieutenant JED H. LONG (O-1329604), Company F, 47th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15741. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15741).

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

(Sentence ordered executed . GCMO 374, USFET, 1 Sept 1945).

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

BOARD OF REVIEW NO. 2

1 SEP 1945

CM ETO 15749

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
First Lieutenant DONALD E. SEDER (O-1287765), 341st Replacement Company, 65th Replacement Battalion, Ground Force Reinforcement Command.	Trial by GCM, convened at Ludgershall, Wiltshire, England, 21 April 1945. Sentence: To be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that First Lieutenant Donald E. Seder, 341st Replacement Company, 65th Replacement Battalion, Ground Force Reinforcement Command, did without proper leave, absent himself from his organization at Tidworth, Wiltshire, England, from about 4 February 1945 to about 18 February 1945.

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

Specification 1: (Findings disapproved by the confirming authority).

Specification 2: (Nolle prosequi).

Specification 3: (Findings disapproved by the confirming authority).

Specification 4: (Findings disapproved by the confirming authority).

Specification 5: (Findings disapproved by the confirming authority).

Specification 6: In that * * *, did at London, England, on or about 1 February 1945, present for payment, and obtain allowance and payment of same, a claim against the United States to Captain A. A. Abbott, Finance Department, an officer of the United States, duly authorized to pay such claims, in the amount of fifty dollars ($50.00), for service pay and allowances allegedly due him by the United States, which claim was false and fraudulent in that it was in excess of pay and allowances due him and then known by the said First Lieutenant Donald E. Seder to be false and fraudulent.

Specification 7: (Nolle prosequi).

Specification 8: In that * * *, did at London, England, on or about 3 February 1945, present for payment, and obtain allowance and payment of same, a claim against the United States to Captain A. A. Abbott, Finance Department, an officer of the United States, duly authorized to pay such claims, in the amount of one hundred and fifty dollars ($150.00), for service pay and allowances allegedly due him by the United States, which claim was false and fraudulent in that it was in excess of pay and allowances due him and then known by the said First Lieutenant Donald E. Seder to be false and fraudulent.

Specification 9: In that * * *, did at London, England, on or about 5 February 1945, present for payment, and obtain allowance and payment of same, a claim against the United States to Captain A. A. Abbott, Finance Department, an officer of the United States, duly authorized to pay such claims, in the amount of one hundred and fifty dollars ($150.00), for service pay and allowances allegedly due him by the

United States, which claim was false and fraudulent in that it was in excess of pay and allowances due him and then known by the said First Lieutenant Donald E. Seder to be false and fraudulent.

Specification 10: (Nolle prosequi).

Specification 11: In that * * *, did at London, England, on or about 7 February 1945, present for payment, and obtain allowance and payment of same, a claim against the United States to Captain A. A. Abbott, Finance Department, an officer of the United States, duly authorized to pay such claims, in the amount of one hundred and fifty dollars $150.00), for service pay and allowances allegedly due him by the United States, which claim was false and fraudulent in that it was in excess of pay and allowances due him and then known by the said First Lieutenant Donald E. Seder to be false and fraudulent.

Specification 12: In that * * *, did at London, England on or about 13 February 1945, present for payment, and obtain allowance and payment of same, a claim against the United States to Captain A. A. Abbott, Finance Department, an officer of the United States, duly authorized to pay such claims, in the amount of three hundred dollars ($300.00) for service pay and allowances allegedly due him by the United States, which claim was false and fraudulent in that it was in excess of pay and allowances due and then known by the said First Lieutenant Donald E. Seder to be false and fraudulent.

Specification 13: In that * * *, did, at London, England, on or about 14 February 1945, present for payment, and obtain allowance and payment of same, a claim against the United States to Captain A. A. Abbott, Finance Department, an officer of the United States duly authorized to pay such claims, in the amount of five hundred dollars ($500.00), for service pay and allowances allegedly due him by the United States, which claim was false and fraudulent in that it was in excess of pay and allowances due him and then known by the said First Lieutenant Donald E. Seder to be false and fraudulent.

Specification 14: In that * * *, did at London, England, on or about 17 February 1945, present for payment, and obtain allowance and payment of same, a claim against the United States to Captain A. A. Abbott, Finance Department, to an officer of the United

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States duly authorized to pay such claims, in the amount of one hundred and fifty dollars ($150.00) for service pay and allowances allegedly due him by the United States, which claim was false and fraudulent in that it was in excess of pay and allowances due him and then known by the said First Lieutenant Donald E. Seder to be false and fraudulent.

Specifications 2, 7 and 10, Charge II were withdrawn by direction of the appointing authority. He pleaded not guilty to, and was found guilty of, all the remaining specifications and the charges. 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 20 years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, disapproved of the findings of guilty of Specification 1, 3, 4 and 5 of Charge II, confirmed the sentence, reduced the period of confinement to five years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the Prosecution:

a. Charge I and its Specifications (AWOL from 4 Feb to 18 Feb. 1945). The morning reports of the accused's organization for 5 February and 21 February 1945 showed the accused absent without leave from 4 February 1945 to 18 February 1945 (Pros.Ex.I). His commanding officer instituted an unsuccessful search for him on 5 February 1945 (R9). He was apprehended at the London Finance Office on 18 February 1945 (R10).

b. Charge II and its Specifications The court took judicial notice of the Army Regulations pertaining to the pay and to the certificate of accounts by commissioned officers. With reference to those specifications of which the accused was found guilty and the finding was approved by the confirming authority there was introduced in evidence a stipulation (R11; Pros.Ex.2) dated 25 March 1945, wherein it was stipulated that the accused presented for payment to Captain A. A. Abbott, Finance Disbursing Officer of the Army of the United States at London, England, the following claims against the United States for pay and allowances, in the amounts, and on the dates as shown:

Specification	Date Presented	Amount
6	1 February 1945	$50.00
8	3 February 1945	150.00
9	5 February 1945	150.00
11	7 February 1945	150.00
12	13 February 1945	300.00
13	14 February 1945	500.00
14	17 February 1945	150.00

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It was also further stipulated that the accused is a First Lieutenant in the Army of the United States having completed three years of service and that he had received full payment for all pay and allowances due him through 31 December 1944. He also drew pay totalling $350.00 during January (R11;Pros.Ex.2).

Major A. A. Abbott testified that he as Finance Officer in the London, England, office had the authority to disburse funds of the United States and did on the dates appearing in the stipulation above disburse the amounts set forth therein to the accused in cash (R13-14).

4. Evidence for the Defense: The accused having been properly advised concerning his rights as a witness elected to testify in his own behalf (R14-15). He related his extensive military service in foreign countries since December of 1941 when he was an enlisted man in the Finance Department. He was commissioned a Second Lieutenant of Infantry on 15 June 1942, went overseas in October 1942, and took part in the invasion of Africa, served through the Tunisian campaign, in the invasion of Sicily where he was wounded, in the invasion of France and in combat through France, Belgium and into Germany. In October 1944 he was sent back to England because of a skin disease he picked up in Africa. There he was assigned to his present organization. He was given a 3 day leave which expired on 3 February 1945 and went to London where he started drinking heavily and gambling. He lost so much money that he went to the Finance Office and obtained money "which I knew at the time was not due me". He thought he could by gambling win back his losses and repay the Government. Instead, he lost again, so he continued to draw more money and to lose it. He knew he was "AWOL" after 3 February 1945 (R15-17). It was shown by stipulation that from 11 November 1944 to 9 January 1945 accused was a ward patient for a recurrent skin condition in a hospital in England and that during that time his conduct was good (R18).

5. Discussion:

a. Charge I (AWOL). The evidence for the prosecution shows, and the accused admits, that he was voluntarily absent without leave from his organization from 4 February 1945 until he was apprehended on 18 February 1945 as alleged in the Specification of Charge I. Such absence constitutes a violation of Article of War 61. (MCM 1928, par.132 p.145)

b. Charge II and its specifications: (Fraudulent claims against the United States). With reference to those specifications of this charge of which the accused was found guilty and the findings were approved by the confirming authority (Specification 6,8,9,11-14, inclusive) the stipulation entered into by the accused and admitted in evidence established as a fact that on various days during February 1945 at London, England, the accused, a First Lieutenant, presented to the local Finance Officer seven claims against the United States for his alleged services in the amounts appearing in the stipulation, totalling $1450 and as a result collected that amount in cash. It was shown without contradiction that the local Finance Officer had authority to pay claims of that nature and did pay the accused. The

accused admitted that he was not entitled to receive the sums that he collected in the manner described during February 1945. From this admission it may properly be inferred that he knew his claims were false and that therefore they were fraudulent. All of the elements of proof necessary to support the findings of guilty of the offenses charged were therefore proven by substantial evidence of record. Those elements are listed in MCM, 1928, par.150b, p.182, as follows:

> "Proof. - (a) That the accused presented or caused to be presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States as alleged; (b) that such claim was false or fraudulent in the particulars alleged; (c) that when the accused presented the claim or caused it to be presented he knew it was false or fraudulent in such particulars; and (d) the amount involved, as alleged".

It is noted that the findings of guilty of Specification 1, 3, 4 and 5 were disapproved by the confirming authority upon the recommendation of the Theater Staff Judge Advocate for the reason that in January 1945 when the accused presented and collected these four claims totalling $350 the prosecution failed to show that he was not entitled to that sum and that therefore the claims were not shown to be false. No doubt it was intended to set forth in the stipulation (Pros.Ex.2) that on 31 December 1944 the accused was paid in full for all service pay and allowances due him up to and including that date. The stipulation, however, failed to set that forth. It is dated 25 March 1945 and merely states that on that date he had been paid to and including 31 December 1944. As pointed out in the Staff Judge Advocate's Review the findings now under review are sustained only because of the accused's admission on the stand that he was not entitled to receive the money for which he presented claims during February. Army Regulations of which the court could and did take judicial notice support this admission (AR 35-1420, par.3a; AR 35-1360, par.7a). From them it may properly be deduced that a First Lieutenant in an AWOL status, if not entitled to pay on 1 February 1945, would not be entitled to any pay during the remainder of the month as long as he continued to be in an AWOL status (CM ETO 15154, Sohn).

6. The charge sheet shows that accused is 22 years and three months of age. He was inducted 22 June 1940 and commissioned 15 July 1942 at San Juan, Puerto Rico.

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

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8. Conviction of an offense under Article of War 94 shall be punished by a fine or imprisonment or by such other punishment as a court-martial may adjudge. Confinement in a penitentiary is authorized upon conviction of the crime of knowingly presenting a false claim against the Government of the United States by Article of War 42 and section 35 (amended), Federal Criminal Code (18 USCA 80). As accused is less than 25 years of age and the sentence as reduced is for not more than ten years, the place of confinement should be changed to the Federal Reformatory, Chillicothe, Ohio (Cir.229, WD, 8 June 1944, sec.II, pars. 1a(1), 3a, as amended by Cir.25, WD, 22 Jan.1945).

Edward Burchstein Judge Advocate

Charles Stephens Judge Advocate

Ronald D. Miller Judge Advocate

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RESTRICTED

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 1 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of First Lieutenant DONALD E. SEDER (O-1287765), 341st Replacement Company, 65th Replacement Battalion, Ground Force Reinforcement Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. In accordance with the authority cited in the Board of Review holding, the place of confinement should be changed to the Federal Reformatory, Chillicothe, Ohio. This may be done in the published general court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15749. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15749).

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

(Sentence ordered executed. GCMO 403, USFET, 11 Sept 1945).

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

BOARD OF REVIEW NO. 3

18 AUG 1945

CM ETO 15756

UNITED STATES	)	20TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Prien, Germany, 22 May 1945. Sentence: Dismissal
	)	
First Lieutenant EMMET SEIBELS (O-1011539), Headquarters 9th Tank Battalion.	)	

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

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that First Lieutenant EMMET SEIBELS, Headquarters 9th Tank Battalion, was, at Willanzheim, Germany, on or about 24 April 1945, found drunk while on duty as Battalion Adjutant.

He pleaded not guilty and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed from the service. The reviewing authority, the Commanding General, 20th Armored Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, though characterizing it as inadequate punishment for an officer guilty of such a grave offense, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 23 April 1945 accused's battalion, which was in bivouac near Willanzheim, Germany, was

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alerted to move forward on a combat mission across the Danube River (R10,17-18). Accused was battalion adjutant and billeting officer. At approximately 1600 hours he was instructed by the battalion S-3, Major Harold S. Spitzer, to be prepared, on orders from "Combat Command A", to assemble and move out with a billeting party composed of two men from each company (R13,17-18). At 1800 hours accused told Captain John W. Heydel that he would be at the command post tent at 2000 hours "waiting for a call for the billeting alert" (R12). At about 2000 hours accused was present at the command post, and at about 2100 hours he assisted in sorting and arranging some mail. When Captain Heydel, who was duty officer, retired at about 2215 hours, accused was sober (R7). Between midnight and 0200 hours accused and a sergeant made some hot bouillon and Captains Heydel and Perkins drank some with them (R7,14). At that time Captain Heydel smelled liquor in the tent and knew there was some cognac in a canteen or canteen cup which accused offered to those present (R7,14). He thought accused "talked in a louder voice" than usual for him (R8). Captain Perkins, who remained in the tent only 15 or 20 minutes, noticed that accused's voice was "a bit thick", but did not believe he had been drinking "enough to cause me any discomfort or concern" (R14).

At about 0230 hours accused fell asleep in a chair in the command post tent. Captain Heydel and the duty sergeant shook him but were unable to awaken him. According to Captain Heydel,

> "he was in such a condition that I couldn't awaken him or make sense out of him. He had no reaction to my shaking. * * * He couldn't open his eyes or see anything. I knew what was wrong. Having known how he gets I recognized it right away. * * * He was I'd say intoxicated. He didn't say anything. He couldn't stand on his own two feet" (R8-9).

Having unsuccessfully attempted to move accused to his cot about 50 feet from the command post tent, Captain Heydel and the duty sergeant placed him on a cot in the tent (R9). At 0515 hours they awakened him and stood him up. He "was a little better" but "a little nasty with his language" (R9). Also, "He had failed to get up during the night to go to the latrine and consequently he was wet from his waist to his knees" (R9). Major Spitzer, who was awakened by "loud speaking and swearing", went to the command post tent and found Captain Heydel and the sergeant trying to get accused out of the tent. Major Spitzer testified that accused was drunk, and that

> "His appearance was that of an individual who was apparently out of control of himself and didn't know what he was doing. He could not stand up or walk. There was an odor of liquor on his breath. * * * I told Lieutenant Seibels

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to go on out and go to bed. He told me to go 'fuck' myself" (R17).

Captain Heydel and the duty sergeant got accused outside the tent and he "started shouting at the top of his voice". They "half dragged and half carried" him down the road, and when they got about ten feet from his cot, according to Captain Heydel, Major Spitzer ordered accused "to shut up". Accused said, "'I'm sorry, sir' and turned around and started shouting again". Captain Heydel then threw him bodily onto his cot and walked away, but accused was up again within 20 to 25 minutes, and was returned to his cot by Major Kelly (R9-10,14).

Major Spitzer testified that the billeting party was still on the alert until 0700 or 0800 on 24 April (R19). At about 0800 or 0900 hours accused walked into the command post tent but "was still very pale and looked like he was ill", so Major Spitzer told him to go back to bed, which he did (R17-18). Between 0900 and 1000 hours, according to Captains Heydel and Perkins, accused attended a meeting at the command post, at which time he was dressed in clean clothing and seemed normal "but had the appearance of a person who has had a very bad night of drinking" (R10-11,14).

4. For the defense, Captain David A. Pitkethy testified that accused came to his command post and talked intelligently between 0830 and 0900 hours on 24 April. At about 1100 hours accused attended a meeting with the witness, and seemed at that time in possession of his physical and mental faculties (R21). Captain Archie Jamieson testified that accused was a superior officer for a period of six monthss during which he served as platoon leader under command of the witness. Accused had a wide technical knowledge and an ability to handle men and make them like him at the same time, and the witness would "take him in any company I command" (R23-24).

After his rights were explained to him accused elected to testify (R25). His father is a rear admiral and his brother a full lieutenant in the navy. During the morning of 23 April the battalion executive sent him a message that the billeting party probably would be called for and that he should pack his things. The billeting party never reported to him, and he made inquiries about it of the executive officer and battalion S-3. They knew nothing about it and said there might not be a billeting party because the move might be tactical. They had expected the battalion to move at 0600 hours on 24 April, and this would require his billeting party to move at 0300 hours. He waited around the battalion command post trying to keep warm, and shortly after Major Spitzer retired, a message came in by telephone from "Combat Command A" stating that the movement time was postponed from "the hour previously mentioned plus six", which meant to him 1200 hours the next day. He was not on duty when the message was received and did not know which of three non-commissioned officers then present received it. He did not drink anything prior to re-

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ceipt of the message and was sober and rational the following morning at 0830 hours, although he felt very bad. He was capable of performing his duties "long before 1200" (R26-29).

A copy of the "G-3 Periodic Report" of the division for 23 and 24 April, introduced in evidence, showed that the front lines were not in contact and that "Combat Command A" moved to an initial assembly area in the vicinity of Feutchwagen "prepared to advance in zone following day" (R24-25, Def.Ex.1). It was stipulated that at 1200 hours on 23 April, the 20th Armored Division was placed under the Seventh Army from the Third Army (R30).

5. After the prosecution and defense had rested their cases, the court recalled Major Spitzer who testified that "all officers are on duty subject to call to duty any time the unit is in the field" (R31). Master Sergeant George W. Wence testified that as the duty sergeant on the night of 23 April from 2100 to 0100 hours, he received various messages from higher headquarters but he did not recall any message to the effect that the alert for movement of the battalion had been postponed for some six hours. The enlisted man who followed him as charge of quarters that night was no longer present with the battalion. The enlisted charge of quarters was required to remain awake and the duty officer was required to be present fully dressed (R32-33). Lieutenant Colonel Ward R. Strong testified that on the night of 23 April the battalion "had been given information that we would move early in the morning". So far as he knew there was no change in the order, although the battalion actually moved several hours later than it was originally scheduled to leave (R34-35).

6. Compelling and competent testimony shows that accused was so grossly drunk for a period of several hours after 0200 hours on 24 April that he was mentally and physically incapable of performing military duty. Indeed, he did not deny being drunk, but testified in effect that because the time originally set for movement of the battalion at 0600 hours on 24 April was extended for six hours before he began drinking, he was not drunk on duty. The evidence shows that at the time he became drunk, the battalion of which he was adjutant was deep inside enemy territory and was alerted for an expected combat mission which would involve a crossing of the Danube River. As adjutant he was also billeting officer and had received instructions and packed his equipment preparatory to moving out with his party in advance of the rest of the battalion. Shortly before he became drunk he was waiting for a call on the billeting alert at the battalion command post. Aside from his testimony there is no evidence that the call was ever received or the original alert cancelled.

> "In time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of [Article of War 85]" (MCM 1928, par.145, p.160).

Considering all the circumstances it is too clear for argument that accused was drunk while on duty in violation of Article of War 85 as charged (see CM ETO 11903, Wofford; Winthrop's Military Law and Precedents (Reprint, 1920), p.614).

7. The charge sheet shows that accused is 33 years and 11 months of age, was inducted into the army 3 March 1941, was commissioned a second lieutenant 25 July 1942, and was promoted to first lieutenant 4 June 1943. No prior service is shown. All members of the court signed a recommendation for clemency requesting suspension of the sentence if approved.

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 mandatory upon conviction of an offense in violation of Article of War 85 when committed by an officer during time of war.

B R Sleeper Judge Advocate

(ON LEAVE) Judge Advocate

E. L. Levy Judge Advocate

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(356)

1st Ind.

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

1. In the case of First Lieutenant EMMET SEIBELS(O-1011539), Headquarters 9th Tank Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence..

2. When copies of the 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 15756. For convenience of reference, please place that number in brackets at the end of the order (CM ETO 15756).

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

(Sentence ordered executed. GCMO 377, USFET, 1 Sept 1945).

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

BOARD OF REVIEW NO. 3

5 OCT 1945

CM ETO 15768

U N I T E D S T A T E S	)	IX AIR FORCE SERVICE COMMAND
	)	
v.	)	Trial by GCM, convened at Headquarters, 1st Tactical Air Force Service Wing, APO 149, U. S. Army, 13, 14 July 1945. Sentence as to each: Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Privates MAJOR WASHINGTON (37067532), JOE D. DUNBAR (14014620), and JOHN L. SPEIGHT (34743409), all of the 1994th Quartermaster Truck Company, 310th Service Group	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Major Washington, Private Joe D. Dunbar, and Private John L. Speight, all of the 1994th Quartermaster Truck Company, 310th Service Group, acting jointly and in pursuance of a common intent, did at Altrip, Germany on or about 25 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Marga Schneider, a female child of 14 years, 4 months.

Specification 2: (Identical with Specification 1).

Specification 3: (Identical with Specifications 1 and 2).

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Specification 4: In that * * *, acting jointly and in pursuance of a common intent, did at Waldsee, Germany, on or about 25 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Toni Dattge, a female child of the age of 15 years, 11 months.

Specification 5: (Identical with Specification 4).

Specification 6: (Identical with Specifications 4 and 5).

Each pleaded not guilty. Three-fourths of the members of the court present at the time the votes were taken concurring in each finding of guilty, Washington was found not guilty of Specification 2 but guilty of the lesser included offense thereunder of assault with intent to commit rape in violation of Article of War 93, not guilty of Specifications 1, 3 and 5, guilty of Specifications 4 and 6 and of the Charge; Dunbar was found not guilty of Specifications 1,2 and 6, guilty of Specifications 3,4 and 5 and of the Charge; Speight was found not guilty of Specification 1 but guilty of the lesser included offense thereunder of assault with intent to commit rape in violation of Article of War 93, not guilty of Specifications 2,3,5 and 6, guilty of Specification 4 and of the Charge. As to Speight, evidence was introduced of two previous convictions by summary court for an absence without leave of hours and for speeding in violation of Articles of War 61 and 96. As to Washington and Dunbar, no evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. As to each, the reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for prosecution:

Between 1700 and 1800 hours, 25 April 1945, as Marga Schneider, 14 years of age, was about to enter the yard of her home at Altrip on the Rhine (R21) the three accused came up the street and followed her into the yard (R21-22,30-31). They were armed. Perplexed, she stopped (R34). Her family was not at home (R22,32). Thinking accused were about to leave, she entered her home in order to get away from them, but they followed her in (R30-31) and Speight motioned for her to go upstairs. When she refused he held the rifle at her chin whereupon she went upstairs and he followed (R22). Upstairs he motioned for her to open the shutters. She did (R22) but made no attempt to cry out (R31). Then he motioned for her to close the shutters. When she refused he again threatened her with his rifle and she complied (R23).

Then "he motioned * * * with his finger to the floor and said, 'Fig, fig'" but she remained standing. He pointed the rifle at her chest, pulled up her skirt and pulled down her pants. She permitted this because "he threatened me a few times with the rifle and I thought he would shoot me". He opened his trousers and tried "to get" his penis into her sexual organs (R23). She did not think that he succeeded (R23-24,28). He then led her by the arm to the next room, "threw" her to the floor, and "tried again" to get his penis into her sexual organs (R24). She did not know whether he succeeded (R28) but "it was close contact" (R25). She did not struggle (R31). Without being called (R35), Washington then entered and spoke with Speight who got up, took his rifle (R25) and went to the door. Washington then laid upon her and tried to insert his penis in her sexual organs (R25). She did not struggle (R31) or resist because "I did not have enough power" (R27). She did not think that he succeeded in penetrating her (R25,28). Without being called (R35), Dunbar then entered and spoke with Washington who took his rifle from the floor. Dunbar then laid upon her and "was trying to get his penis" into her sexual organs (R26). She did not resist. She wanted to cry out "but I could not get a tune out of my lips" (R28). Although she was not certain that Dunbar penetrated her (R28), he was making "back and forth motions" upon her (R26), and she felt a pain (R26,28) "on the vagina" (R29). A soldier came to the door and spoke to Dunbar who took his rifle and went to the door. "They all went down" but she remained upstairs (R26). Within an hour after the soldiers left she was examined by Dr. Theodore Horn (R27).

She further testified that she, in no manner, invited and, at no time, was willing for any of accused to have intercourse with her (R28). While she did not try to strike accused, she refused to obey their first orders (R29). None of accused tried to insert a finger in her sexual organs (R32). The next evening she identified Washington but was unable to identify Speight or Dunbar. However, she did identify them two days later (R32-33). She had been a member of the Young Girls' Bund Organization (R28).

Dr. Horn testified that about 1730 hours on 25 April 1945, he was called to Marga's home. At that time "She was all excited with tears in her eyes". Upon examining her sexual organs, he saw blood just outside the hymen which, though not broken, was somewhat cracked. "The blood was still fresh, which must have come from little breaks or scratches on both sides of the hymen". On the inner parts of the lips "was a gluey substance * * * like human semen * * * from such as a human penis" (R19-20). Professor Doctor Kline testified that he examined Marga on 26 April 1945. His examination revealed "a fresh wound on the sexual organs of Marga Schneider, the hymen had been completely bursted" (R14). "It is possible that the wounds were caused by finger nails, but it also may have been caused by the penis. * * * It looked as if a scratch made by hand" (R16).

Each accused made a pre-trial statement to agents of the Criminal Investigation Division and these statements were introduced into evidence over objection (R49-79; Pros.Exs.1,2,3). Each in his statement admitted coming with the other two to a small village. In his statement Speight said, inter alia:

> "There was a little German girl at the gate. I pointed upstairs at this house and told her to go upstairs * * *. After taking the girl upstairs I told her to lie on the floor. She started crying. I shouted at her to lie on the floor and she did. I put my carbine on the floor and then told her to pull her drawers off. She kept on crying and then I pulled her drawers off. I then tried to have intercourse with her but she was too small" (Pros.Ex.3).

In his statement Washington stated they had been drinking. They stopped in front of a house that looked like a cafe. First Speight entered and was soon followed by Dunbar. When Washington entered he found Speight on a girl, and when Speight got up Dunbar got on the girl. When Dunbar finished, Washington tried to have intercourse with her but was unable because he could not have an erection (Pros.Ex.1).

Dunbar in his statement said that Speight and Washington entered first and "took a little German girl upstairs. She was hollering and I told them that I was going to get the MPs", whereupon the other soldiers threatened him. He went upstairs. Speight was on the girl and "she was hollering a little". Then Washington got on her whereupon Dunbar returned downstairs. Later he decided he might as well "knock off a piece" so he went upstairs as Washington came down. "I went in and got on the girl and after putting my peter into her, my manhood shamed me out and I did not finish". He returned to the truck (Pros.Ex.2).

Having driven off in the truck, the three accused came upon two girls in a field near a forest (Pros.Exs.1,2,3). These girls were Toni Dattge, 15 years, 11 months of age, and her sister, Anni. They were in a field cutting grass for their rabbits and nearby Josef Zimmerman was cutting wood (R35-36,79,83). Upon seeing the three accused emerge from the woods the girls ran to Zimmerman. When accused returned to the woods the girls started to run away but accused reappeared from the woods and beckoned to them (R36-37,80,84). When the girls continued on their way, one accused fired and the girls stopped (R37,80). Speight grabbed and, despite her struggles and cries, dragged Toni into the woods. While so doing he hit her with a carbine. Washington grabbed Anni but, after struggling with her for a while, left her and went into the woods. Dunbar knelt near Herr Zimmerman with his gun in a ready position but later he too went into the woods (R37-39,80-82,83-84). Shots were fired during the struggle (R37,84).

In the woods, Speight motioned for Toni to lie down. When she failed to do so, he knocked her down with his fist. Then he motioned for her to pull down her panties (R39). When she failed to do so, he pointed his gun at her whereupon she complied with his demand. He then removed her panties completely and motioned for her to spread her legs. She resisted but he spread them with his elbows and forced his penis into her sexual organs. While he was having intercourse with her (R40), Washington and Dunbar were two or three feet away looking at them (R46). When Speight got up she sat up and "felt that there was some liquid around" her sexual organ (R40-41). Then Washington came and "pointed the gun" at her and she "had to lay down again". She "tried to put up a resistance" but he pushed her legs apart and put his penis in her sexual organ (R41-42). When he finished Dunbar came up, laid down his rifle and forced his penis into her sexual organs despite the fact that she "again put up a resistance". Having finished, one of the soldiers offered her a chocolate bar which she refused. They then left (R42) and she reported the matter to Zimmerman and her sister (R43) who testified that she was dishevelled, muddy and crying (R81,84). The same day she complained to the American police (R43). Toni and Anni had been members of the Bund Deutches Madel (R44,85); Mr. Zimmerman had been "in the Party" (R83).

On 17 May 1945 Professor Dr. Kline examined Toni. He could only testify that she "had once upon a time sexual intercourse with a man" but was unable to say whether it was lately (R14-16).

In his pre-trial statement, Speight told of stopping the truck upon seeing two girls in the field. He talked to one, offered her some chocolate and told her "fig, fig". She said "OK" but when

> "she saw her sister break and run, screaming from Washington, she then wanted to leave but I grabbed her and carried her into the woods. She started crying and I told her to hush * * *. She continued to cry. I caught her by the hand and carried her into the bushes. I then told her to lie down. I had my carbine in one hand and her by the other, * * *. I told her to lie down again. She lied down. She took her pants off and I pulled her dress up and then I had intercourse with her. She only screamed twice" (Pros.Ex.3).

Washington stated that while they were chasing a deer they came upon the two girls. When one started "hollering", he released her. By that time Speight had taken the other girl into the woods. When Speight and Dunbar had finished, he got on top of her and "after getting my peter into her, which was not hard * * * I took it out" and departed for camp (Pros.Ex.1).

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Dunbar stated that two girls were seen in the field. Washington and Speight ran to the girls who screamed and ran off. Speight and Washington fired some shots. Dunbar tried to make them leave the girls alone but they carried one into the woods. Washington and Speight threatened him if he did not have intercourse with her so he "got on the girl and after getting my peter in her, I again saw my manhood would not let me get through with the act". He got off the girl and, with Speight and Washington returned to camp (Pros.Ex.2).

In his statement each accused stated that he regretted that the incidents hadoccurred. Washington attributed his conduct to the fact that he had been drinking; Dunbar to the evil influence of the other two (Pros.Exs.1,2,3).

4. Evidence for defense:

After his rights as a witness were explained to him (R86), each accused elected to testify.

Speight admitted seeing Marga Schneider on the day and place in question. They entered the house in search of something to drink. When they went upstairs she followed them and he said "fig, fig" to her. She said nothing but pulled up her dress whereupon he tried to have intercourse with her but could not. He then had her get on the floor but again he was unable to effect a penetration. He left her with Washington (R87,89).

Washington testified that when he entered the Schneider house, Speight had gone upstairs. He went upstairs and saw there was a girl. When asked what he was doing Speight replied, "Getting a little piece". When Speight came out of the room he entered and said "fig fig" to the girl. Thinking "it was OK since she did not get up but lay there", he got down and tried to penetrate her without success. He got up and left, whereupon Dunbar went up (R95).

Dunbar testified that Speight and Washington went into the house first. After each had come from the room where the girl was, he entered the room. "She was laying there with her legs open, so I got on her and my peter did not get hard. I tried and had to get off cause I couldn't get in it" (R99).

The three then departed and after a time started hunting a deer (R87,95,99). According to Speight they saw two girls and he went up to one and Washington and Dunbar to the other. He said "fig fig" to the girl but she refused whereupon he offered her chocolate and she said "OK". Within a few minutes he heard shots. He "took this girl into the woods and knocked off my piece". Then he went into the woods. He did not know what Washington and Dunbar did. Later they left together.

Washington testified to catching the other girl by the arm and asking her to go deer hunting. She refused. Then he heard a shot

and thinking that Dunbar had "jumped" the deer he went into the woods. He went up to Speight and saw that he was on a girl. When Speight got up he got on the girl but was unable to accomplish a penetration because his penis was soft. He got up and Dunbar went over to the girl (R95).

Dunbar testified that while looking for deer, he came upon Speight getting off a girl. Washington then got on her. When Washington got off, he got on the girl but was unable to penetrate her because his penis would not get hard (R99).

Each accused denied saying many things contained in their pre-trial statements but admitted signing the statements (R89-90,96-97, 101). Speight stated the "CID" agents would not listen to him so he told them to put down what they wanted (R88). He was not allowed to read the statement and was promised he would not be prosecuted if he signed the statement. However, he admitted being told he did not have to make a statement (R67-70). Washington said he was quite sleepy when he signed his statement (R96). Speight and Washington claimed they were being "framed" by the witnesses — Speight apparently because their testimony was in harmony (R88), and Washington apparently because the witnesses had not at first recognized him (R95).

5. a. It does not appear in the list of those present when the court convened that either the prosecution or defense personnel named in the convening order were present. However, it appears that a trial judge advocate and an assistant trial judge advocate were sworn and that a trial judge advocate acted and performed the usual duties of that office throughout the trial. It further appears that the record of trial is authenticated by an officer, as trial judge advocate, who has the same name and rank of the trial judge advocate appointed by the convening authority. It may be reasonably assumed that the officer named in the convening order is the officer who authenticated the record of trial and who also was sworn and acted as trial judge advocate (CM 127547(1919), Dig. Op.1912-40, sec.395(54), p.235).

At the beginning of trial a person referred to as the defense counsel stated that accused wished to be represented by regularly appointed counsel. Throughout trial accused were defended by a defense counsel and the record of trial is signed, as having been examined, by a defense counsel. However, his signature is illegible other than that it appears to be the signature of a captain of the air corps. Such was the grade and branch of the regularly appointed defense counsel. Moreover, throughout the trial accused acquiesced in their representation by defense counsel whose conduct of the case appears to have been able and vigorous. Furthermore, the trial judge advocate and the president of the court authenticated the record of trial as having been examined and signed by the defense counsel. Under the circumstances, it is reasonable to say that the defense counsel who defended accused was satisfactory to them and that he examined the record prior to its authentication. No substantial rights of the accused were impaired by the failure of the record of trial to show,

in legible form, the name of the defense counsel.

b. Defense moved for a severance on the ground that the defense of one might be antagonistic to the defense of the others. Asked how he arrived at that, defense counsel stated, "That remains to be seen after all the evidence of the prosecution is in". When the prosecution rested, defense did not renew its motion. No abuse of judicial discretion resulted from the denial of the motion (CM ETO 3147, Gayles et al; CM ETO 4294, Davis et al; CM ETO 8234, Young et al). It does not appear from the evidence that their defenses were in fact antagonistic in any material respect (cf: CM NATO 1242, 3 Bull. JAG 62). Each accused admitted to his presence at the times and places alleged and to having, or attempting to have, intercourse with each prosecutrix.

c. Defense's motion to strike Specifications 2, 3, 5 and 6 on the grounds of multiplicity was properly overruled. Accused were jointly charged with six rapes. Prosecution attempted to prove six rapes, two by each of the three accused as principals aided and abetted by the other two. Each of the six alleged acts of carnal knowledge was, if proved, a separate and distinct offense. While two or more "persons cannot be jointly guilty of perpetrating a single joint rape * * * all persons present aiding and abetting * * * are guilty as principals equally with the actual perpetrators" (CM NATO 643, 3 Bull. JAG 62; see also CM ETO 11683, Beal et al). Thus, if the evidence and the court had sustained prosecution's theory of the case, each accused could have been convicted of each of the alleged offenses as charged.

d. Speight took the stand in denial of his pre-trial statement having been made voluntarily (R46-70). All pre-trial statements were introduced over objection (R52,53,59,75). The voluntary or involuntary character of a confession is a question of law to be determined from the facts adduced in the particular case (CM 252086, Kissell, 33 BR 331,342). Prosecution presented evidence which, if believed, established that the pre-trial statements were voluntarily made (R49-66,71-75). Substantial evidence supports the law member's ruling in admitting them.

In connection with prosecution's evidence in support of the voluntary nature of the pre-trial statements, it is to be noted that the assistant trial judge advocate testified that Speight voluntarily reaffirmed his pre-trial statement to him as investigating officer (R73-75). The Board finds no error in permitting him to testify — either because he was assistant trial judge advocate (cf: CM 224549, Sykes, 14 BR.159; CM 228507, Noon, 16 BR. 191) or had been investigating officer (cf: MCM, 1928, par.114b, p.117).

It is further to be noted that each accused's pre-trial statement tended to incriminate the other two accused. As set out in this holding, each pre-trial statement has been shorn of matters incriminating the other two insofar as was consistent with meaning. As to each pre-trial statement the court was carefully and properly instructed it was to be considered only as evidence against its maker (R53,56,59,75).

6. a. Specifications 1, 2 and 3:

Prosecution's evidence discloses that the three accused followed Marga Schneider, a 14 year old girl, into her home. Within, Speight forced her to go upstairs at the point of a rifle and, again at the point of a rifle, forced her to submit to his attempt at sexual intercourse. Unbidden, Washington entered the room while Speight was trying to have sexual intercourse. When Speight departed Washington tried to have intercourse with her. While he was so doing, Dunbar, likewise unbidden, entered and, after Washington departed, tried to have intercourse with her. Although she made no resistance, other than, at first, refusing to obey Speight's orders, the court was justified in concluding that she, a girl of tender years, was intimidated by Speight's threats with his rifle and that Washington and Dunbar knowingly exploited the fear that had been engendered by Speight, and even contributed thereto by entering the room under the circumstances shown. Substantial evidence supports the findings. "Among the lesser offenses which may be included in that of rape" is "an assault with intent to commit rape" (MCM, 1928, par.148b, p.165; CM ETO 15902, Mariano). Penetration by Dunbar was sufficiently established by the testimony of prosecutrix and the two physicians and by Dunbar's pre-trial admission (see CM ETO 611, Porter).

b. Specifications 4, 5 and 6:

The testimony of Toni Dattge constitutes full and complete proof of the findings of which accused were found guilty. Corroborating her testimony was the testimony of her sister, Anni, and Mr. Zimmerman, as well as accused's pre-trial admissions (CM ETO 3740, Sanders et al; CM ETO 3933, Ferguson et al).

7. The charge sheets show that Washington is 22 years six months of age and was inducted, without prior service, 1 July 1941, at Camp Joseph T. Robinson, Arkansas; Speight is 21 years five months of age and was inducted, without prior service, 9 March 1943 at Fort Benning, Georgia; and that Dunbar is 23 years of age and enlisted without prior service, 27 August 1940, at Barksdale Field, Louisiana.

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

9. The penalty for rape is death or life imprisonment as the court-martial may direct (Article of War 92). Confinement in a United States Penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code

(18 USCA 457,567); also upon conviction of assault with intent to commit rape by Article of War 42 and Section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, par.1b(4),3b).

B K Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. H. Clegg Jr. Judge Advocate

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

BOARD OF REVIEW NO. 3

21 SEP 1945

CM ETO 15772

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private JOHN H. ARNOLD (34753003), 558th Motor Ambulance Company, 428th Medical Battalion	Trial by GCM, convened at Fulda, Germany, 31 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private John H. Arnold, 558th Motor Ambulance Company, 428th Medical Battalion, did, at Merseburg, Germany, on or about 7 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Stefani Brus.

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 applying to his own use a government vehicle in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General,

Advance Section, Communications Zone, European Theater of Operations, approved the sentence but recommended that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that during the night of 6 May 1945, accused and two other soldiers went to a dance held at a displaced persons' camp in Merseburg, Germany. At about 2330 or 2345 hours, accused left the dance upon learning that it was "off limits" to soldiers (R11,19,27).

Later that night, between 0100 and 0240 hours, a colored soldier, subsequently identified as accused, broke a window and without permission entered a room occupied by prosecutrix, Stefani Brus, a single Polish woman 27 years of age, and a male civilian named Stanislow Druciarek, in one of the barracks of the misplaced persons' camp (R29-32,34,36). Upon hearing the noise, Druciarek left the room through a hole in the wall (R35). Accused struck matches, the room being dark, and began a search of the room. Stefani, who had on a skirt, blouse, sweater and panties, cried out for help, and called, "Mr. Grzech, help black" (R9,31). As accused approached her, she picked up some scissors from a table. He took them from her, "poked" her in the back with them, and laid them on the table, whereupon she hid them. "he unbuttoned himself" and started to undress her. He then grabbed her "with madness" and threw her on the bed. She screamed and yelled, but he grabbed her by the throat and squeezed the breath from her so she could not do so any longer (R31,36). Holding one hand around her throat, which she tried to pull away, he pulled off her panties, put his private parts into hers and had intercourse with her without her consent (R31-32,58). After three or four minutes, two American soldiers came to the room with Mr. Grzech, who had summoned them. Not hearing anything, they called out, and then heard a woman yelling. Grzech opened the door by reaching through the broken window (R9-12). Accused jumped up from the bed and Stefani turned on the lights (R31). As the soldiers entered the room, accused was standing up fastening his belt. His pants were open in front. Stefani's blouse was open in front, and she was crying and trembling with her hands over her face. Her hair was "slightly messed up" and she had "reddish marks" on her neck (R12-13,18,21). A pair of ladies' pants lay on the floor by the bed. Broken glass lay underneath the window (R14,23). Accused told

the soldiers that he heard the girl screaming and came to the door, and she asked him to stay (R29). She told them immediately that accused had intercourse with her (R60).

4. After being advised of his rights, accused elected to testify (R43). He is from North Carolina, is married and has children, and has two brothers in the service. During the evening of 6 May, he and another soldier went to the displaced persons' camp to try to negotiate for some liquor. They later tried to get some "frauleens", and went to a dance, which they left after being advised that it was "off limits" (R43-45). Accused went alone to the home of some Frenchmen to see about the liquor, and a short time later started back to camp, when he heard a woman screaming, and also a man's voice. Thinking his friends were in a "fuss", he went to the door and knocked and said, "I am a military soldier" (R45-46,50). Stefani opened the door and asked him in. The lights were on. She asked for chocolate, and said, "You comrade". He gave her a cigarette which she accepted. She caught him by the arm and sat down on the bed. About 7 or 8 minutes after he entered the room, while he was still standing with his raincoat on, which he had not removed, the soldiers knocked on the door. He opened the door and let them in, and told them about coming there upon hearing the screaming (R46-47,50,54). Stefani was not crying, and his pants were buttoned (R54). He did not strike any matches or break the window (R46). He did not have intercourse with her and did not put his hands on her (R49). Except for a little wine he had at the French home, he had not been drinking (R49).

For the defense, one of the soldiers who went to the house testified that he heard no sounds inside the house until he "yelled who was there" (R56). He "took it for granted" that Grzech opened the door, but accused could have opened it (R57).

Stanislow Druciarek, aged 25, testified that before he heard the noise outside, he had been talking with Stefani, who spoke in a loud voice and asked him "where I was at that night" (R41). Stefani woke him when she heard the noise, and he removed some boards from the wall and went through the hole (R41-42).

5. The testimony of prosecutrix shows that accused had carnal knowledge of her without her consent, at the time and place alleged, after breaking into her room, by the use of physical force which overpowered her. Her testimony is corroborated by other testimony showing that accused was discovered in her room during the early hours of the morning, fastening his belt, whith his pants unbuttoned, that prosecutrix was crying and trembling, with her hair mussed and "reddish marks" on her neck, and that a pair of ladies' pants and broken glass were seen on the floor of the room. All

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of such testimony is sharply contradicted by the testimony of accused that he did not break in the house and did not have intercourse with prosecutrix. Since the record contains substantial, corroborated evidence that the offense of rape was committed by accused, the findings of guilty are supported, and will not be disturbed (CM ETO 611, Porter; CM ETO 1202, Ramsey, et al; CM ETO 10103, Washington; CM ETO 14383, Janes).

6. The charge sheet shows that accused is 37 years eleven months of age and was inducted 9 June 1943 at Fort Benning, Georgia.

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

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

B R Cooper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. V. Leary Judge Advocate

1st Ind.

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

1. In the case of Private JOHN H. ARNOLD (34753003), 558th Motor Ambulance Company, 428th Medical Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15772. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 15772).

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

(Sentence as commuted ordered executed. GCMO 470, USFET, 8 Oct 1945).

15772

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

BOARD OF REVIEW NO. 3

28 SEP 1945

CM ETO 15774

U N I T E D S T A T E S	) OISE INTERMEDIATE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER.
v.	)
Private TONEY KENNEDY (34513783), 394th Quartermaster Truck Company	) Trial by GCM, convened at Dijon, France, 28, 29 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania

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HOLDING by BOARD OF REVIEW NO. 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 charges and specifications:

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

Specification: In that Private Toney Kennedy, 394th Quartermaster Truck Company, did at Frecourt, France, on or about 20 January 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. (Madame) Ananie Gallissot.

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

Specification: In that * * * did at Frecourt, France, on or about 20 January 1945, with intent to do her bodily harm, commit an assault upon Mrs. (Madame) Ananie Gallissot, by wilfully and feloniously striking the said Mrs. (Madame) Ananie Gallissot in the face and head with his fist and by wilfully and

feloniously tearing the external genital organs of the said Mrs. (Madame) Ananie Gallissot.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found of Charge I and Specification, guilty, of the Specification of Charge II guilty, except the word "tearing", substituting therefor, respectively, the word "bruising", and guilty of Charge II. 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 prosecution's evidence showed that early in the afternoon of 20 January 1945 accused stopped a truck he was driving near the home of Madame Ananie Gallissot, 62 years of age, about one kilometer from Frecourt, France. He entered her house and acted as if he were cold (R17). He said to her "Zig-zig", which she did not understand. However, when he then made certain motions she understood and tried to get out the door. He brought her back, shut the door, threw her on the floor and "tucked up" her skirt. When she shouted "Help" (R18), he hit her on the nose with his fist and, as blood flowed from the blow, smeared it all over her face with one hand. While she shrieked and shouted, he tried to have sexual intercourse with her. He used his hands in holding his penis and in opening her vagina to penetrate it (R19). She testified he "was on the edge of my vagina, trying to enter it" (R20) and his "penis was in contact with my vagina". Asked "Was it inside your body?" she answered, "Where he entered, yes" and when the question was repeated, she replied, "The penis was inside the vagina, he tried to get in". He "tried what he could to get in but he couldn't get in. He was pushing and was pushing but he couldn't. I suffered that until I cried". It was "in the vagina that he went. He tried to rape me" (R34). She testified that he then had an emission "on me", got up and "went out to go near his truck". She followed to call her husband but as she passed the truck accused stopped her and took her "by the shoulder to take me back". At that moment a French truck appeared (R20).

During this time Charles Gallissot, husband of the victim was working in a house 100 meters away. He heard someone shouting on the road, and came out to see his wife, her hair dishevelled and only half dressed. She called out to him that "a negro just raped me". As he followed her to his home he saw "a French truck which the dark soldier had stopped and was trying to get the truck to get away". His wife said "That's the soldier who just raped me". Gallissot, wearing wooden shoes, was going to take a shoe and strike the soldier with it, but the

soldier took out a revolver and pointed it at him. The occupants of the French truck were reluctant to take the soldier, but "he pointed the gun at them too" and was given a ride (R23-24). Mrs. Gallissot's face was all bruised and "smeared with blood". Her apron was "only rags, shreds" (R25). A French doctor who examined her that night at her home found her lips and one eye bruised, scratches on her knees, her vagina and vulva bruised (R26-27).

Accused and three other colored soldiers were brought to Madame Gallissot's home the next day. She recognized accused at once as the soldier who attacked her, started "to lunge at him" and had to be restrained from striking him (R30). She also identified him in court (R18).

4. After explanation of his rights accused elected to remain silent (R32). No evidence was offered in his behalf.

5. a. Charge I and Specification. Although accused did not succeed in effecting complete penetration, there was abundant evidence for the court to conclude it was sufficient to constitute the crime of rape. "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not" (MCM, 1928, par.148b. p. 165). Substantial evidence of all elements of rape supports the court's findings of guilty (CM ETO 6554, Hill; CM ETO 3933, Ferguson et al).

b. Charge II and Specification. The brutal manner in which accused struck his victim in the face and bruised her genital organs intending to cause her bodily harm was clearly demonstrated. However, it was clearly apparent that this assault took place in connection with herrape that followed immediately. Under these circumstances this Charge and Specification constituted an unreasonable and improper multiplication of charges (MCM, 1928, par.27, p.17). The accuser evidently drafted the charges having in mind that if the prosecution failed to prove that rape was committed it could still show accused was guilty of assault with intent to do bodily harm. Charging him separately in this manner was unnecessary since the evidence demonstrated that accused first assaulted his victim with the intent to commit rape, a more serious offense than assault with intent to commit bodily harm and a lesser included offense of rape (MCM, 1928, par.148b, p.165) of which lesser included offense the court could have found him guilty had the evidence been insufficient to sustain a finding of guilty of rape. Nevertheless, no substantial right of accused was injuriously affected since he received the lesser mandatory punishment for the crime of rape (AW 92)

In view of the competent and compelling evidence of the identification of accused, no prejudice resulted from the evidence of the victim's pre-trial identification of him while he was in custody and with other negro soldiers (CM ETO 6554, Hill, supra).

6. The charge sheet shows that accused is 29 years one month of age and was inducted 14 November 1942 at Fort Jackson, South Carolina. He had no prior service.

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

8. The penalty for rape is death or life imprisonment as the court martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 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 (AW 42; Cir.229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

27 SEP 1945

CM ETO 15776

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private ERNEST E. BUTLER (33517533), 3453rd Quartermaster Truck Company	Trial by GCM, convened at Paris, France, 18 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U. S. Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private Ernest E. BUTLER, 3453rd Quartermaster Truck Company, European Theater of Operations, United States Army, did, at the 7th General Dispensary, Seine Section, Com Z, European Theater of Operations, United States Army, on or about 28 November 1944, desert the service of the United States and did remain absent in desertion until he came under military control at Paris, France on or about 19 January 1945.

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

Specification: In that * * * having been placed in confinement in the Paris Detention Barracks, Seine Section, Com Z, European Theater of Operations, United States Army on or about 24 November 1944, did, at the 7th General Dispensary, Seine Section, Com Z, European Theater of Operations, United States Army on or about 28 November 1944, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and their specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence, recommended that the sentence be commuted and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but, owing to special circumstances in this case and the recommendations of the reviewing authority, commuted the sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution was not disputed as follows:

On 26 November 1945 accused was placed in confinement in the Paris Detention Barracks (R5-6). On 28 November while still in confinement he and four other prisoners were turned over to an armed guard who took the men to the 7th General Dispensary for medical treatment. While there accused escaped, after disregarding the guard's order to halt. The guard fired three or four shots which missed him "because there were too many people there" (R6-7). On 17 January 1945 while in a Paris cafe dressed in civilian clothes accused was arrested by French police who placed him in handcuffs. While waiting for the car which was to take him away for questioning, he escaped (R22-23) and went to the home of Jacqualine Hanequin, of 22 Passage de la Moselle, Paris 19, France, with whom he had been living on the Rue Paul Bert since the end of November (R13,17). Upon his arrival in handcuffs, she cut them off (R17). During his stay with her he wore civilian clothes from time to time (R16) and expressed the intention of returning to his organization (R18).

On 19 January he was apprehended by an agent of the Criminal Investigation Division in a hotel room in the "Clignancourt area in a little place called St. Ouen" where he was found in bed with Jacqueline (R9).

On 1 March 1945 after being warned of his rights, accused signed

a statement admitting that he left his organization at Chartres on Thanksgiving Day in November 1944 to see Paris where he remained "shacked up" with Jacqueline until the time of his arrest (R12;Pros.Ex.C).

4. a. While accused was confined at the Paris Detention Barracks rations were very short; some days no meals were given to the prisoners; some days they received one or two meals (R25-27).

b. After his rights were explained (R29), accused testified. He admitted he was absent without leave from his organizations (R33) which he left "around October" (R35). He was confined in the Paris Detention Barracks on 24 November 1944. While there he received small portions of food, was given no seconds and some days obtained no food at all (R30). He was required to sleep on a concrete floor with no mattress and was given but one blanket. He escaped because of the treatment he received, but had no intention of deserting the service (R31). He wore civilian clothes "once or twice" when he had to get his clothes cleaned (R32). When apprehended he had about 70,000 francs on his person, money he obtained from friends and from gambling (R36).

5. While accused's testimony that he intended to return to his organization is supported by Jacqueline's testimony that while living with her he "expressed intention to go back to his unit" (R18), it was shown that following an escape from confinement he remained absent without leave approximately 42 days until he was apprehended. During this period he was near military installations. The court was warranted in resolving the question of his intent not to desert against him. Substantial evidence supports the court's findings of guilty of desertion as alleged under Charge I and Specification (CM ETO 1629, O'Donnell) and escape from confinement as alleged under Charge II and Specification (CM ETO 3153, Van Breeman).

6. The charge sheet shows that accused is 28 years of age. The data as to service reads: "Nov. 1941 at Ft. Meade, Maryland". Accused stated that he was inducted (R44). No prior service is shown.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. L. Levy Judge Advocate

RESTRICTED

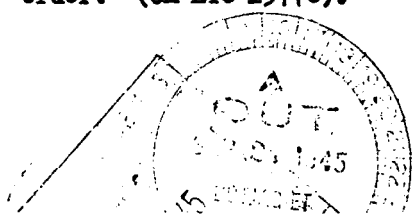
(380)

1st Ind.

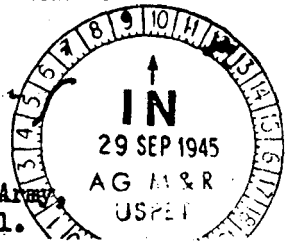
War Department, Branch Office of The Judge Advocate General with the European Theater. 27 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private ERNEST E. BUTLER (33517533), 3453rd Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15776. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15776).



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



(Sentence as commuted ordered executed. GCMO 486, USFET, 13 Oct 1945).

5776

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

BOARD OF REVIEW NO. 3 24 APR 1945

CM ETO 15782

U N I T E D S T A T E S	)	65TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Regensburg, Germany, 30 April 1945. Sentence: Dismissal.
	)	
Second Lieutenant ROBERT S. RUSH (01014721), Company L, 259th Infantry.	)	

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

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Second Lieutenant Robert S. Rush, Company L, 259th Infantry, was, at Weissenborn, Germany, on or about 3 April 1945, found drunk while on duty as Platoon Leader.

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. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, 65th Infantry Division, approved the sentence, remitted the forfeitures, and forward-

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ed the record of trial for action under Article of War 48. The confirming authority, The Commanding General, United States Forces, European Theater, confirmed the sentence, though deeming it wholly inadequate punishment for an officer guilty of such a grave offense, and withheld the order directing the execution thereof pursuant to AW 50½.

3. Evidence for prosecution:

On 2 and 3 April 1945, the battalion of which accused's company was a part, was moving from Rotenburg to Creuzburg in pursuit of the enemy. It spent the night of 2-3 April at Haarode, Germany, and began moving out the next morning about 0900 hours (R32) convoyed by artillery units (R26,32). Accused's company moved out between 1000 and 1100 hours (R6,9,15,26) with accused, who was the weapons platoon leader (R15,26), riding in a company jeep. Its driver noticed nothing peculiar about his actions (R6). Early in the afternoon, the company came to a halt in Weissenborn, Germany (R6,9,27,32) where accused took two or three drinks of a liquid contained in a wine bottle (R7,10-11). During the afternoon when the company executive officer was conversing with accused, an enemy plane came over (R16-17). While others rushed for cover, accused tried to mount a machine gun and to fire at the plane. "He had difficulty in getting out from the jeep to the gun; there was a lot of equipment on the vehicle more or less impeding his progress". He also had difficulty in freeing the gun from a stationary position and moving it around to a point where he could fire at the planes" (R18). Though the executive detected no odor on his breath, accused appeared to be rather "shaky" and "clumsy" and not to have full control of his physical faculties. To see that he did not fire the weapon, the executive remained with him until about fifteen minutes before the convoy pulled out. When he left accused appeared to be "very sleepy", "slightly intoxicated" and not in full control of his senses and faculties. His conversation was a "little fuzzy and blurred". During the afternoon the executive dissuaded the accused from driving off in the vehicle (R16,19,21,24). Sometime during the afternoon, accused's company commander, upon observing the accused's dress was unmilitary, his speech incoherent, and his breath alcoholic, ordered him to remain in the jeep (R27-28).

Later the battalion commander saw accused sitting in the vehicle. After talking to him, the battalion commander asked him to follow him to a nearby courtyard. After calling accused a third time,

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"I went back to the car, told him to get out and follow me * * * He could hardly walk; he was staggering, stumbling, leaning over. He could just barely stand up". (R33).

Asked if he had been drinking, accused said, "I just had a couple of glasses". His breath was alcoholic. Believing accused to be drunk, the battalion commander relieved him and so advised accused's company commander (R31-35) who placed him in a closed vehicle where he soon went to sleep. The company commander thought accused drunk (R29-30).

The driver was away from his vehicle most of the afternoon. Late in the afternoon he noted that accused was "sleepy" or "fatigued" (R8). He was present when the battalion commander spoke to accused (R5,8,11). He could not say that accused was intoxicated anytime during the afternoon (R14).

4. Evidence for the defense:

That afternoon Private Albert L. Bollinger, Cannon Company, 259th Infantry, saw accused take three drinks of what he believed to be "Anisette" -- "something like a brandy" (R45,47). When the plane came over, the machine gunner fired one shot whereupon the gun jammed. Accused came over and fixed the gun. The machine gunner testified the accused knew what he was doing, did it quickly, and was neither clumsy nor awkward in his motions (R40-42). Bollinger, who observed accused assisting the machine gunner, thought accused was sober. Bollinger also saw accused after the battalion commander had talked to him. Although accused was sleepy, "he seemed to be all right" (R45-46). A lieutenant talked to accused sometime during the afternoon. He could not form an opinion as to whether accused was drunk (R47-49).

Accused's former company commander rated accused "excellent" in the performance of duties and "superior" in leadership. He had never seen him drink on duty (R36-37). Two squad leaders testified that accused was a good officer, one going so far as to say, "I'd rather follow him than anyone" (R37-39).

5. After his rights as a witness were explained to him accused elected to remain silent (R49).

6. Accused's unit was marching forward in pursuit of the enemy. During a halt, accused was seen to take two

or three drinks of a liquid. Later his company executive officer, noting his condition, stayed with him lest he try to fire a machine gun. His company commander, observing indicia of drunkenness, ordered him to remain in the jeep. Later his battalion commander, after a conference with accused revealing that he was under the influence of alcohol, relieved him from duty. Substantial evidence supports the findings that accused was drunk on duty (CM ETO 11903, Wofford).

7. The charge sheet shows that accused is 30 years of age, that he was appointed a second lieutenant 2 January 1943, and that he had prior service as an enlisted man from 6 January 1941 to 1 January 1943.

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

9. The penalty for violating Article of War 85 by an officer in time of war is dismissal and such other punishment as a court-martial may direct.

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. Stacy Judge Advocate

15782

(385)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 24 AUG 1945
TO: Commanding General, United States Forces, European Theater, (Main) APO 757, U. S. Army.

1. In the case of Second Lieutenant ROBERT S. RUSH, (01014721), Company L, 259th 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 15782. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15782).

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

Sentence ordered executed. GCMO 376, USFET, 1 Sept 1945).

15782

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

22 SEP 1945

BOARD OF REVIEW NO. 2

CM ETO 15783

U N I T E D S T A T E S	)	66TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Nantes, France, 16 May 1945. Sentence: Dismissal and forfeiture of all pay and allowances due and to become due.
Lieutenant Colonel ERNEST W. DOYLE (0349109), 3rd Battalion, 263rd Infantry	)	

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

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Lieutenant Colonel ERNEST W. DOYLE, Headquarters Third Battalion, 263d Infantry, was, at Blain, Brittany, France, on or about 15 March 1945, found drunk while on duty as Battalion Commander.

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. 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 and forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, 66th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, "though inadequate punishment for an officer guilty of such a grave offense", and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The prosecution's evidence is summarized as follows:

On 15 March 1945, the accused was commanding officer of the 3rd Battalion, 263rd Infantry. On that day the battalion, under the command of the accused (R13), was withdrawing from a line where it contained the enemy and was moving into a bivouac area (R7) near Blain, France (R8) preparatory to moving into another sector of the line about 80 miles away (R9). The withdrawal was a progressive movement (R7) starting about dawn on 15 March (R12) as the battalion was relieved by another battalion (R7) and was completed about 1400 (R13). About 0900 or 1000, accused was seen to drink two or three "shots" of gin in the command post west of Blain (R13). At 1200, the battalion S-3 noticed that the accused was slightly slow, not coordinated as he believed a normal person should be, and walked with an unsteady gait (R14). In his opinion, accused was drunk at that time (R15). At about 1545, the regimental commander visited the command post of the 3rd Battalion and inquired for accused (R8). The accused emerged from the command post tent with a map in his hand. His walk was unsteady, his breath had a strong odor of liquor, his speech was slightly incoherent and "his entire appearance was that of a man who was drunk". In the opinion of the regimental commander, accused was drunk (R8).

4. a. The accused, having been advised of his rights as a witness by the law member, elected to remain silent. (R42).

b. Accused was evacuated to an aid station at about 1800, 15 March 1945 and examined by a medical officer who believed accused was sober at that time but "may have been under the influence of alcohol" (R33). The officer noted an odor of alcohol as the only evidence of drinking (R34-35) and could not say whether he could have been under the influence of alcohol at 1400 (R36). Another medical officer examined the accused at about 1800 prior to his evacuation to determine whether he was under the influence of alcohol (R38). The accused told him he had been drinking. In the opinion of the medical officer, accused was slightly under the influence of alcohol as evidenced by slight retardation in his speech and could have been intoxicated at 1400 to the extent that he would be known as drunk (R38-39).

An extract of accused's WDAGO Form 66-1 showing his assignments and rating was admitted. (R42, Def.Ex.A).

5. Prosecution's evidence is undisputed that accused was, at the time and place alleged, in command of a battalion in the field and in the actual exercise of command. The battalion was being relieved from the line where it was engaged with the enemy. There can be no question that accused was on duty within the meaning of Article of War 85 (MCM, 1928, par.145, pages 159-160). Accused's drunkenness at the time and place alleged was established by the opinion of witnesses who observed and testified to accused's unsteady walk, lack of coordination, slightly incoherent speech, and the fact that he was drinking gin during the day. Both the opinion of witnesses and testimony of accused's conduct were admissible on the issue of drunkenness. All the elements of proof were satisfied. (MCM 1928, supra;

CM ETO 9423, Carr, and authorities therein cited).

6. The charge sheet shows accused to be 34 years old, and commissioned as a 2nd Lieutenant in the National Guard 20 March 1937. He entered on extended active duty as a 1st Lieutenant 17 February 1941.

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. A sentence of dismissal is mandatory upon conviction of an officer for being drunk on duty in time of war in violation of Article of War 85, and such other additional punishment as a court-martial may direct is authorized (AW 85).

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

(390)

1st Ind.

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

1. In the case of Lieutenant Colonel ERNEST W. DOYLE (0349109), 3rd Battalion, 263rd 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 15783. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15783).

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

Sentence ordered executed. GCMO 443, USFET, 2 Oct 1945).

15783

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

BOARD OF REVIEW NO. 2

25 AUG 1945

CM ETO 15785

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, 20 May 1945.
Captain MAX A. KELLY (O-315438), Company F, 317th Infantry	Sentence: Dismissal.

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

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Captain Max A. Kelly, Company F, 317th Infantry, was, at Bettenhausen, Province of Hessen-Nassau, Germany, on or about 5 April 1945 found drunk while on duty as commanding officer of Company F, 317th Infantry.

He pleaded not guilty to the Specification but guilty of "being drunk in quarters" and not guilty to a violation of the 85th Article of War but guilty of violation of the 96th Article of War. He was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, 80th Infantry Division, approved the sentence "although inadequate" and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence "though wholly inadequate punishment for an officer guilty of such grave offenses" and withheld the order directing its execution pursuant to Article of War 50½.

15785

3. Evidence for the Prosecution:

Three officers who, during the afternoon of 5 April 1945, at Bettenhausen, Germany, saw and observed the accused, then company commander of Company F, 317th Infantry, testified that he was in an intoxicated condition. He could not walk straight. He weaved. He smelt of liquor. He was drunk (R7,10,11). He was at a building in which he was billeted and in which was also located the company command post (R19). At that time the accused's company was a part of a battalion in reserve but on call to move at any time. It was three to five miles back from the front lines and not under fire. It was on an alert status (R7-8,9,19). The accused was a good company commander when he left liquor alone. He was relieved of his command the following morning (R8).

4. Evidence for the Defense:

The accused had been rated as "superior" as a company commander by his superiors. He had been in combat since 5 August 1944 and was slightly wounded in action. He was awarded the Purple Heart, and two Bronze Service Campaign Stars. A fellow officer and five enlisted men testified that he was an excellent company commander, excellent in tactics, and good and thoughtful to his men (R13,14,15,16).

After being fully advised of his rights as a witness accused elected to remain silent.

5. Five of the six members of the court and the defense counsel recommended clemency be extended to the accused because of his brilliant record of combat service, his courage and resourcefulness, and his inspiring leadership and sound tactical judgment. The reviewing and confirming authorities however, each declared the sentence to be inadequate.

6. The evidence clearly shows and the accused admitts by his pleas that he was drunk on the afternoon of 5 April 1945 at Bettenhausen, Germany, while commanding officer of Company F, 317th Infantry. Substantial competent evidence without contradiction shows that at that time his company was on the alert awaiting orders to move forward in combat. The conclusion that he was on duty at the time was therefore legally supported by the evidence.

> "In time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article" (MCM, 1928, par.145, p.160).

7. The charge sheet shows accused to be 32 years one month of age. He was commissioned 20 March 1934, R.O.T.C., and entered active service 5 March 1942 at Muskogee, Oklahoma.

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. Dismissal of an officer is mandatory in time of war upon conviction of a violation of Article of War 85.

Judge Advocate

Judge Advocate

Judge Advocate

(394) CONFIDENTIAL

1st Ind.

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

1. In the case of Captain MAX A. KELLY (O-315438), Company F, 317th 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 15785. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15785).

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

(Sentence ordered executed. GCMO 375, USFET, 1 Sept 1945).

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

BOARD OF REVIEW NO. 1

25 SEP 1945

CM ETO 15787

U N I T E D S T A T E S	100TH INFANTRY DIVISION
v.	Trial by GCM, convened at Bad Canstatt, Germany, 28 April 1945. Sentence as to each accused: To be shot to death with musketry.
Privates WOODROW PARKER (34561139), and SIDNEY BENNERMAN, JR. (34174757), both of 163rd Chemical Smoke Generator Company	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Woodrow Parker, and Sidney Bennerman Jr., both of the 163rd Chemical Smoke Generator Company, acting jointly, and in pursuance of a common intent, did, at Heilbronn, Germany, on or about 15 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Ulita Obichwist, a human being, by striking her on the head and face with rifles.

Specification 2: In that * * * acting jointly, and in pursuance of a common intent, did at Heilbronn, Germany, on or about 15 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Peter Lobacz, a human being, by striking him on the head and face with a rifle.

Specification 3: In that Private Woodrow Parker, 163rd Chemical Smoke Generator Company did, at Heilbroon, Germany, on or about 15 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Ulita Obichwist.

Specification 4: In that Private Sidney Bennerman Jr. 163rd Chemical Smoke Generator Company did, at Heilbroon, Germany, on or about 15 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Ulita Obichwist.

Each accused pleaded not guilty and, all of the members of the court present at the times the votes were taken concurring, each was found guilty of the Charge and all specifications preferred against him. No evidence of previous convictions was introduced against either accused. All of the members of the court present at the times the votes were taken concurring, each accused was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 100th Infantry Division, as to each accused, approved the findings and sentence, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed each of the sentences and withheld the order directing the execution thereof pursuant to Article of War 50½.

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

About 2100 hours 15 April 1945, three white American soldiers and the two accused, colored, both armed with carbines, were drinking wine with two civilians at a Polish refugee camp at Heilbronn, Germany (R17-18,23-25,27-29,35,39,42,51,56), near the bivouac area of accused's organization (R6). One of the white soldiers, at accused Bennerman's request, gave him a .22-caliber German rifle as a souvenir (R18-19,23; Govt.Ex.5). Because the man who customarily slept in the same room with her in the barracks in front of which accused and others were seated had left the camp and she was afraid to sleep alone, Ulita Obichwist (one of the deceased, a Polish refugee) came to where Peter Lobacz (the other deceased, also a Polish refugee) was sitting, near

the table of accused and the others, and asked if he would stay with her for the night (R34,38-40). He agreed and accompanied his two daughters, Eweline and Anna, his brother and brother's wife, Malvina, a Luba Kot and a Konstantine Salofwaue (all refugees) to the cellar or air-raid shelter where they all customarily slept, about 150 meters to 300 yards distance (R33-34, 39,41-42,47-48,51,53). There he obtained a bed cover and then returned to the barracks (R40).

Subsequently, at about 2200 hours, both accused left their group (R23,27,29) and proceeded to the mentioned cellar where they entered Malvina Lobacz' room, struck matches and inquired about "mademoiselles" (R35-37,42-43,49,50,52,54). One accused attempted to drag her husband, John, outside and the other accused made advances toward Malvina, after which accused left, one armed with one carbine and the other with two (R49), but returned in about an hour, entered, again struck matches and searched for "mademoiselles" (R35,43-44,49, 50,52,55). The Lobacz daughters and Luba Kot, who were frightened, were hiding under the bed (R35,38,45,52,55). One accused grabbed Malvina and endeavored to throw her upon the bed, but her husband yelled that he was going to summon the American police, and accused left in a short time (R44,49).

The next morning at 0630 hours, a military guard saw both accused, only one of whom had a weapon, pass his post at a point about three-quarters of a mile from the refugee camp (R22-24,26). Early that morning (16 April), the bodies of Peter Lobacz and Ulita Obichwist were discovered, the former on a cot in the barracks where he slept (R8,11,14-16,34,36,48; Gov't.Ex.4) and the latter on the ground about 50 yards from the barracks (R7-8,10,14,16,36; Gov't.Exs.1,2,3). An autopsy performed upon Lobacz' body in mid-afternoon on the day revealed that the cause of death was crushing of the skull and that the wound was produced by a blunt, flat object, approximately two and a half to three inches in width (R11,15-16). Ulita Obichwist's body was lying flat on its back, with the legs widely spread apart, leaving a distance of two feet between her feet, and with the clothes rolled up, exposing her body below the nipple line (R10,15). Death, which had occurred between 12 and 18 hours prior to the autopsy (mid-afternoon, 16 April) and which might have followed the lethal blow within any time from a short time up to two hours thereafter, was caused by fracture of the skull, which produced immediate unconsciousness. Dried blood covered the face and head, and the upper face from the upper lip to the lower forehead was driven in approximately an inch from normal, the nose flattened, eyes depressed and frontal skull completely fractured. Further evidence of injury consisted of: evisceration of brain tissue; a lacerated wound from the left side of the nose into the mouth, presumably produced by a blow with a blunt, broad object; a three-inch lacerated wound on the right side of the head ending in a sharp penetrating wound into the skull, such as would be made by a sharp instrument; on the back were superficial lacerations produced "as in dragging a body over a rough surface", and cinders were embedded in the shoulder region and buttocks (R7-8, 10-12,14-16; Gov't.Exs.1,2,3). External examination showed a closed

vulva and a dried mucous deposit upon the skin of the vulva and the adjacent thighs, but no blood or other evidence of injury about it (R13).

On the ground in front of the barracks door was a large spot of blood, and leading therefrom towards the point where the woman's body lay was a trail of bloodstains and marks on the ground such as would have been caused by dragging "a body" over the ground (R15; Gov't.Ex.4). Three pieces of a rifle exactly like that given by the white soldier to Bennerman the preceding evening were found scattered on the ground near the mentioned spot of blood (R19,21-22; Gov't.Ex.5). The butt stock and bloodstained hand guard of an Army M-1 carbine were found under the bed in which deceased Lobacz was found (R21; Gov't.Ex.7).

On 17 and 18 April, respectively, Bennerman made two voluntary, sworn pretrial statements (R60-62,66-67,70-71; see Gov't.Exs.A,C for id.). On 18 April, Parker made a voluntary, sworn pretrial statement (R62-63), 64-65,67-70; see Gov't.Ex.B for id.). True copies of the three statements, save for deletions of the name of the accused other than the maker in each case, were admitted in evidence (R70-71,74-78; Gov't. Exs.8,9,10), over objection by the defense (R75,78). The originals thereof were identified in open court and are bound in the record of trial as Prosecution Exhibits A,B and C, for identification.

Bennerman's statements were substantially as follows: (17 April) he and a companion left his company area about 2000 hours on the evening in question, with their carbines. In about an hour, they joined a group of civilians and American white soldiers for a drink. One of the latter, at accused's request, gave him a .22-caliber rifle for a souvenir. After sitting with the group for about an hour, the two colored soldiers started to return to the billets, but accused's companion stated he was going to return and secure sexual intercourse. At about 2300 hours, they entered a house occupied by civilians. The companion struck a match and accused saw a girl, who was frightened, leave her bed and join a man in his bed. Accused and his companion argued when the latter expressed the desire to "get some of this pussy". The companion insisted, said "I'm going to kill those son-of-a bitches", and struck the man's head with his carbine, holding it in both hands by the barrel. Accused heard no outcry from the man. The companion then struck the girl in the head with the carbine, and again struck the man, breaking the stock. Accused was two or three feet away at this time. His companion grabbed the souvenir .22-caliber rifle from him, announcing he was "going to finish killing these son-of-a-bitches" and with it struck the girl on the head two or three more times. He then took her by the legs, started to drag her out of bed, and when she screamed silenced her by again hitting her on the head with the rifle. He dragged her by the legs out onto the road and alongside of a building, a short distance away. Accused was some five or six feet away from them at this time. The companion then pulled the girl's clothes up above her waist, leaving her naked from the waist down, spread her legs apart, inserted his penis into her sexual organs and engaged in sexual intercourse with her. After five minutes, during

which he was unable to have an emission, he left the girl and the two went to the house from which the companion had dragged her and found the barrel of the companion's broken carbine, which he threw alongside the road after saying, "I believe I killed those sons-of-a-bitches". They stopped along the road, slept and returned to their company at about daybreak (Gov't.Ex.8).

(18 April) while his companion was striking the man and the woman with his carbine, accused lit five or six matches "to help him to see what he was doing". After the companion had struck the man and the woman and dragged her outside the door, this accused dragged her from there to the side of the building across the way. After the companion endeavored without success to have an emission, accused accepted his invitation to try, lay upon the woman and inserted his penis into her, but was also unable to have an emission. The companion then again inserted his penis into her for about five minutes, after which the two left the scene (Gov't.Ex.10).

Parker's statement substantially accorded with Bennerman's version, with the following exceptions: this accused was not drunk and he did not believe his companion was drunk. Accused held the barrel of his carbine in his right hand when he struck the man on the head. He hit the man once and the woman once and hit the man a second time, breaking the stock of the carbine on the side of the bed. His companion then hit the woman in the head with the .22-caliber rifle obtained from the white soldier. Both then picked up the woman and dragged and carried her, bleeding around the head and face, out across the road to the side of another building. When they placed her on the ground, accused could see she was still alive. He mounted her and inserted his penis into her and when he was unable to have an emission, his companion mounted her and did the same. After the companion announced that he had an emission, he arose and accused again inserted his penis into the woman and after about ten minutes completed the act with an emission. During the intercourse, accused could hear the woman mumbling. He picked up the barrel of his carbine, which had dropped while they were carrying the girl, and later threw it to the left of the road (Gov't.Ex.9).

4. After accused were advised of their rights, each elected to remain silent, and no evidence was offered in their behalf (R79-80).

5. a. Murders of Ulita Obichwist and Peter Lobacz (Specifications 1 and 2):

Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par.148a, pp.162-164). The law

presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (1 Wharton's Criminal Law (12th Ed., 1932), sec.426, pp.654-655), and an intent to kill may be inferred from an act of accused which manifests a reckless disregard of human life (40 CJS, sec.44, p.905, sec.79b, pp.943-944). Whether or not a firearm when used as a bludgeon is a deadly weapon depends upon all the attending circumstances including the manner of its use, and is generally a question of fact for the jury (or court-martial) (Ann. 8 ALR 1319; 1 Wharton, supra; cf: MCM, 1928, par.149m, p.180).

The sole substantial evidence of accused's identity as the murderers of the two deceased is their confessions, as mere proof of opportunity to commit a crime, while corroborative, is not sufficient evidence of guilt (CM ETO 804, Ogletree et al); nor is proof of the presence at the scene of the pieces of the carbines which were in accused's possession on the evening in question, because it merely raises a probability of their guilt (cf: CM ETO 7867, Westfield; CM ETO 9306, Tennant). The corpus delicti of each murder was adequately established. The crushed skull in the case of each deceased and the bloody facial depression in the case of deceased Ulita Obichwist were mute and gruesome evidence "indicating the probability that /each/ was unlawfully killed" and thus authorized the admission and consideration of the confessions (MCM, 1928, par.114a, p.115; CM ETO 12320, Norris). Parker's confession establishes that he came to the cellar in quest of a woman, saw the man and woman in the same bed, and struck the man twice and the woman once on the head with the butt of a carbine, after which, with the aid of his companion, who was present throughout, he dragged her to where the two raped her, as discussed below. The court could properly infer malice from his use of the carbine in a manner likely to and which did in fact cause death (see authorities cited supra). His motive was obviously sexual gratification. The Board of Review is of the opinion that the evidence fully supports the findings of Parker's guilt of murder (CM ETO 5584, Yancy; CM ETO 8166, Olin W. Williams).

Bennerman's confessions show that he aided and abetted his companion, who expressed his intention to kill the victims, in the actual killing of them by lighting matches "to help him to see what he was doing", and by his continuing presence and at least passive encouragement. His full collaboration in the enterprise is shown by his help in dragging the woman outside to where the subsequent rapes were committed. As an aider and abettor, he was guilty as a principal of the murder of each (CM ETO 1453, Fowler; CM ETO 5156, Clark; CM ETO 5764, Lilly et al).

b. Rapes of Ulita Obichwist (Specifications 3 and 4):

Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration of her genitals is sufficient carnal knowledge, whether emission occurs or not. The force involved in the act of penetration is alone sufficient where there

is in fact no consent (MCM, 1928, par.148b, p.165). Unlawful and forcible carnal connection with a woman in a state of unconsciousness at the time is presumed to be without her consent and is rape (44 Am. Jur., sec.9, p.906). Again, the only substantial evidence inculpating accused in the rapes charged consists of their confessions (see authorities cited in par.5a, supra). But again, the record contains adequate evidence, aliunde the confession, of the corpus delicti of the offense of each accused. This evidence, which may be direct or circumstantial, need only show that the offenses charged have probably been committed, need not be sufficient of itself to convince beyond a reasonable doubt that they have been commited, or to cover every element of the charges, or to connect the accused with the offenses (MCM, 1928, par.114a, p.115; CM ETO 14040, McCreary). Here the uncontroverted evidence was that Ulita Obichwist and the man near whom she was in bed were both unlawfully killed by bludgeoning (see par.5a, supra); that the woman was forcibly dragged from the barracks in which she was in bed near the man to the point where her dead body was found; that there was a dried "mucous" deposit in the region of her sexual organs; that she was found flat on her back with her legs two feet apart at the feet and her body exposed below the nipple line; and that two colored soldiers on the evening in question were inquiring for "mademoiselles" among the Polish refugees, and that one of the soldiers made advances toward one of the women to the point of trying to throw her on a bed and was dissuaded only by her husband's threats to call the American police. This evidence was enough to indicate the probability that the woman was raped and the admission and consideration of accused's confessions of rape were therefore proper (MCM, 1928, supra; CM ETO 14040, McCreary). Parker's confession establishes beyond doubt that he had carnal knowledge of Ulita Obichwist while she was unconscious, but, on his own statement, while she was still alive. As to Parker, the finding of guilty of rape is amply sustained by the evidence (44 Am. Jur., sec.9, p.906, supra; CM ETO 5584, Yancy; CM ETO 8166, Olin W. Williams; CM ETO 14587, Teachey, and authorities therein cited).

Bennerman admitted sexual intercourse with the woman in his second statement, but did not state specifically whether she was conscious, unconscious but alive, or dead at the time. Medical testimony was that unconsciousness followed the lethal blow instantaneously, but that death might have occurred at any time after the blow from a short time up to two hours. Death occurred 12 to 18 hours before the mid-afternoon examination on 16 April. It was during this six hour period, according to other evidence, that the assaults were committed. It is unnecessary to rely upon the presumption of continuance of the condition of life, shown to have existed at least up to a few minutes before (1 Wharton's Criminal Evidence (11th Ed.), sec.143, pp.161-162; cf: MCM, 1928, par. 112a, p.110), which might be rebutted by the presumption of innocence (cf: 1 Wharton, supra, sec.71, pp.83-84), to conclude that Bennerman was properly proven guilty of rape. Neither of his statements contains the slightest indication that the woman was dead; medical probabilities are that she was alive; and Bennerman continually spoke of "the girl". His second confession shows carnal knowledge of an unconscious woman

which is rape (see authorities, supra). Moreover, Bennerman clearly inculpated himself as the aider and abettor of his companion, whose guilt of rape was separately established, by confessing to helping to kill the woman and man and to drag her to the scene of the loathsome crime. His guilt as a principal was established and he was properly found guilty of rape (CM ETO 8542, Myles and related case of CM ETO 10339, Boyd; CM ETO 10857, Welch and Dollar; CM ETO 14596, Bradford et al).

No more revolting case has come before the Board of Review. The utter obliviousness of the accused to accepted maximatic principles of civilized conduct caused by their bestial, lust-crazed selfishness and resulting in the murders and rapes merits the extreme punishment to which they have been sentenced.

6. The defense objected to the admission of copies of the statements of the two accused with the name of accused other than the maker deleted in each case, on the ground in effect that the context of the statements when read together left no doubt as to the identity of the deleted name and effectually nullified the deletions, thereby contravening the rule (MCM, 1928, par.114c, p.117), that a confession of an accused is inadmissible against his co-accused (R75,78). The law member overruled the objection and instructed the court that each statement might be considered only against the accused who made it, and no statement might be considered against the accused who did not make it (R76,78). His ruling and cautions were proper and, in view of the fact that only three statements were involved, the court could adequately obey the injunction (CM ETO 1052, Geddies et al, and authorities therein cited).

7. The charge sheet shows that each accused is 27 years of age; that Parker was inducted 12 December 1942 at Fort Benning, Georgia, and Bennerman was inducted 22 November 1941 at Fort Bragg, North Carolina, in each case to serve for the duration of the war plus six months; neither accused had prior service.

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

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

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

15787

Donald K. Carroll Judge Advocate

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ETO 15787 BENNERMAN, SIDNEY JR.
PARKER, WOODROW

1st Ind.

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

1. In the case of Privates WOODROW PARKER (34561139), and SIDNEY BENNERMAN, JR. (34174757), both of 163rd Chemical Smoke Generator Company, 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, 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 15787. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15787).

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

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

(As to accused Bennerman, sentence ordered executed. GCMO 479, USFET, 10 Oct 1945).
(As to accused Parker, sentence ordered executed. GCMO 480, USFET, 10 Oct. 1945).

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

RESTRICTED

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REGRADED UNCLASSIFIED

BY AUTHORITY OF TJAG

BY CARL E. WILLIAMSON, LT. COL.,

JAGC, ASS'T EXEC ON 20 MAY 54

REGRADED UNCLASSIFIED

BY AUTHORITY OF TJAG

BY CARL E. WILLIAMSON, LT. COL.,

JAGC, ASS'T EXEC. ON 20 MAY 54